Missouri Attorney General's Opinions - 1939

Opinion	Date	Topic	Summary
1-39	Mar 27	ELECTIONS.	County superintendent of schools need not file declaration of candidacy.
1-39	Apr 12	HEALTH. SALARIES AND FEES.	Appointees of State Board of Health are not allowed additional pay for grading of examination papers.
1-39	May 17	INHERITANCE TAX.	1. When the estate of any deceased person has not been appraised for inheritance tax purposes, the probate court, or any interested person, may make application to the probate court to reopen said estate for the purpose of determining its clear market value so that an inheritance tax may be imposed upon the interests of property transferred. 2. The statute of limitations does not apply to collection of inheritance taxes until such time as the taxes have been duly assessed.
2-39	July 10	CITIES OF THE FOURTH CLASS. COURTHOUSES.	Two questions of extension of boundaries. Right of County Court to sell.
3-39	Feb 2	COUNTY DEPOSITORIES.	Contract made by County Court with County Depository, which has duly qualified, prior to Laws of Mo., 1927, page 502, binding and legal until expiration.
3-39	Sept 9	ASSESSORS.	May be removed by county court for failure to perform duties and a successor appointed.
5-39	Mar 2	TAXATION. SALES TAX.	Municipal corporation is a user and consumer of tangible personal property bought by the corporation to be used upon W.P.A. projects and is liable for the sales tax therefor.
5-39	Mar 15	TAXATION AND REVENUE.	When a petition for correction and abatement of an assessment of income is filed, collectors are not to certify taxes to the State Auditor.
5-39	May 10	CITIES TOWNS AND VILLAGES. AUTHORITY TO PASS ORDINANCES.	The officers of a village may pass ordinances regulating peddlers.
5-39	May 16	CRIMINAL PROCEDURE.	Return on death warrant may be made to circuit clerk if court not in session.
5-39	June 6	CONSTABLES.	(1) May serve anywhere in state warrant issued out of any justice court in county; (2) May arrest without warrant if sees offense

			committed, or with warrant if he has one, and cause prisoner to be arraigned in township where offense was committed, if a misdemeanor if felony, may cause prisoner to be arraigned anywhere in county. (3) If represents himself to be deputy sheriff, and hold no such commission is guilty of impersonating an officer. (4) Cannot charge fee for service he does not perform. (5) His duty to take prisoner before justice if warrant of arrest was directed to him.
5-39	July 26	TAXATION. COUNTY COURT.	The county court has authority to settle excessive taxes by reducing assessment down to the fair valuation as of the date the taxes are assessed.
5-39	Sept 6	MARRIAGES. RELEASING OF MORTGAGES SECURED BY SERIES, NOTES OR BONDS.	Mortgages or deeds of trust providing for issue of series of notes or bonds aggregating $100,000 or more and given by public utility not under jurisdiction of Public Service Commission, may be released in accordance with the provisions of Section 3083, Laws of Mo. 1933.
6-39	Jan 12	COUNTY COURTS. CONTRACTS BINDING SUCCEEDING COURTS.	County court may appoint a superintendent of a poor farm for a term extending into that of their successors in office provided there is no fraud or collusion in connection with such contract.
6-39	Jan 26	OFFICERS.	Excess fees – recovery may be had.
6-39	Sept 7	BOMBING.	Approved form of information for destruction of buildings by explosives.
6-39	Oct 10	CONSERVATION COMMISSION.	Agents are entitled to certain fees under Section 8287 for making arrests.
8-39	Nov 18	MARRIAGE.	A marriage in Missouri between a man of twenty-one years of age and a woman of sixteen years of age is voidable.
9-39	Jan 19	COUNTY COURTS. EXECUTING CONTRACTS. SIGNING WARRANTS. FACSIMILE SIGNATURES.	County courts may appoint agent to execute contracts or each member of the county agreeing to the contract may sign it. The elected presiding judge or acting presiding judge may sign county warrants. The county judge may not use a rubber stamp containing his facsimile signature to sign warrants.
9-39	Feb 13	TAXATION. DRAINAGE DISTRICTS.	Lands purchased by drainage districts for the purpose of protecting drainage tax lien are exempt from assessment and sale for general taxes accruing subsequent to its acquisition by the drainage district.
9-39	June 15	COUNTY COLLECTORS.	Hold over until their successors are qualified.
9-39	June 29	ANIMALS RUNNING AT LARGE.	Where there is a County wide stock law and an injunction has been decreed by Circuit court against a Constable therein for taking up

			animals thereunder, such decree would restrain only the party to the record and his privies.
9-39	Aug 4	LIQUOR.	Local Option Statutes as same existed prior to prohibition, stand repealed and are no longer in full force and effect.
9-39	Aug 7	PURCHASING AGENT.	Not required to advertise for bids on sale of merchandise.
9-39	Aug 9	PURCHASING AGENT.	Corporation, in which curator, regent or trustee of educational and eleemosynary institution is stockholder, may be let contract by state purchasing agent for supplies to be furnished the institution for which said stockholder is curator, regent or trustee.
9-39	Nov 8	PURCHASING AGENT.	Must buy supplies for penal institutions from prison industries if they have or can within sixty days manufacture the same.
10-39	Mar 28	LIQUOR CONTROL.	Brewing corporation may have interest in wholesale business. Neither is brewing corporation liable for violations committed by wholesale corporation.
10-39	Mar 29	PARK BOARD.	Administration over roads and bridges in and contiguous to State Parks.
10-39	June 21	CONSERVATION COMMISSION.	Article 5, Section 26 of Missouri Constitution vests Conservation Commission with authority to dispose of lands.
10-39	June 23	PROSECUTING ATTORNEY.	Mandamus not proper proceeding to compel county court to allow stenographic fees to prosecuting attorney.
10-39	July 19	BOARD OF PHARMACY.	Constitutional to transfer surplus funds of Board of Pharmacy at close of biennium to revenue funds.
10-39	July 26	STATE CONSERVATION COMMISSION.	Not liable in torts.
10-39	Aug 26	CONSERVATION COMMISSION.	Acquisition of land from Evans-Howard Sewer Pipe Company.
10-39	Sept 11	PARK BOARDS.	Park Boards may not employ skilled help and pay same from Appropriation Act for repairs and replacements.
10-39	Sept 11	STATE BOARD OF HEALTH.	Fees must be paid on cabins operated in state parks by private individuals, but not when operated by state.
10-39	Sept 12	COUNTY COURTS. ROADS AND BRIDGES.	It is the duty of the county to maintain county roads through State parks.
10-39	Sept 13	STATE PARK BOARD.	Interpretation of Sections 26a and 26o of House Bill 716 relating to appropriations for parks.
10-39	Sept 14	GAME AND FISH.	A club is not a commercial establishment within the meaning of Section 8285 Laws of Missouri, 1931.

10-39	Sept 18	PARK BOARDS.	Section 26o, House Bill No. 716, does not authorize purchase of additional land for Pershing Memorial State Park.
10-39	Sept 27	SCHOOL. STATE PARK BOARD.	Board of Directors of common school may convey real estate upon order of voters at annual meeting. State Park Board has no power to convey State Park property except by act of Legislature.
10-39	Sept 28	ROADS AND BRIDGES.	County road may be vacated by abandonment for a period of ten years.
10-39	Oct 26	TAXATION. SALE OF LANDS FOR DELINQUENT TAXES. COLLECTOR'S DUTIES.	Collector is not authorized to issue certificate of purchase at sale of lands sold for delinquent taxes until the amount of the bid is paid him.
10-39	Nov 16	STATE CONSERVATION COMMISSION.	Not liable for back taxes on property purchased for use of state.
11-39	Jan 9	TAXATION. LEVY. UNCOLLECTED TAXES.	In fixing a levy, the county court should take into consideration amount to be realized from all uncollected taxes except those, that after a reasonable time and after reasonable efforts to collect, remain uncollected, county court has a wide discretion in fixing the levy and unless it abuses this discretion and acts arbitrarily and fraudulently, the levy will not be interfered with by the courts.
11-39	Mar 7	ROADS AND BRIDGES.	No vote of the people needed to levy the tax authorized by Section 8067 R. S. Mo. 1929.
11-39	Mar 22	FINANCIAL STATEMENT. THE COST OF PUBLICATION CHARGED TO WHAT FUNDS.	The cost of the publication of the financial statement shall be charged to the various funds which are published in such statement and not to the general revenue fund alone.
11-39	Apr 7	THE PROSECUTING ATTORNEY. DUTIES.	Prosecuting attorney may not represent the opposite parties in cases in which the State Highway Department is interested.
11-39	May 1	CORONERS' FEES.	Coroner may hold an inquest and charge fees therefor where violent and casual deaths happen in his own County and the body is discovered therein.
11-39	May 11	SCHOOLS.	Transportation of High School Pupils.
11-39	Sept 11	OFFICERS. SALARIES AND FEES.	Mode of payment of additional compensation to circuit judge and prosecuting attorney on account of additional duties required by the 1939 laws.
11-39	Sept 26	TAXATION AND REVENUES.	Cities of the Fourth Class shall, in the published list of delinquent lands to be sold for delinquent taxes, provide that the same shall be

			sold at public auction at the court house door of the county in which such city may be located.
11-39	Dec 19	TAXATION AND REVENUE.	County Court, by order, may have lands sold under the provision of 9953b, Laws of Missouri 1939. If the sum realized from such sale is in excess of the costs incurred and advanced, the balance shall be distributed pro rata to the funds entitled to receive the taxes on the land.
12-39	Jan 6	PROBATE JUDGE. WILLS.	Construction to be placed on various clauses in a will as to what estate is vested – whether life estate or life estate with power to sell.
12-39	Jan 16	MOTOR VEHICLES.	Parochial schools not entitled to free licensed plates.
12-39	Feb 1	MOTOR VEHICLES.	Dealers in motors only not required to register as “dealer” Registration of reconstructed motor vehicle.
12-39	Mar 7	DOGS. NOTICE OF ELECTION CONCERNING DOGS.	1. Only one publication necessary for a notice of election. 2. Duties of assessors and county clerks.
12-39	Apr 21	MOTOR VEHICLES.	Person may attach insignia of profession to license plate.
12-39	May 26	NOTARY PUBLIC.	When bond becomes insufficient, county clerk or circuit clerk of St. Louis may order new bond and forfeit his office if order is not complied with.
12-39	July 14	BALLOT TITLE.	Providing that in 1949 and every ten years thereafter the general statute laws be revised in the manner directed by the General Assembly.
12-39	Aug 18	STATUTES. REVISION BILLS GO INTO EFFECT NOVEMBER 1.	Laws not revision measures and passed without an emergency clause go into effect ninety days after adjournment.
12-39	Sept 19	TRADE MARKS.	Under Sec. 12449, R. S. Missouri, 1939 a separate application must be filed for each name, mark or device used.
12-39	Sept 21	OATHS. BOARD OF NURSE EXAMINERS.	Section 13479, page 752, Laws of 1939.
12-39	Nov 7	SCHOOLS.	Children of employees of the Confederate Soldiers’ Home are entitled to be sent by the local rural school district to a high school district, and local district must pay any deficit in tuition.
12-39	Nov 9		Supplemental letter for November 7, 1939, opinion to Hon. A. T. Broughton.

13-39	Aug 17	FUNDS.	State Treasurer entitled to transfer only that part of Grain Inspection Fund under Sec. 13360, R. S. Mo. 1929, which is in excess of $30,000.
15-39	Feb 16	MOTOR VEHICLE.	Any truck driven or operated on the highways must be registered.
15-39	Feb 21	COUNTY BUDGET.	How to pay debts of past years and method to determine validity thereof.
15-39	Apr 12	MOTOR VEHICLE LAWS.	Illinois Trucks temporarily in Missouri need not procure Missouri licensee.
15-39	May 22	SCHOOLS.	Property of school districts exempt from taxation, said districts being municipal corporations.
15-39	Aug 21	MOTOR VEHICLES.	Non-resident owner must display plates. Receipt of registration not sufficient.
15-39	Sept 28	COUNTY WARRANTS.	Limitations are governed by the provisions of Section 12173, R. S. Mo. 1929.
16-39	Jan 18	CIRCUIT CLERKS.	If Circuit Judge approves the appointment of a deputy to Circuit clerk under Section 11812, Laws of Mo. 1937, p. 446, the county must pay the same; the amount of the salary must be taken into consideration even though the anticipated revenue may not be sufficient to pay the same under the Budget Act.
16-39	Feb 16	COUNTY BUDGET.	County Clerk cannot be compelled to draw warrant on 1939 funds for 1938 debt, where there is no surplus.
16-39	Mar 8	MOTOR VEHICLE FUEL TAX. GASOLINE.	Agents and employees of federal government exempt when – Sales at Jefferson Barracks taxable when.
16-39	Mar 24	LIMITATIONS. COUNTY TREASURERS.	Limitation does not begin to run against the County Treasurer and his bondsmen until the end of his term and breach of duty then to pay over funds.
16-39	Apr 26	CRIMINAL LAW. INFORMATION. NUMBER OF COUNTS.	Where one offense is committed the state may file an information containing several counts where different sections of the statute are violated.
16-39	May 4	Hon. G. R. Chamberlin	WITHDRAWN
16-39	Oct 6	SCHOOLS.	Children from orphans' home residing in families in common school districts may attend without paying tuition.
16-39	Nov 14	LAW PRACTICE.	Agent may appear in justice court in representative capacity, but not for valuable consideration.
16-39	Nov 30	TAXATION.	Erroneous publication invalidates sale of land for delinquent taxes.

		PUBLICATION.	
16-39	Dec 20	TOWNSHIP ORGANIZATION. PAYMENT OF BONDS.	Township board should retain moneys collected from levies for paying bonds of the township.
17-39	Jan 25	WARRANTS. COUNTY.	Manner of reducing rate of interest.
17-39	June 8	STATE HOSPITAL.	Employees personally liable for negligent acts.
17-39	Aug 21	COUNTY BUDGET ACT.	Payment of claims out of class other than that to which they belong prohibited except same may be paid out of Class 6 under certain conditions.
17-39	Oct 18	TAXATION AND REVENUE.	County Courts may only compromise back taxes under the provisions of Section 9950. When lands are sold and the description is imperfect the sale is not valid but the tax lien is transferred to the grantee. Right of such lienholder.
17-39	Oct 30	COUNTY COURTS.	County judges and counties of over twenty thousand (20,000) population are entitled to mileage for each necessary trip made.
18-39	Jan 6	COUNTY COURTS.	Judges of Barton County Court are entitled to receive 5¢ mileage in traveling to and returning from holding county court: may be charged only once for each regular term and not for special or adjourned terms, may not collect mileage for making trips to look after county's business or pay a third person mileage to transport the county court.
18-39	May 8	TAXATION. COUNTY COURT.	Title to real estate left to city by will vests in city after will is probated, as of date of testator's death and is thereafter tax exempt.
18-39	Sept 1	PROSECUTING ATTORNEYS.	Required to represent county officers in proceedings in which the county is the interested party.
18-39	Oct 27	TAXATION AND REVENUE.	Construction of Senate Bill No. 94, Laws of Missouri 1933 and Senate Bill No. 311, Laws of Missouri 1939 as to the question of description in procedure affecting title.
18-39	Dec 15	COUNTY COURTS AND SCHOOL FUND MORTGAGES.	The County Court under tis powers to manage and dispose of properties purchased under school fund mortgages may enter into contracts of sale for same and bind subsequent courts.
19-39	Sept 1	CHATTEL MORTGAGES. MOTOR VEHICLES.	The provisions of Section 3097a, House Bill No. 546 of the Sixtieth General Assembly do not apply to mortgages given to manufacturers and dealers.
19-39	Sept 9	Mr. W. T. Conley	WITHDRAWN
19-39	Sept 19	CHATTEL MORTGAGES.	Section 3097A, Laws of Missouri 1939, must be followed to give

			notice to the world of all chattel mortgages except those given to a manufacturer or dealer who do not come within the act of 3097A.
19-39	Nov 10	DRAINS AND LEVEES.	The repairs and upkeep on bridges in counties organized by county courts in drainage districts are controlled by Section 10837, Laws of Missouri, 1937, page 227, and in districts organized by circuit courts bridges must be repaired and kept by the district.
20-39	Jan 9	COUNTY COURT.	Salary of deputy county clerk in county having population of 7,500 and less than 10,000 persons, not to exceed $900.00 per year.
20-39	Jan 16	LOTTERY.	Marking fish and offering prizes for those who catch them is a lottery.
20-39	Feb 22	AUCTIONEERS.	An auctioneer may sell certain articles not subject to duty in the county without obtaining a license.
20-39	Apr 26	SCHOOLS AND SCHOOL DISTRICTS. APPROPRIATIONS.	School funds may not be spent by boards of directors for repairing or building of public highways leading to the schools.
20-39	May 17	SCHOOLS.	Election and qualification of Directors.
20-39	June 5	CHILD LABOR.	Students of the School of the Ozarks are exempt from Article 3, Chapter 125, R. S. Mo. 1929.
20-39	June 7	SCHOOLS.	A rate of levy once voted by the district cannot be revoked by subsequent vote.
20-39	July 24	CITIES OF FOURTH CLASS.	May vote on bond issue for establishing and maintaining a fire department.
20-39	Aug 14	Hon. Edward Cusick	WITHDRAWN
20-39	Aug 16	STATE VETERINARIAN. TRAVEL EXPENSES WITHIN AND WITHOUT THE STATE.	State Veterinarian may receive travel expenses within and without the state when the same are incurred in performance of official duties.
20-39	Sept 12	CRIMINAL LAW.	Giving false information for the purpose of a birth certificate is a misdemeanor and is barred by the statute of limitations.
20-39	Sept 12	ANIMALS AND APPROPRIATIONS.	Appropriation for diseased animals in H B 716, Section 12a is invalid because other laws must be referred to in order to ascertain the purpose of the appropriation contrary to Article X, Section 19.
20-39	Nov 3	AGRICULTURE. STATE VETERINARIAN.	The State of Missouri has sufficient enabling acts to justify the Federal Department in cooperating with the state in the eradication of diseases of livestock.
20-39	Nov 9	AGRICULTURE.	Contract between owner of cattle and with the federal and state

		DISEASED CATTLE. STATE'S LIABILITY FOR PAYMENT.	department does not obligate the State of Missouri to pay for cattle infected with Bang's Disease which are destroyed pursuant to such contract.
21-39	Jan 5	LICENSE. MERCHANTS.	The legislature has determined that the license required "begins" on the date when the county collector approves the bond and grants the license, and that said license ends twelve months thereafter.
21-39	Jan 24	PRELIMINARY EXAMINATION.	Pleas of not guilty in a justice court is not a waiver.
21-39	Jan 31	PEDDLERS.	Trucks selling groceries from house to house to individuals, deemed peddlers; if orders are taken and goods delivered later they are not peddlers.
21-39	Mar 21	CRIMINAL LAW.	Validity of warrant of arrest immaterial after conviction.
21-39	Apr 25	SCHOOLS.	Appropriations for State Teachers Colleges.
21-39	May 5	ATHLETIC COMMISSION.	State commission may employ as inspector person who is already employed by federal, state or county government.
21-39	May 10	SCHOOLS.	Donations or gifts to teachers invalid.
21-39	May 11	SCHOOLS.	Appropriation of funds for State University.
21-39	May 19	TOWNSHIP TRUSTEES.	Vacancy filled by county court; construction of "ten days" time in which to qualify.
21-39	June 17	TOWNSHIP ASSESSORS.	Not required to give bond for performance of their duties.
21-39	July 19	ROADS AND BRIDGES.	It is not necessary to notify landowners to cut hedge fence before bringing civil action under section 7329 R. S. Missouri, 1929.
21-39	July 25	Hon. Donald B. Dawson	WITHDRAWN
21-39	Aug 3	TOWNSHIPS.	(1) May recover books and records from outgoing trustee by replevin or mandamus; (2) Governor may order audit of township records.
21-39	Sept 22	TOWNSHIP COLLECTORS. BONDS.	Township collector may give personal or surety bond. Surety bond may be paid for by township if consent and approval is given by governing body.
21-39	Nov 15	LOTTERIES.	Gift auction at which merchandise certificates are bid not a gift enterprise or lottery.
21-39	Dec 20	TAXATION AND REVENUE. ROAD DISTRICTS.	Uncollected taxes belonging to a district should go into the special road district to which such unorganized territory is attached.

21-39	Dec 22	TAXATION.	Merchants who do not file bond and do not obtain a merchant's license may be subject to forfeiture action under Section 10076, R. S. Missouri, 1929.
22-39	Mar 22	COUNTY COLLECTORS.	Laws of Missouri 1937, page 502, impinge upon Section 12184 R. S. Mo. 1929 and repeals the same by implication as to the irreconcilable features. 1937 Laws, supra, do not impinge upon Section 9885, Laws of Mo. 1935, page 408.
22-39	May 9	SEWER DISTRICTS.	(1) Not necessary to secure permit from bd. of plumbing supervisors before connecting sewer in incorporated sewer district in incorporated town where town has satisfactory plumbing code. (2) Necessary to secure permit form board in unincorporated area. (3) Sewer district may require its own permit and charge fees; trustee not liable where drain layer acting independently excavates public road without excavation permit.
22-39	July 26	STATUTES. EMERGENCY CLAUSE. WHEN EFFECTIVE.	If a bill is amended, then the emergency clause must be adopted after such amendment in order that it may be effective.
22-39	Aug 15	PUBLIC SERVICE COMMISSION.	Cannot exact contract hauler license from trucker transporting livestock from farm to market and on return trip hauling his (the trucker's) own property.
22-39	Oct 2	JUSTICES OF THE PEACE.	Construing Section 2150, R. S. Missouri, 1929.
22-39	Nov 30	COUNTY COURTS.	Who may call a meeting of the County Court during adjourned term.
24-39	Feb 9	RECORDER. MARRIAGE LICENSES.	A man may marry his step-daughter.
24-39	Feb 11	ROADS AND HIGHWAYS.	Maintenance of road Districts and the right of a road commissioner to employ himself.
24-39	Apr 19	MOTOR VEHICLES. WHEELS. WEIGHT COMPUTATION.	Truck operator may use as many sets of wheels on his truck as he desires so long as he keeps the vehicle within the dimensions of the law as to length, height, width, weight of load and the amount of weight on each wheel.
24-39	May 17	FOREIGN JUDGMENTS.	Foreign judgment must be sued on this state to establish a lien of same.
24-39	May 26	CONSERVATION COMMISSION. GAME AND FISH.	Statutes not inconsistent with the Conservation Amendment or rules of the Commission remain in force.
24-39	Aug 28	UNEMPLOYMENT COMPENSATION.	"Notice of Lien" may be filed and not recorded by the Commission. County Court should furnish a number book for the purpose of

			checking an employer as to his liability under a “Notice of Lien”.
24-39	Sept 27	TAXATION.	Collector’s deed of trustee.
24-39	Nov 21	TAXATION.	Trustee’s deed.
24-39	Dec 15	COUNTY COURT.	In order for judge of county court of Newton County to be entitled to five dollars per day while the court is in session, he must actually be present on those days.
25-39	Mar 23	COUNTY SURVEYOR.	Duty of county court to furnish surveyor supplies and instruments.
25-39	Dec 16	OFFICERS. SALARIES AND FEES. TREASURER OF THE CITY OF ST. LOUIS.	The salary of the Treasurer of the City of St. Louis is fixed by Laws of Missouri, 1939, page 486, and was payable in accordance therewith when that act went into effect.
26-39	Jan 30	PENAL INSTITUTIONS.	Conditional Commutation by Governor is forfeited when?
26-39	June 19	HIGHWAYS.	Construction through municipalities having population of more than 2,500 according to last decennial census.
26-39	Sept 14	PARDONS AND PAROLES.	Special trial judge has no authority to parole a defendant, and the successor of the judge in the judicial circuit where the case was tried still maintains jurisdiction.
27-39	Jan 5	TAXATION.	The liability for the payment of a corporation franchise tax of domestic corporations attaches as soon as the certificate of authority to do business is granted.
27-39	Jan 21	ROADS AND BRIDGES.	When County Court may change boundaries of road districts in counties not under township organization.
27-39	Jan 31	TAXATION. CREDIT UNIONS.	The owners of the shares of stock in a credit union who have no money borrowed on such stock for the purpose of reporting the value of such stock to the assessor shall take into consideration the entire assets of such credit union and deduct therefrom the liabilities of such union and this amount shall be the basis upon which the value of the stock is fixed for taxation purposes.
27-39	Mar 4	COUNTY COURTS.	School Fund Mortgage. County Courts have no authority to accept a deed to lands, on which there is a mortgage with bond, in full satisfaction of such mortgage and bond.
27-39	Mar 9	ELECTIONS.	City primary election is legal holiday.
27-39	Apr 6	TAXPAYER.	Person paying merchant’s tax is a taxpaying citizen within meaning of Section 27, Laws of Mo. 1935, page 277.
27-39	Apr 19	TAXATION.	Buildings erected on leased land shall be assessed as real estate at the situs of the property.

27-39	July 14	SCHOOLS. COUNTY SUPERINTENDENT OF SCHOOLS.	County need not furnish office to one not properly qualified to hold office.
27-39	July 20	SCHOOLS.	Section 11202 R. S. Missouri, 1929 is the proper section to remove a county Superintendent of Schools for cause.
27-39	July 26	Hon. Clarence Evans	WITHDRAWN
27-39	Sept 1	MOTOR VEHICLES.	Section 3097A only applies to fixing of chattel mortgages and not recording, and is directory and not mandatory that the mortgagee or assignee shall have the certificate of title stamped or sealed.
27-39	Dec 8	TAXATION. COMPROMISE AND SETTLEMENT OF TAXES BY THE COUNTY COURT.	County court may compromise taxes at any time before payment of same provided, however, such compromise is subject to the provisions of the Constitution as to valuation. County court may not compromise taxes for which lands have been sold under the Jones-Munger Act.
28-39	Feb 25	ELECTIONS. EXEMPTIONS.	Voting bonds for court house and jail-duties of officers with respect to furnishing election supplies and compensation therefor. May claim under both 1160 and 1163 when.
28-39	Mar 1	TAXATION. CHAIN STORES.	Section 3 of House Bill No. 34 for the Sixtieth General Assembly is constitutional.
28-39	Aug 2	COUNTY COLLECTORS.	County Collector of Jasper County may not establish and maintain a branch office at Joplin under the provisions of Section 9899 R. S. Mo. 1929.
29-39	July 8	BLIND PENSION.	Recipient of a blind pension cannot be stricken from the rolls until he has been given reasonable notice and such fact certified to the State Auditor.
29-39	Aug 31	CERTIFIED PUBLIC ACCOUNTANTS.	A lawfully registered C.P.A. cannot be prosecuted criminally under Section 13716, R. S. Missouri, 1929.
29-39	Sept 18	SCHOOLS.	Public schools not within the scope of statutes requiring fire escapes and which provide criminal liability for failure to so provide.
29-39	Sept 22	MOTOR VEHICLES.	It is an offense to operate motor vehicles as chauffeur without a chauffeur's license.
29-39	Dec 15	TRADE-MARKS. INFRINGEMENTS.	The use of the word "Blind-Kraft" by Missouri residents not an infringement on the trade name "blindcraft" adopted by residents of the State of California.
31-39	May 9	Hon. Arkley Frieze	WITHDRAWN
31-39	June 7	COSTS.	Prosecuting Witness liable in certain cases for costs on acquittal of

		CRIMINAL CASES.	defendants. County must make order taxing same against prosecutor.
31-39	Oct 7	COUNTY WARRANTS.	Under section 12173, after lapse of five years county warrants may not be paid.
31-39	Nov 20	LIQUOR CONTROL.	Upon granting of permanent injunction under the Liquor Control Act, all costs must be paid by the defendant owner of the property or the defendant in the cause.
32-39	Jan 25	CRIMINAL COSTS.	The insolvency act must be strictly followed in order to obtain a release on a punishment of a fine and costs.
32-39	Apr 14	SHERIFF FEES.	The Sheriff is not entitled to fees for serving subpoena until the litigation is at an end.
32-39	July 5	MOTOR VEHICLES. TRAILER.	Wood saw or feed grinder powered by automobile motor permanently mounted on automobile chassis and towed from place to place by automobile not a trailer.
32-39	July 14	SWAMP LANDS.	Where county land patent to swamp land is void purchaser is entitled to refund of purchase money.
33-39	June 27	TAXATION. COLLECTION OF TAXES.	Collector or county court may pay only the amount authorized by statute to an attorney for collecting delinquent personal taxes.
33-39	Sept 8	TAXATION. COMPROMISING TAXES DUTY OF THE COLLECTOR TO START PROCEEDINGS TO SELL.	The county court may compromise taxes as provided by Section 9950, Laws of Mo. 1933, page 426, at any time before they are sold at the third sale. It is the duty of the collector to institute proceedings pertaining to the sale of lands for taxes.
33-39	Sept 28	COUNTY TREASURER. BONDS, SALE OF.	County Treasurer shall advertise bonds for bids as directed in Sec. 2911, R. S. 1929; County Court may order Treasurer to reject bids; and county may order treasurer to again advertise the bonds in the same manner, or then may sell them at private sale.
34-39	Sept 16	SALARIES AND FEES.	Clerk of the Circuit Court of Jackson County may retain fees in payment of his salary.
35-39	Feb 14	TAXATION AND REVENUE.	Outlawed taxes are not a charge against property.
35-39	Feb 28	LIQUOR.	Funeral parlor chapel can not be classed as a church because religious services are held there weekly. No statutory requirement that a 3.2 beer licensee have good moral character. Suspension of 3.2% beer license not statutory grounds for refusal of subsequent application for similar license. Filing of criminal prosecution is not in itself a conviction requiring the refusal of a 3.2% beer license for one year. Cities can not suppress or prohibit sale of intoxicating liquor

			authorized by statute.
35-39	May 9	TOWNSHIP ORGANIZATION. TOWNSHIP BOARDS EMPLOYING MEMBERS.	Township board may not employ one of its own members to act as foreman or overseer of work under the direction of the board.
35-39	May 13	DOG TAX. ANIMALS.	County dog tax once submitted to voters of county cannot be resubmitted.
35-39	May 15	TOWNSHIP CLERKS.	No fee for drawing or writing warrant.
35-39	May 25	Hon. J. A. Gray	WITHDRAWN
35-39	July 1	COUNTIES. DRAINAGE DISTRICTS.	Counties under 70,000 population cannot issue anticipation warrants under Section 2097, R.S. Missouri, 1929. Drainage districts cannot go into voluntary bankruptcy or cannot be forced into involuntary bankruptcy.
35-39	July 12	COUNTY COURTS.	Right to make donations to individuals and associations.
35-39	Aug 2	OPTOMETRY. OPTOMETRY BOARD. OFFICERS.	Person appointed to Board must file oath of office before he is qualified. Incumbent remains member of Board until successor qualifies.
35-39	Aug 25	COUNTY CLERKS.	Senate Bill #239 effective November 1, 1939. Gives clerks no more authority than they had. What source additional pay is to be paid from. May refuse to sign warrants when.
35-39	Sept 5	MORTGAGES.	Deed of Trust signed by husband and wife on an estate by the entirety securing note of husband is a valid instrument.
35-39	Dec 12	SCHOOLS.	Transportation of school children under Section 9197, R. S. Mo. 1929, should be provided for children living more than one-half mile from the schoolhouse, but it is not necessary that transportation be made from the door of the home to the door of the schoolhouse.
37-39	Jan 25	SHERIFF'S FEES.	$1.00 fee allowed for execution; $1.00 fee allowed for garnishment.
37-39	July 11	PAROLES.	Information obtained by Parole Officer privileged information; other data is public record.
37-39	Aug 4	GOVERNOR. PARDONS & PAROLES.	Governor can issue pardons and paroles anytime after conviction – does not have to wait a year after convict has been discharged.
37-39	Sept 28	CHATTEL MORTGAGES. MOTOR VEHICLES.	Recorder of deeds may make release of chattel mortgage on his records without the title to such mortgage being presented to show such release.
38-39	Jan 16	CONSTITUTIONAL AMENDMENT.	Cost of paying for the sample ballot publication on a proposition should be borne by the State, under Section 10385, R. S. Mo. 1929.

38-39	Feb 8	TOWNSHIP ORGANIZATION.	It is the mandatory duty of the county clerk to furnish a prepared form to the township clerk for the publication of the financial condition of the township.
38-39	May 3	TOWNSHIP ORGANIZATION. TAXES.	Township taxes are junior to county taxes for county purposes and the total of the two can not exceed the maximum provided for by the Constitution for county purposes.
38-39	May 26	ELECTIONS.	In counties under the township organization plan the county court is limited to one voting place in a precinct unless the court should divide the precinct and make an order setting out the boundary and the name of each precinct.
38-39	June 2	SOCIAL SECURITY, APPEALS.	A procedural statute is applicable to actions which have accrued or are pending as well as to future actions.
38-39	July 14	COUNTIES.	May not impose a tax on skating rinks under Section 14323, R. S. Mo. 1929, unless performances or exhibitions of professional skill are given.
38-39	Aug 16	CANCER HOSPITAL.	Cancer Commission proper party to execute contract of bailment with Federal Government.
38-39	Aug 21	OFFICERS.	Not liable for tax illegally collected if done in good faith and paid over into the County Treasury.
38-39	Sept 30	COURTS. DOCKET FEES AND USE OF.	Circuit court, in absence of statutes authorizing same, may not make a rule requiring that a portion of the filing fee be used for maintaining the library of the court.
38-39	Nov 9	TAXATION & REVENUE.	County assessor has no legal authority to assess property at twenty per cent less than its actual value. State Board of Equalization to equalize taxes. Mandamus is the remedy to compel actual value assessment.
38-39	Dec 14	TAXATION AND REVENUE.	Lands sold by collector for delinquent taxes on real estate and purchased by him constitutes a void sale. A transfer of his rights obtained by such certificate would convey nothing. The money paid by such collector at such sale constitutes a voluntary payment.
39-39	Jan 5	PROBATE COURTS. INHERITANCE TAX.	Inheritance tax appraiser cannot employ attorney to advise him relative to the appraisement and charge the fee of such attorney as necessary expenses incurred in the performance of his duties as appraiser.
40-39	Feb 6	Hon. Walter A. Higbee	WITHDRAWN
40-39	July 5	SALES TAX.	The city is liable for a sales tax on material which it purchases directly and supervises the work itself. The same applies to property owners if the materials are furnished to them at their request.

40-39	July 25	MUNICIPALITIES. MOTOR VEHICLES. REGULATION OF LIGHTING EQUIPMENT.	Municipalities under a special charter without a special provision in such charter may not regulate lighting equipment on motor vehicles except that which is provided by the statutes.
41-39	June 1	WATER DISTRICTS. ADDING TERRITORY TO THE DISTRICT.	
41-39	June 29	ELECTION CONTEST. LEGISLATURE.	Representative entitled to receive emoluments of office from State Treasury upon determination of election contest.
41-39	Sept 28	LOTTERY.	“Policy writer” of a drawing in this state can be prosecuted for a felony, or for a misdemeanor.
41-39	Oct 20	TOWNSHIP TRUSTEE. FEES.	The township trustee is entitled to commission on all moneys which he is required by law as official to disburse.
41-39	Oct 24	STATUTES. REVISION BILLS.	House Bill No. 16 passed by the 60th General Assembly goes into effect November 1, 1939.
41-39	Dec 5	FINANCE DEPARTMENT.	Publication of unclaimed deposits in failed banks.
41-39	Dec 19	STATE CANCER COMMISSION.	Interpretation of provision in contract for State Cancer Hospital relative to heating.
42-39	Feb 21	COUNTY COURT. JURORS.	Court may pay board and lodging of jury kept together in misdemeanor case.
43-39	Jan 7	OFFICERS.	County treasurer cannot be appointed court reporter in the 21st Judicial Circuit, and he cannot appoint a first cousin of his wife as deputy county treasurer. The nepotism statute affects the office of treasurer.
43-39	Jan 24	PROSECUTING ATTORNEYS. DUTIES. NOT REQUIRED TO REPRESENT SCHOOL DISTRICTS. LIMITATION OF ACTIONS AGAINST COUNTY TREASURER.	Prosecuting attorney is not required to represent a school district in an action to recover moneys from county treasurer. Action against a county treasurer for money alleged to have been wrongfully paid out should be brought within three years.
43-39	Mar 3	TAXATION.	County assessor should file individual tax lists with the county clerk after making up his land and personal property books.
43-39	Mar 8	SHERIFF.	Sheriff of Franklin County can appoint a deputy approved by the judge of the circuit court and pay the deputy out of his own fees, but the county court cannot allow the deputy a salary.

43-39	Mar 15	DEPUTY HEALTH COMMISSIONERS.	Appointment for one year; general duties.
43-39	Apr 5	RECORDER INDEXING CONTRACTS.	The party extending a loan agreement should be listed as grantor in the index of deeds.
43-39	May 1	Hulen & Walden	WITHDRAWN
43-39	May 11	CRIMINAL COSTS.	Method of providing fee bill and payment of costs in misdemeanor cases.
43-39	May 16	SCHOOLS.	County courts must either collect the amount of a school fund mortgage or foreclose such mortgage.
43-39	Sept 27	LIQUOR.	Possession only of illegal intoxicating liquors constitutes a misdemeanor.
44-39	Feb 18	MISSOURI STATE SCHOOL FOR DEAF.	Not liable for assessment by Fulton, Missouri, for benefits derived from sewer or disposal plant.
44-39	Oct 25	BARBER SCHOOL.	Section 13529, page 188, Laws of Missouri, 1937, requiring a permit not applicable to Missouri School for the Deaf.
45-39	Feb 20	ELEEMOSYNARY INSTITUTIONS.	Board may grant permission to an individual to copy data on insane patients.
45-39	Feb 21	ELEEMOSYNARY INSTITUTIONS.	City of St. Louis only required to pay expenses as set out in Section 8636, 1935 Session Laws.
45-39	Mar 18	INSANE PATIENTS.	When law requires that patient be served by process personally, regardless of the effect upon the patient the insane asylum must permit such service.
45-39	Sept 2	ELEEMOSYNARY. STATE HOSPITALS.	May not decline to take patients of county if payments required by law have been made, even though county has outstanding debt for former patients.
45-39	Sept 13	PENAL INSTITUTIONS.	The Record Clerk of the penitentiary must follow the law in classifying the prisoner for service of two sentences, one of which was for the conviction on a case while a convict.
46-39	Aug 24	PENAL INSTITUTIONS.	Sentences of a defendant who has appealed and later convicted on another charge, shall not run concurrently.
46-39	Oct 12	TAXATION AND REVENUE.	Construction of Senate Bill No. 311 in relation to Senate Bill No. 94 as to the first, second and third sale and the resale provided in Section 9953b of said Senate Bill No. 94, the powers of the trustee and the rights and duties of junior lienors.
46-39	Oct 30	TAXATION AND REVENUE.	Offerings for sales of delinquent tax lands must be successive. Unless such offerings are made successively, sales thereunder will be void.

47-39	May 11	COUNTY COURTS. TOWNSHIP BOARDS. ROADS AND BRIDGES. SPECIAL COMMISSIONERS AND TAXATION.	The seven questions pertaining to the rights of the county courts, township trustees and special road commissioners of taxation for road and bridge purposes in counties under township organization.
47-39	July 20	FISH AND GAME.	Possession of squirrels between June 1st and November 30th is not a violation of section 8277 R. S. Missouri, 1929.
48-39	May 18	SCHOOLS. DIRECTORS AND CLERKS.	Different questions relating to school directors, their qualifications and election of the clerk and their records.
49-39	Mar 22	SCHOOL.	Treasurers of city, town or village districts not entitled to compensation until annual reports have been filed.
49-39	Apr 3	SCHOOLS.	City, town and consolidated school districts may change their boundaries in the same manner as common school districts under Section 9275, R. S. 1929, even though such change takes a part of the territory of the city and puts it into an adjoining district.
49-39	Aug 15	Hon. Lloyd W. King	WITHDRAWN
51-39	Jan 30	COUNTY RECORDS.	Section 12116, R. S. 1929, only authorizes destroying, by burning, “assessment lists,” and does not authorize the burning of township tax books.
51-39	Apr 25	TAXATION.	County board of equalization can not raise valuation on part of a tract, but must raise or lower valuation on whole tract.
51-39	July 7	NURSES.	Examination fee determined by law as of date applicant takes examination.
51-39	Sept 13	TAXATION.	The School District is a “Municipal Corporation” and all its lands are exempt from taxation under Section 6, Article 10, Constitution of Missouri.
51-39	Oct 11	DENTISTRY.	Chiropractor who examines a patient’s teeth and recommends a treatment therefor, or that such teeth be extracted, violates Section 13582, R. S. Mo. 1929, amended by Laws of Mo. 1937, page 492, relating to the practice of dentistry.
51-39	Oct 13	CRIMINAL LAW.	Distributors of wire service and distributors of printed racing news in gambling establishment, or hand-book operators are not guilty of any crime under the statutes of Missouri.
51-39	Oct 28	TAXATION AND REVENUE.	Certificate-holder at a third sale under the provisions of Senate Bill No. 94, Laws of Missouri 1933, is entitled to a deed and possession after the redemption period unless he fails to pay subsequent taxes

			and permits the property to be sold under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, at page 851, and in such event he loses all rights obtained under the certificate of purchase.
51-39	Dec 21	TAXATION.	County collector is not compelled to notify a tax payer as to his personal taxes until after they become delinquent.
52-39	Feb 16	SCHOOLS.	Consolidated Districts may furnish transportation to non-resident pupils.
52-39	Mar 29	BURIAL SOCIETIES.	May admit members up to sixty-six (66) years of age.
52-39	May 5	CONSTITUTIONAL LAW. APPROPRIATIONS TO INDIVIDUALS OR PRIVATE AGENCIES PROHIBITED.	State funds may not be paid to private institutions or agencies for the care of indigent sick and/or the care of dependent and/or neglected and dependent children.
52-39	Oct 19	UNEMPLOYMENT INSURANCE.	In absence of fraud four separate corporations having a majority of the same stockholders, and not individually having eight employees, do not come under the Unemployment Compensation Act.
53-39	Mar 5	PROBATE COURT. PUBLIC ADMINISTRATOR.	Court cannot oust the administrator who has taken charge of an estate under Sec. 299 (5) by appointment under the terms of proviso in Sec. 7.
53-39	May 24	SCHOOLS.	School board in common school district may assess a levy up to forty cents per hundred dollars valuation without an election by the taxpayers.
53-39	June 13	OFFICERS. AUDITING ACCOUNTS OF PUBLIC ADMINISTRATOR OF COUNTY OF ST. LOUIS.	Comptroller of the County of St. Louis may audit the accounts of the public administrator of that county.
54-39	Jan 6	DOG LICENSE LAW.	Any constable in the county may enforce the dog license law.
54-39	Feb 10	TAXATION.	County clerk is entitled to retain ten cents for each county dog license, in addition to his regular salary.
54-39	Feb 24	COUNTY COURTS. DOGS. COLLECTION OF TAXES.	The county court is not authorized to appoint and pay a person to enforce the collection of dog taxes but may pay a person a reasonable sum to enforce its quarantine order on dogs for rabies.
54-39	Mar 16	ANIMALS. DOG TAX. DOGS.	Person having more than ten dogs liable only for ten dollars tax.

54-39	Mar 27	ROAD DISTRICT.	A voter on the submission of the adoption of a special road district need not be a taxpayer, but should be qualified under the general election laws.
54-39	Apr 29	TAXATION AND REVENUE.	Owner purchasing at third sale acquires interest free from tax liens for which sale was had.
54-39	June 5	SHERIFF'S FEES. HIGHWAY PATROL.	Entitled only to mileage actually traveled. Warrant to be executed by them, should be addressed to them.
54-39	July 27	COUNTY COURTS. COUNTY HIGHWAY ENGINEER.	County Court must determine whether applicant for position as county highway engineer meets statutory requirements as to qualifications.
54-39	Oct 19	RECORDER OF DEEDS.	Has no authority to keep out of office justice of peace soliciting performance of marriage ceremony, whose conduct annoys applicants for marriage license and is detrimental to efficient operation of said office, but county court has right to eject intruders from said office.
54-39	Nov 30	STATUTORY CONSTRUCTION.	Words "shall be lawful" in Section 9953b., Laws of Missouri, 1939, construed to be directory.
54-39	Dec 5	COUNTY COURTS.	Have authority to institute suits to prevent trespasses upon county property.
55-39	Feb 10	INSURANCE.	Reasons for disapproving articles of incorporation for Missouri Valley Mutual Casualty Company.
55-39	Feb 25	INSURANCE DEPARTMENT.	Approval of affidavit of change in number of Directors of Pyramid Life Insurance Company.
55-39	May 16	INSURANCE.	Approval of Amended Articles of Incorporation of Central Mutual Casualty Company of Kansas City.
55-39	June 1	HABITUAL DRUNKARDS.	Not confinable in state institutions under order of probate court.
55-39	July 18		Opinion letter issued to Hon. Ray B. Lucas.
55-39	Aug 1	INSURANCE.	Approval of reduction and increase of capital stock of St. Louis Fire and Marine Insurance Company.
55-39	Sept 12	INSURANCE.	Approval of amendment of Articles of Incorporation of Kansas City Life Insurance Company changing date for annual meeting of stockholders.
55-39	Sept 27	INSURANCE.	Disapproval of proposed Articles of Incorporation of Industrial Benefit Insurance Company.
55-39	Sept 27	INSURANCE.	Approval of articles of incorporation of Mutual Commerce Casualty Company.

55-39	Nov 4	INSURANCE.	The “Safe Driver’s Reward” which involves a return of 15% of premium by casualty companies to policy holders in the event no claims are reported is a rate making device only and, therefore, proper.
55-39	Nov 14	INSURANCE.	Contract whereby Royal Provident Corporation of America agrees to replace lenses in glasses and give free adjustment on frames is insurance contract.
55-39	Nov 18	INSURANCE.	Approval of articles of incorporation of Midwestern Fire and Marine Insurance Company.
55-39	Nov 22	INSURANCE.	Approval of proposed articles of incorporation of the American Fidelity Life Insurance Company of Kansas City.
55-39	Dec 7	INSURANCE.	Approval of articles of incorporation of the Old American Insurance Company.
56-39	Mar 21	NEWSPAPERS.	Newspapers printing notices under section 5599, Laws of Missouri, 1931, page 141, must meet all the requirements of section 13775, Laws of Missouri, 1937, page 432.
56-39	Aug 1	CREDIT UNIONS.	Cannot engage in general banking business.
56-39	Aug 4	INSURANCE. BURIAL SOCIETIES.	United Mutual Life Assurance Society of America, Inc., cannot be licensed as a foreign corporation to do business in Missouri; it if does business without complying with the statutes it is a violation of the penal laws.
57-39	Jan 4	SCHOOLS. SUPERINTENDENT. QUALIFICATIONS.	County superintendent of schools is required to possess only one of the alternative qualifications set out in Section 9454, R. S. Mo. 1929.
57-39	Jan 12	SHERIFF.	A sheriff may serve warrant issued on a misdemeanor out of the Circuit Court in any other county in the State.
57-39	Jan 23	TAXATION.	Taxation of Railroads and Utilities for school purposes.
57-39	Feb 17	COUNTIES. CONDEMNATION PROCEEDINGS.	County may withdraw from condemnation proceedings before owner’s right to compensation becomes vested; only liable for court costs and not attorneys fees; when county may appeal from judgment of the circuit court.
57-39	Feb 24	OFFICERS.	County officers not prohibited from purchasing county warrants at par value.
57-39	Mar 8	APPROPRIATIONS.	Where an act creating an office provides for compensation and traveling only within the state, then such officer is not authorized to incur travel expenses outside of the state even though his appropriation provides for such expense.

57-39	May 12	COUNTY COLLECTORS.	What constitutes delinquent personal property tax list and duties of county court in connection with settlement.
57-39	May 16	PENAL BOARD.	Authority of law for imprisonment in penitentiary is only pursuant to sentence of court for a felony.
57-39	May 24	ANIMALS.	Charges for feeding and keeping strays are only legally assessed, pursuant to statutory authority.
57-39	May 31	CRIMINAL LAW.	Physician is incompetent to testify as to sobriety of a patient whom he is treating for injuries, but a physician is competent to testify as a layman when he is not treating an intoxicated person.
57-39	June 3	PENAL INSTITUTIONS.	Reprieves for specified periods are part of the Governor's Constitutional prerogative.
57-39	June 5	SHERIFFS AND OFFICIAL BONDS.	Sureties on Sheriff's bonds are not liable for excess bills presented to the County Court by the Sheriff and paid to him.
57-39	June 7	RECORDER OF DEEDS.	Required to produce original records at trial on order of subpoena duces tecum.
57-39	June 17	PUBLIC LANDS. UNITED STATES GOVERNMENT.	State laws respecting federally owned lands are junior to the federal laws thereover.
57-39	June 20	COUNTY.	Not liable for hospital expense of person committed to Missouri Training School.
57-39	June 26	CRIMINAL PROCEDURE.	Venue of jail break is in county where prisoner is confined from a county having no jail.
57-39	June 27	Hon. G. Logan Marr	WITHDRAWN
57-39	June 30	PARK BOARD.	Powers of maintenance and improvement are limited to territorial bounds of State Parks.
57-39	July 13	SHERIFFS.	Entitled to mileage in each case when serving five warrants on the same defendant.
57-39	July 19	SHERIFF FEES.	Sheriff not entitled to a fee for transporting prisoner when confined in jail in adjoining county because of insufficiency of local jail.
57-39	July 20	ASSESSMENTS. TAXATION.	Personal property on which the United States Government holds a mortgage is taxable to the mortgagor.
57-39	Aug 2	SHERIFFS.	Misappropriation of money constitutes embezzlement.
57-39	Aug 16	ELECTIONS.	Grand Jury may open ballot boxes in any election for the purpose of investigating fraudulent elections.

57-39	Aug 22	AGRICULTURE, DEPT. OF. EGG INSPECTION.	Owner of “egg-breaking establishment” not required to take out “egg-trafficking license.”
57-39	Aug 25	VENUE.	Ordinarily venue in a criminal case for removing and concealing mortgaged property is in the county of the residence of the defendant.
57-39	Oct 17	COUNTY BUDGET ACT.	Current revenue coming in during the current year can be used during that year.
57-39	Nov 1	AGRICULTURE. COMMERCIAL FEEDING.	Feed for livestock and poultry containing rice hulls in any form may not be sold as a commercial feed in this state.
57-39	Nov 9	COUNTY COURT.	In order to render the county liable for blood hound harness and red lenses purchased by the sheriff, the sheriff must be a lawfully authorized agent of the county.
57-39	Nov 17	TAXATION. SALE OF LAND TO TRUSTEE. THE TRUSTEE MAY NOT BE DEPUTY COUNTY COLLECTOR.	Deputy county collector may not act as trustee. Authority of the trustee to collect fees for service.
57-39	Nov 29	COUNTY JAIL.	The Morgan County jail must be maintained within the corporate limits of the county seat of justice, Versailles. A part of the Morgan county home can not be maintained or used as the county jail, because it is outside the corporate limits of the Morgan county seat of justice, Versailles.
57-39	Dec 4	CRIMINAL LAW.	Negroes cannot be barred from county jury panel by conspiracy or scheme without subjecting the jury panel to a motion to quash.
57-39	Dec 7	CRIMINAL COSTS.	In a preliminary the county or state is not liable for the costs when the defendant is discharged.
57-39	Dec 14	CRIMINAL LAW.	Under the so-called habitual criminal act, prior conviction and sentence to Intermediate Reformatory at Algoa is sufficient to satisfy its terms.
58-39	Jan 26	BUILDING AND LOAN.	Directors may contract with association; when.
58-39	Mar 29	BOND INVESTMENT COMPANIES.	Commissioner of Finance has the power to examine Bond Investment Companies.
58-39	May 6	POLICE BILL. AMENDMENTS TO.	Lawmakers may not infringe upon the appointive powers of the Governor in enacting legislation.
58-39	May 25	BUILDING AND LOAN.	Agreement between Federal Association and State Association

			covered by joint faithful performance bond that Federal Association shall have priority does not meet requirements of Section 5591, Laws of Missouri, 1931, p. 147.
58-39	Aug 17	BUILDING & LOAN ASS'NS.	(1) Officer or employee may furnish individual bond without "faithful performance of duty" clause; (2) Bond cannot be cancelled without ten days notice in writing; (3) Supervisor of Building and Loan Associations may prepare form of individual bond in compliance with House Bill 166.
58-39	Dec 13	Mr. Hue D. McDonald	WITHDRAWN
59-39	Jan 3	ELECTIONS.	Persons convicted of violating Section 7783(g) are disqualified from voting.
59-39	Mar 1	SCHOOLS.	Rural School District may purchase land adjacent to a school for road purposes.
59-39	Mar 10	ELECTIONS.	Board of Election Commissioners of St. Louis County to make canvass alone of election returns.
59-39	Mar 28	SCHOOLS.	Directors of town school district cannot dispose of building or school house site until another building or school house site has been provided.
59-39	Mar 28	PHYSICIANS.	Must not operate on adults without consent or on minors without obtaining consent of parents, or inmates at Intermediate Reformatory.
59-39	Apr 15	TAXATION.	Buildings owned by lessees are subject to taxation separate from the land.
59-39	May 6	ASSESSORS.	(1) Compensation for taking list containing only undivided interest in real estate in counties of 40,000 or less. (2) Compensation for entering tract so owned in land book.
59-39	May 10	COUNTY COLLECTOR.	It is mandatory on the county collector to withhold fees to witnesses or grand jurors for delinquent taxes, even though the taxes are in a larger amount than the warrants.
59-39	May 16	SCHOOLS.	County Superintendent of Schools not entitled to any unexpended balance in fund created by Section 9475, R. S. Mo. 1929.
59-39	Aug 2	TAXES.	Cost of making resurvey of city property.
59-39	Nov 7	BOARD OF OPTOMETRY.	Secretary of board must be selected by the board and cannot be appointed by the Governor.
59-39	Dec 14	TAXATION.	City collector of city of second class cannot assess a penalty of more than 1% upon delinquent real estate taxes but can assess and is entitled to 3% of the total penalty of not more than 5% on personal

			delinquent taxes.
59-39	Dec 30	TAXATION AND REVENUE.	1. Trustee appointed under the provisions of 9953b, Laws of Missouri 1939, at page 851, is to receive his fees as a part of the costs. 2. That by order of County Court the trustee may sell for a less or greater sum than the taxes.
60-39	Apr 4	BONDS. SURETY BONDS. COLLECTORS' BONDS. OFFICERS.	1. Payment of premium of surety bond not mandatory on public body. 2. Premium to be paid out of Class 4. 3. Entire premium to be paid for by county and not apportioned among the funds protected.
60-39	Aug 1	OFFICERS.	Deputy County Tax Collector may not be appointed Trustee for purchases of lands and lots under Senate Bill No. 311, 60th General Assembly.
60-39	Sept 7	NATIONAL GUARD. ENLISTED MEN.	There is no law, state or federal, which prohibits the discharge of a civilian employee, other than an employee of the United States, for the sole reason of his attendance at a National Guard Encampment undergoing federal training.
62-39	Feb 28	TAXATION AND REVENUE.	Legal representative of minor may redeem from the Collector after sale and delivery of deed, if no controversy of fact; otherwise right of party to redeem must be established in court of competent jurisdiction.
62-39	Mar 22	SCHOOLS.	It is not legal to have challengers and watchers in the polls at school elections.
62-39	Mar 31	PROSECUTING ATTORNEY FEES.	When dismissal is at cost of defendant such fee is not taxable as a part of the cost.
62-39	Apr 12	SCHOOLS. TRANSPORTATION. CONSOLIDATED DISTRICTS.	The board of directors of consolidated districts, unless authorized by vote of the electors of the district, may not provide for transportation of pupils in elementary schools except where the average daily attendance falls below ten.
62-39	May 9	Hon. John W. Mitchell	WITHDRAWN
62-39	June 16	FERTILIZER LAWS. AGRICULTURE.	Agriculture Experiment Station must label or tag each separate parcel of "Vigoro" before it may be exposed for sale.
62-39	Oct 20	COLLECTORS AND SHERIFFS.	Authorized to appoint salaried attorneys under House Bill No. 480.
62-39	Dec 29	SHERIFF'S FEES.	Amount entitled for services under Sections 11789 and 11791, R. S. Mo. 1929.
63-39	Feb 24	GAMBLING.	Prosecution for punch boards brought under Section 4290 R. S. Mo. 1929.

63-39	Mar 23	STATE HIGHWAY PATROL.	Meaning of "resident tax paying citizen."
63-39	June 2	LOTTERIES.	Use of photographs to select winner.
63-39	Dec 19	TAXATION AND REVENUE. COUNTY BUDGET LAW. REFUNDING OF TAXES.	Taxes unlawfully collected should be refunded out of Class 5 under the County Budget Act.
64-39	Apr 3	CRIMINAL COSTS.	Payment of an insufficient check after five days is not a defense to the action.
64-39	Apr 3	TAXATION. COUNTY CLERK AND EXTENSION OF TAXES.	County Clerk should extend taxes separate for each bond issue.
64-39	Dec 22	PROSECUTING ATTORNEY. COUNTY TREASURER. COUNTY COURT. COUNTY CLERK.	Prosecuting Attorneys in certain counties are entitled to additional pay for acting in juvenile cases, under 1939 Session Laws. Treasurer in counties under township organization in certain counties is entitled to additional amount allowed under 1939 Session Laws. County Judges are entitled to mileage in certain counties under the 1939 Session Law. County Clerk in certain counties is allowed $500.00 additional pay as budget officer, under the 1939 Session Law.
65-39	Feb 23	STATE ATHLETIC COMMISSION.	Rule of commission is superior to rule of city commission.
65-39	Mar 27	ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS. PROPERTY SUBJECT TO TAX. DISTRICT FUNDS EXPENDED. WHERE.	Special road districts organized under Art. IX, chap. 42, R. S. Mo. 1929, are not authorized to make levies for road and bridge purposes. Cities located in a special road district are not exempt from the general levies for road and bridge purposes. Special road district funds to the amount of 25% of the amount collected in a city may be expended by the commissioners on the streets in such city.
65-39	Apr 18	TAXATION. ROAD AND BRIDGE LEVY AND BUDGET ACT.	All road and bridge taxes collected on properties in special road district should be paid to the special road district on demand even though such taxes are apportioned as provided by the County Budget Act.
65-39	May 5	LOAN & INVESTMENT COMPANIES.	Additional powers conferred on Loan and Investment Companies do not apply to individuals.
65-39	July 18	SCHOOLS. BOARD OF EDUCATION. RETIREMENT OF	Board of Education in cities of 500,000 or over may not terminate the tenure of teachers on the basis of age without recommendation of the Superintendent of Instruction. Revenues may be used to pay

		TEACHERS. USING PUBLIC REVENUE FOR PAYMENT INTO RETIREMENT FUND.	teachers retired from service.
65-39	Aug 22	TAXATION.	No exemption allowed on execution of judgment for personal taxes.
65-39	Aug 29	SWEEPSTAKE TICKET.	Lottery.
65-39	Aug 30	ROAD DISTRICTS. MUNICIPAL CORPORATIONS.	City of the fourth class cannot organize itself into a special road district under Section 7047, R. S. Mo. 1929.
65-39	Sept 26	TAXATION AND REVENUE.	Until final sale, under the provisions of Senate Bill No. 311, Laws of Missouri 1939 and especially Section 9953a thereof, or delivery of a deed under the provisions of Section 9957, Senate Bill No. 94, Laws of Missouri 1933, cities may collect delinquent taxes on real estate as provided by statute, the lien for general taxes being paramount is unaffected by such procedure.
65-39	Dec 1	SCHOOLS. COUNTY COURT.	It is not necessary that the Circuit Court be in session to constitute a valid sale under Section 9254 R. S. Missouri, 1929.
65-39	Dec 14	ROAD DISTRICTS.	Under Section 7868, R. S. Missouri, 1929, County may organize only one road district for the whole county excluding all special road districts.
66-39	Feb 23	CITIES.	May, by ordinance impose reasonable monthly service charge for sewer service connections.
66-39	Mar 18	Mr. R. J. Newport	WITHDRAWN
66-39	Oct 6	WORKMEN'S COMPENSATION COMMISSION. RULES AND REGULATIONS IN REGARD TO EXAMINATION OF RECORDS OF EMPLOYERS.	Workmen's Compensation Commission may not make a rule authorizing the Commission to examine the records of employers to determine whether or not such rule has been violated.
67-39	Aug 28	SOCIAL SECURITY.	Residence requirement for aid for dependent children.
68-39	Jan 21	CHIROPRACTIC BOARD.	Member whose term expires and office is filled by another's appointment is out of office.
68-39	Jan 30	DEAD BODIES.	If any person shall die without means of burial expenses, the person or persons having the body of such person in their custody are

			required to notify the Secretary of the Anatomical Board.
68-39	Mar 27	CHIROPRACTIC.	Four members can issue license. Biennial successive renewals of license with attendant fee is compulsory and without exception.
68-39	Apr 20	ASSESSMENT.	Assessors should assess all real property if the ownership on June 1st of the year preceding the collection of taxes.
68-39	May 16	THE COUNTY COLLECTOR. TAX RECEIPTS.	County collector may make a tax receipt in any form he desires so long as it evidences the payment of the taxes on the property and for the period for which the taxes are paid.
68-39	June 20	Dr. T. C. Oyler	WITHDRAWN
68-39	Oct 7	PROSECUTING ATTORNEY. COUNTY HOSPITALS.	Duty to represent county hospitals. May spend hospital funds to pay cost of litigation, but may not hire or pay private counsel.
68-39	Dec 29	MUNICIPAL CORPORATIONS.	Jefferson City, being a city of the third class may issue bonds for the erection of a municipal office building that may be partly used by state offices.
69-39	Jan 26	COUNTY COURTS. COUNTY BUDGET.	County courts where they have transferred funds from the road fund to the general fund may not replace such moneys until all claims, including the fifth class claims, have been paid.
69-39	Jan 26	Dr. Harry F. Parker	WITHDRAWN
69-39	July 5	STATE BOARD OF HEALTH.	Definition of hotel – certain hotels required to have fire escapes.
69-39	July 24	STATE BOARD OF HEALTH.	Not required to register births of children adopted in this state, when not born in Missouri.
69-39	Nov 16	STATE BOARD OF HEALTH.	Regulations respecting control of venereal diseases within statutory powers of Board.
70-39	May 23	MUNICIPAL CORPORATIONS.	City of the Third Class may enter into an exclusive contract with an individual for collection of garbage and assess a fee for its removal.
71-39	Jan 31	COUNTY TREASURER.	No vacancy exists in the office of county treasurer by virtue of the failure of treasurer-elect to qualify under Laws of Mo. 1937, p. 425.
71-39	Feb 23	INTOXICATING LIQUOR. CRIMINAL PROCEDURE.	Shipments of intoxicating liquor when interstate and when intrastate. When officers may search and seize liquor.
71-39	Apr 17	TAXATION.	1. Drainage Districts by Circuit Court. Refunding under Sec. 11022 R. S. Mo. 1929. Powers of Board of supervisors. 2. Collector must collect and pay over tax included in “drainage tax book” and in so doing is not liable on his bond.

71-39	May 24	GUARDIANS. CURATORS. REAL ESTATE OF WARDS. MANAGING OF.	A guardian of an insane ward may convey mineral rights of ward's real estate but should follow the statutes relating to conveyance of real estate for his procedure.
71-39	May 26	LIQUOR. TAXPAYERS.	A person paying only sales taxes and no other taxes is not eligible for a liquor license.
71-39	June 24	LIQUOR CONTROL. LICENSING OF A CORPORATION.	The managing officer of a corporation which desires to obtain a license to sell intoxicating liquor is not required to be a resident and taxpaying citizen of a town or village in which he proposes to sell intoxicating liquor.
71-39	July 24	INTOXICATING LIQUOR. CORPORATIONS CRIMINALLY LIABLE FOR VIOLATIONS OF LIQUOR CONTROL ACT.	Officers, agents, servants and employees participating in violations also criminally liable.
71-39	Aug 3	CITIZENSHIP.	Service in the United States military forces does not automatically create citizenship.
71-39	Sept 27	LIQUOR.	In making the refunds authorized by Section 119 of House Bill No. 716, the Supervisor of Liquor Control must pay State Treasurer face amount of stamps out of the fund specifically appropriated for that purpose.
71-39	Sept 28	LIQUOR.	Liquor dealers cannot sell wine in unstamped bottles.
71-39	Oct 17	CIRCUIT CLERK. EX-OFFICIO RECORDER OF DEEDS.	He shall make his report and pay all fees in monthly and the county court shall pay the clerk who is ex-officio Recorder of Deeds a salary at the end of each month. Both procedures are mandatory.
71-39	Nov 9	Hon. Walker Pierce	WITHDRAWN
71-39	Nov 17	LIQUOR.	Boats operating on navigable streams within this state cannot be licensed to sell intoxicating liquor and, therefore, all such sales are illegal.
71-39	Nov 18	LIQUOR.	In city elections on question of whether intoxicating liquor containing more than 5% alcohol by weight can be sold by the drink, at least a majority of the qualified voters must vote. Then a majority of those voting controls the election.
71-39	Dec 28	LIQUOR.	Liquor licensees authorized to sell intoxicating liquor by the drink may also sell 3.2% beer under the same license.
72-39	Apr 21		WITHDRAWN

75-39	May 12	OFFICERS.	Police Commissioners at St. Joseph is not city officer but a state officer as far as city council contracts for material be concerned.
75-39	Nov 7	OFFICERS. PAYMENT OF SALARIES IN ADVANCE.	The court has no authority to advance the salary of any county officer.
76-39	Aug 2	COUNTY CONTRACTS.	Officers cannot be interested in contracts of the county.
76-39	Dec 8	PUBLIC SERVICE COMMISSION.	Can not exact motor carrier's license from trucker transporting livestock from farm to market and on the return trip hauling his (the truckers) own property.
77-39	Mar 17		Recipient of Blind Pension may request his name stricken from the Blind Pension Roll.
77-39	Apr 13	OFFICERS.	Circuit Judges can not lawfully hold office of school director.
77-39	May 22	RAILROADS. SAFETY DEVICES AND INTERSTATE COMMERCE COMMISSION.	Safety devices for engines of railroads should be required and ordered by the Interstate Commerce Commission.
80-39	Oct 3	TAXATION AND REVENUE.	Succeeding Collector should give credit for payment of delinquent taxes on real estate when the county court finds, by its written order of record, that such taxes were paid and a valid receipt was given by the former Collector for such payment, absent fraud or mistake.
80-39	Nov 30	PROSECUTING ATTORNEYS.	Duties imposed on other administrative officials to direct prosecutions do not relieve prosecuting attorneys of their duties in regard to same.
81-39	Feb 23	TAXATION.	Allocation clause of House Bill No. 14 is unconstitutional on account of class legislation.
81-39	June 6	RECORDER OF DEEDS. FEES.	Fees of recorder of deeds for making certified copies.
81-39	June 16	TAXATION. COLLECTION OF DELINQUENT TAXES IN CITIES UNDER A SPECIAL CHARTER.	Cities operating under a special charter should certify their delinquent taxes to the county collector unless the charter provides for such collection.
81-39	Sept 5	UNEMPLOYMENT COMPENSATION.	"Notice of Lien" need not be acknowledged for filing in the office of the Recorder of Deeds.
81-39	Sept 22	RECORDER OF DEEDS.	Under the statutes no fee is allowed a recorder of deeds for the filing of a "Notice of Lien" under Unemployment Compensation Act.

81-39	Oct 12	LABOR COMMISSIONER.	Labor and Industrial Inspection Department must retain reports indefinitely.
81-39	Oct 13	COMMISSIONER OF LABOR AND INDUSTRIAL INSPECTION.	Has the right to inspect and collect inspection fees from gasoline filling stations and bulk stations.
81-39	Oct 13	MOTOR VEHICLES.	Certification of the description of the chattel mortgage on a motor vehicle can only be placed upon the certificate of title.
81-39	Oct 24	COMMISSIONER OF LABOR.	Has power to administer oaths or affirmations, to examine witnesses where he finds them and to take and preserve evidence, all provided Commissioner request information relative to his duties. Such evidence inadmissible in criminal prosecution except as admission.
81-39	Dec 5	STATUTES. REPEAL OF STATUTES. EFFECT OF REPEAL.	The effect of the repeal of a statute is to revoke or recall the provisions of same.
81-39	Dec 21	LABOR.	Person remaking bedding consisting of sterilized feathers not required to obtain a permit or pay fee.
82-39	May 22	CLERKS OF COURTS – COSTS.	Circuit Clerk in issuing fee bills for costs should include therein all costs of case including jurors' and witness' fees, sheriffs' costs etc. If plaintiff deposits an amount for security of costs and the same is not sufficient to include all costs of case the plaintiff if he is losing party can be required to pay the difference. Fee bills, and executions thereon can be issued up to or during such time thereafter as judgment for costs might be revived.
83-39	Feb 10	CRIMINAL COSTS.	State Highway Patrolmen are entitled to witness fees when the trial is held more than five miles from their place of residence and are entitled to the same fees for the transportation of prisoner as allowed the sheriff or any other officer.
83-39	Feb 20	CIRCUIT CLERKS.	Interested parties desiring papers recorded in office of circuit clerks may obtain same by paying fee provided in Section 11678, R. S. Mo. 1929.
83-39	Mar 10	CRIMINAL COSTS.	Sheriff is not entitled to mileage fees for a deputy sheriff for the apprehension of a prisoner before conviction.
83-39	Mar 13	PROSECUTING ATTORNEY.	Can be Probation Officer without violation of Section 18, Article 9 of the Missouri Constitution.
83-39	Mar 21	CITIES AND STATE BUILDINGS.	Construction of State Buildings not subject to city ordinances.
83-39	Apr 5	LEGISLATION.	A law expiring of its own force at a given future date cannot be

		UNCONSTITUTIONALITY.	revived or re-enacted without setting it out in full.
83-39	Apr 13	ROADS AND HIGHWAYS. SPECIAL ROAD DISTRICTS. COMMISSIONERS EXPENDING ROAD FUNDS OUTSIDE OF THE DISTRICT.	The funds of a special road district may be expended outside of the district under certain circumstances.
83-39	Apr 21	RECORDER OF DEEDS. WHAT INSTRUMENT SHALL BE RECORDED.	Instruments of writing affecting real estate shall be recorded only when they have been duly acknowledged or proved by the grantor named in such instrument.
83-39	May 3	CONSTABLE.	Entitled to 10¢ per mile for serving court processes when arresting a person in another county.
83-39	May 25	CRIMINAL PROCEDURE. COST BILLS. SIGNING AND CERTIFYING.	The trial judge is the proper party to certify a criminal cost bill.
83-39	June 9	TAXATION. SALES TAX. INTERSTATE COMMERCE TRANSACTIONS.	Contracts for sales of goods or for services consummated within the State of Missouri are subject to the provisions of sales tax regardless of the residence of the parties to the contract or of the location of the property.
83-39	June 12	JUSTICES OF THE PEACE. SALARIES AND FEES.	A justice of the peace who is paid a salary cannot retain the fees which come into his court.
83-39	June 13	PUBLIC ADMINISTRATOR.	He may apply for appointment as administrator when a resident of this state has disappeared for a period of over seven years.
83-39	June 23	INSURANCE. FRATERNAL INSURANCE.	Senate Bill No. 286, known as the Fraternal Insurance Act, exempts voluntary unincorporated associations issuing insurance contracts such as the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen from the provisions of the fraternal laws, however, the women's auxiliaries of such brotherhoods must comply with the fraternal laws of Missouri, unless the insurance contracts involved are benefits provided exclusively through local or subordinate lodges. Such brotherhoods are suable entities in courts of this state when insurance contract are involved.
83-39	July 18	PROSECUTING ATTORNEY.	Special Prosecuting Attorney not entitled to salary or fees.

83-39	July 20	INCOME TAX, GRAND JURY.	Income Tax Returns must be produced under subpoena duces tecum to the Grand Jury.
83-39	July 27	INTOXICATING LIQUOR.	Person paying only sales tax not eligible for liquor license. Section 27 of Liquor Laws does not apply to 3.2 per cent beer license.
83-39	Aug 10	CRIMINAL COSTS.	State is not liable for costs in apprehending a parolee sentenced to the penitentiary by a Circuit Judge upon revocation of the parole. Parole is not part of case proper.
83-39	Aug 11	TAXATION AND REVENUE.	Unless drainage, levee and special improvement districts have protected their interest by paying the general taxes or redeeming before the third general tax sale, they have thereby lost their claim for assessments for the particular years involved. Also they must redeem the certificates of purchase as provided in Section 9963f, supra, as a condition precedent to the foreclosure of their lien.
83-39	Nov 16	CRIMINAL COSTS.	Upon a case being "continued generally" on either a capital case, penitentiary case or county jail sentence, or fine, the cost is taxed but not certified to either the State Auditor or Clerk of the County Court.
83-39	Dec 6	ESCHEATS.	Time spent in the army under Section 890 R. S. Missouri, 1929, should be excluded from the twenty-one year limitation on escheats to the state.
83-39	Dec 12	TAXATION AND REVENUE.	(1) Collector can offer resales after effective date of Senate Bill No. 311. (2) Necessary steps for collector to follow. (3) When collector should issue a tax deed thereunder. (4) Retroactive feature of Senate Bill No. 311.
83-39	Dec 20	BARBER BOARD.	Physical and mental examination of barbers to be conducted by licensed physician under direction of State Board of Health.
84-39	Mar 14	COUNTY COURT.	County Court of Platte County cannot appoint a purchasing agent, but must purchase supplies for all county offices except that of sheriff.
85-39	Jan 13	COUNTY BUDGET ACT.	Surplus of funds after payment of judgment may be transferred to general revenue fund for retiring protested warrants; under Laws of 1933, p. 340, County Court may include such balance in estimate for ensuing year's expenditures.
85-39	Jan 18	SHERIFFS. CONSTABLES.	Constables may not supplant sheriffs in performance of duties imposed upon sheriffs under the law. Constables may be used as elisors in the event the sheriff is disqualified from acting.
85-39	June 23	MOTOR VEHICLES.	Commissioner may permit corporation that has changed its name to retain and continue use of dealer's license plates issued to it without

			making new application and payment of additional fees.
85-39	Oct 16	SCHOOLS & CHILDREN.	Manner of enforcing compulsory school attendance laws.
85-39	Oct 19	COUNTY COURTS.	The right of county courts to compromise with delinquent officials.
85-39	Nov 30	COMMISSIONS. COUNTY SURVEYORS.	Governor has no power to withdraw commissions once issued. County surveyors may be removed for delinquencies in office by general statutory method.
86-39	Jan 20	DEDICATION. ROADS.	County Court can enforce easement in platted streets for public uses unless there be an abandonment of the easement.
86-39	Jan 26	CRIMINAL COSTS.	A dismissal for nolle prosequi is the same as an acquittal in regard to payment of costs.
86-39	Mar 8	COUNTY COURTS.	Marion County Court can only hold sessions in the county seat of Palmyra.
86-39	Apr 10	ELECTIONS.	Failure to provide proper accommodations for voting.
86-39	July 24	MUNICIPAL CORPORATIONS.	Any charter provision which is not a mere detail of the running of a city and in conflict with the State Constitution or State Law is void.
86-39	Sept 13	TAXATION AND REVENUE.	Sale for taxes for 1932, barred by statute of limitations from sale in 1938, absent suit for taxes or judgment thereon or action under Senate Bill #94. Collector failing to exercise statutory remedy of collecting taxes is liable on his bond for the same.
86-39	Oct 7	JUSTICES OF THE PEACE.	May perform marriage ceremonies only in their respective townships.
86-39	Dec 20	STATE HIGHWAY COMMISSION.	The word “axle” as used in Section 7788 R. S. Missouri, 1929, does not mean “rocker arm” which makes several axles.
86-39	Dec 21	PRINTING.	$1.00 for each description is the maximum amount the County Court can pay for printing under Section 9952b, Laws of Mo. 1935.
87-39	Jan 27	TAXATION.	County Clerk or Deputy in the office of County Clerk only can collect dog tax fee. The law itself is in operation upon publication of the notice of the favorable election by the county court.
87-39	Feb 14	COUNTY COURTS. COUNTY WARRANTS. ROAD DISTRICTS.	Warrants issued by the county court for general road districts which are in excess of anticipated revenue are void and the road district is not liable. Treasurer is liable for paying warrants out of revenue for years other than for which it was issued unless there a surplus.
88-39	Feb 24	Mr. Paul H. Teal	WITHDRAWN
88-39	June 22	ELECTIONS. MAJORITY.	Majority of the elected members present constitutes a quorum when they pass on election contests.

89-39	Feb 21	Hon. Gene Thompson	WITHDRAWN
89-39	Apr 10	SCHOOLS. BOARD OF DIRECTORS. SCHOOL SITES.	Board of directors are not authorized to change the school site without consent of the voters.
90-39	Jan 24	CIRCUIT CLERKS.	Sections 11677 and 11678 R. S. Mo. 1929 are still in effect.
90-39	Feb 15	FEES. CORONERS INQUEST.	Fees allowed to Doctor for post-mortem. Autopsy. Witness fee.
90-39	Aug 17	TAXATION AND REVENUE.	Cities of the third class must collect their taxes on real estate under the provision of Senate Bill No. 94 of the Laws of Missouri for 1933. Section 9953b of Senate Bill No. 311 of the 60th General Assembly does not apply to cities of the state except the City of St. Louis in the capacity of a county.
90-39	Sept 9	Mr. E. S. Trantham	WITHDRAWN
90-39	Dec 19	Mr. E. S. Trantham	WITHDRAWN
91-39	Jan 6		Opinion letter to the United States Treasury Department.
91-39	Nov 8	CHATTEL MORTGAGES.	Kansas Certificate of Title must be stamped by recorder of deeds if requested by the mortgagee when the chattel mortgage is executed in the State of Missouri.
92-39	Mar 25	RECORDER OF DEEDS. COUNTY COURT.	Court only fixes reasonable amount for recorder to retain out of excess fees for deputy hire.
92-39	Oct 12	Mr. C. G. Vogt	WITHDRAWN
93-39	Mar 16	BUILDING PERMITS.	Assessor may not revoke a building permit issued under and by virtue of Article 2, Chapter 112 R. S. Mo. 1929.
93-39	Aug 28	UNEMPLOYMENT COMPENSATION FUND AND ADMINISTRATION FUND.	Depositories and securities.
93-39	Nov 9	CONSTABLES.	Deputy constables in St. Louis County must be approved by a majority of the Circuit Judges and are not entitled to fees but are paid a salary.
93-39	Dec 11	JUSTICE OF THE PEACE.	A justice of the peace in St. Louis County must account for and pay over to the county treasurer the fee of $2.00 he receives for solemnizing a marriage.
94-39	Nov 17	TAXATION AND EXEMPTION.	Municipal corporation which purchases tax certificates must pay all taxes due to the date of the issuance of the deed before the collector is authorized to execute and deliver the deed. Such city will

			be exempt from paying taxes assessed on such property but not yet due.
94-39	Nov 18	TAXATION MERCHANTS.	Ad valorem tax due even though merchant commences business after first Monday in June and is prorated.
96-39	Apr 14	SCHOOLS.	Transportation of pupils.
97-39	Apr 12	BOARDS.	Board of Trustee of Confederate Home cannot compromise litigation.
97-39	Sept 8	NEPOTISM.	Wives of school directors who are first cousins to teacher's husband are not related by affinity within the terms of the Nepotism Act.
98-39	Jan 10	JUSTICES OF THE PEACE.	Authority to appoint additional justice under Section 2137, R. S. Mo. 1929.
98-39	Feb 21	SHERIFF.	The county court in the November Term must make an order allowing a definite amount for the board of each person for each day, notwithstanding the sheriff boards Federal prisoners.
98-39	Aug 23	Hon. Conn Withers	WITHDRAWN
98-39	Oct 28	STATE PURCHASING AGENT. STATE TREASURER.	The State Treasurer rather than the State Purchasing Agent is given the duty by law to purchase liquor stamps.
99-39	Mar 15	INFORMATION.	Approved form of information under Section 4304 R. S. Mo. 1929.
99-39	July 1	INSANE PERSONS.	Cole County is liable for the expenses of a patient originally declared insane by said county and becomes insane again, even though the patient has been residing in another county for several months. The county may, in its discretion, bear the expense of a person found insane when the residence is not known and cannot be determined.

ELECTIONS: County superintendent of schools need not file declaration of candidacy.

March 27, 1939

Mr. H. D. Allison
County Clerk
Buchanan County
St. Joseph, Missouri

FILED
1

Dear Mr. Allison:

We wish to acknowledge your letter of March 18th wherein you state as follows:

> "I would like to have a legal opinion on the following questions concerning the election of the County Superintendent of Schools which takes place April 4, 1939.
>
> 1. Is it the duty of the county clerk to furnish the ballots?
>
> 2. Does a candidate for this office have to file his declaration of candidacy with the county clerk? If so, what is the last day on which he can file?
>
> We are unable to find any section of the law covering the above questions. It has always been customary in this county that the county clerk furnish ballots but since there is no section stating what the deadline on filing is, we are wondering what authority we would have for ordering ballots to be printed with the possibility that someone might file after the ballots come from the printers."

In reply to your first question, we are enclosing copy of an opinion rendered by this department under date of March 23, 1935, which we believe answers your question fully. Said opinion was written to Jos. Crain, Pros. Atty.

We have examined the statutes relating to the county superintendents and find no provision requiring a candidate for said office to file his declaration with the county clerk, or any other officer or office, nor do we find any provision that it shall be filed on a certain date.

Section 10257, R. S. Mo. 1929, provides that the name of no candidate shall be printed upon any official ballot at any primary election unless at least sixty days prior to such primary, a written declaration shall be filed by the candidate.

As pointed out in the enclosed opinion, however, (page 4) -

> "Under the statutes creating the office of county superintendent of schools, there is no primary election, the election of a county superintendent of schools to be conducted along with and as a part of the annual school district meeting held in April, and the person receiving the highest number of votes, regardless of party affiliation, is declared elected to the office."

From the foregoing, we are of the opinion that candidates for the office of county superintendent of schools do not have to file declarations of candidacy in order to be elected to said office provided they have the other requisite qualifications.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
MW:RT

HEALTH:
SALARIES AND FEES: Appointees of State Board of Health are not allowed additional pay for grading of examination papers.

April 12, 1939

FILED

Dr. C. F. Adams
State Board of Health
Jefferson City, Missouri

Dear Sir:

This is in response to your request of recent date wherein you request an opinion on the following question:

> "Last November I was asked by Dr. Harry F. Parker to substitute for him in grading some examination papers, said examination papers having been submitted by applicants for medical license in Missouri. Dr. Parker was busy with other things at that time, hence his request.
>
> "Recently, March6th, 1939, Mr. William Dorsey, Auditor for the State Board of Health, handed me a check for $25.00, saying the check was payment for my grading said examination papers last November.
>
> "Being a regular employee of the State Board of Health, it has occurred to me that probably I am not entitled to this check for $25.00, because my regular salary of $300.00 per month plus this check might be construed as a double salary, for which there is no proper authority. Hence this request for an official opinion from you with reference to this matter.

"On page 110 of the 1937 Laws - Fifty-ninth General Assembly - you will find that the sum of $15.000 was appropriated for

"'A. Personal Service:

"Compensation for Members of the Board and consultant, salary of reporter, notary and witness fees and cost of investigations and hearing..$15,000.00'

"That is under Section 39. State Board of Health - Medical Licensure.

"On page 111 of the same book of laws you will find this:

"'Laboratory:

"Director, bacteriologist, assistant bacteriologist, water technicians, relief technicians, stenographers, clerks, helpers and janitors..$43,680.00'

"This is under Section 40. State Board of Health - Department of Health. A. Personal Service.

"I have been informed that the services I rendered by grading the above-mentioned examination papers were in addition to my services as Director of the Division of Laboratories. The check in question was paid out of the personal service fund under Medical Licensure - so I am wondering if I am entitled to it."

You stated in your letter that you have graded some examination papers of applicants for medical licenses and that you did this for Dr. Harry F. Parker who is the State Health Commissioner.

By Section 9113, R. S. Mo. 1929, the State Board of Health is authorized to hold the examinations to which you

refer and by Section 9119, R. S. Mo. 1929, a fee is provided for which is to be used for the payment of maintaining the expenses of the Board of Health. In 1935 the lawmakers provided compensation for the members of the State Board of Health. Laws of Missouri, 1935, page 266, Section 9020, is as follows:

> "The commissioner of health shall perform such duties as may be prescribed by the board and this article. Each member of the board shall receive as compensation for his service the sum of Ten Dollars ($10.00) for each day engaged in this service and all legitimate and necessary expense incurred while employed on the business of the board. The president of the board shall certify the amount to the commissioner of health and the per diem, traveling and other expenses of members and on presentation of this certificate the auditor of state shall draw his warrant on the state treasurer for the amount."

It will be noted from this section that the Commissioner of Health shall perform such duties as may be assigned to him by the Board, and we assume that the duty of grading these examination papers is one that has been assigned to him by the Board. The appointment, qualifications and compensation of the Commissioner of Health are provided for in Laws of Missouri, 1933, Section 9024 at page 269. This section is as follows:

> "The Governor, by and with the advice and consent of the Senate, shall appoint a Commissioner of Health, who shall hold his office for a term of four years, and who shall be a physician in good standing and of recognized professional and scientific knowledge and a graduate of a reputable medical school, and shall have been a resident of the State for at

> least five years next preceding his appointment, and in making such appointment there shall be no discrimination made against the different systems of medicine that are recognized as reputable by the laws of this State. The Commissioner of Health shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner of Health shall be five thousand dollars ($5000) per annum. He shall also receive traveling and other expenses necessarily incurred in the performance of his duties. The Commissioner of Health as hereby constituted shall assume all the rights, powers, privileges and duties heretofore conferred by law upon the Secretary of State Board of Health heretofore authorized by law, which office is hereby abolished. Where any law refers to the Secretary of the State Board of Health as heretofore constituted, same shall, after the passage of this Act, be construed as referring to and meaning the Commissioner of Health as hereby and herein constituted."

The office of the Commissioner of Health was created in lieu of the office of the Secretary of the Board of Health whose duties were prescribed by Section 9020, R. S. Mo. 1929. These duties were such as may be prescribed by the State Board of Health. Under the old act the salary was fixed by the State Board of Health. The State Board of Health is an administrative body and it is a creature of the statute and we must look to the statute for its powers and duties. In State ex rel. v. Goodier, 195 Mo. 551, our Supreme Court has held that this board was an administrative body.

In your request you refer to the 1937 appropriation act. On the question of whether or not this fee which has been tendered to you for your services in grading these papers is for additional duties, we do not think the

appropriation act sheds any light. Even if the appropriation act included such an item, in order for it to be legal, it would have to be supported by some law. In our research on the question we do not find where this service that you have performed could be classed as an additional duty for which additional compensation would be allowed. As stated in your request you are a regular employee of the State Board of Health and it seems that that Board has the authority to assign to its employees whatever duties it deems proper.

On the question of the right of a person to claim public funds, he must be able to point out the statute authorizing the payment of same. In State ex rel. v. Brown, 146 Mo. 401, 406, the rule is stated in the following language:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.'"

CONCLUSION.

From the foregoing it is the opinion of this department that your services in grading the papers of

medical applicants would not be classed as an additional duty authorizing you to receive compensation therefor and in addition to your regular salary paid you as an employee of the State Board of Health.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

INHERITANCE TAX 1. When the estate of any deceased person has not been appraised for inheritance tax purposes, the probate court, or any interested person, may make application to the probate court to reopen said estate for the purpose of determining its clear market value so that an inheritance tax may be imposed upon the interests of property transferred.

2. The statute of limitations does not apply to collection of inheritance taxes until such time as the taxes have been duly assessed.

May 17, 1939

5-15

FILED
1

Honorable Charles M. Abbett,
Judge of Probate Court,
Tuscumbia, Missouri

Dear Judge:

This is to acknowledge your letter of recent date requesting an opinion from this office on the following set of facts:

> "On or about February 9th, 1930, Effie Adcock a resident of this county died leaving a will of which the enclosed is a true copy as same is on file in my office.
>
> "The will of the deceased was admitted to probate in this office on the 15th day of February, 1930 and the estate closed and finally settled on the 27th day of November 1931.
>
> "No inheritance tax appraiser was ever appointed and I wish to inquire if I should appoint one now and if so the approximate amount of tax due and from whom it should be collected."

Your attention is directed to Section 586, R. S. Mo. 1929, relating to the jurisdiction of the probate court to appoint appraisers for the purpose of determining the amount of inheritance tax due and payable in any particular estate. This section reads in part as follows:

> "The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of tax provided for in this article and the person, persons, association, institution or corporation liable therefor, and to determine any

> question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction."

You will particularly notice that the probate court may determine any question which may arise in connection with the estate of a decedent, and do any act authorized by law to be done in connection with such estate. It is further provided in this same section that:

> "If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is hereinafter provided for appraisers, or the court before determining such matters, may of its own motion, or on the application of any interested person, including the state treasurer, the prosecuting attorney or attorney-general, appoint some qualified taxpaying citizen of the county as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this article."

Obviously, the above section of the statute is for the purpose of determining the clear market value of estate of the decedent, as it is upon the clear market value of the estate that the tax is to be imposed.

If the estate of the party about which you inquire may be reopened at this time to determine the clear market value at the date of the deathof the decedent for the purpose of imposing an inheritance tax, it must be by the authority of the section above noticed.

In the case of In re Bernero's Estate, 197 S. W., 121, the Supreme Court considered a statute very similar to the one we have before noticed as was contained in the old

Collateral Inheritance Tax Law. The facts in this case disclose that one Louis Bernero, Sr., died testate on August 8, 1904. Under the terms of his will, Theresa Bernero, his wife, was given a life estate in certain property, thereafter to pass unto one Manuello Bernero, the adopted son of the decedent. Administration was had upon the estate and final settlement was made December 14, 1908. During the administration of the said estate, an assessment of collateral inheritance tax was made, but as to the devisees aforementioned, no tax was assessed. On April 4, 1910, Manuello Bernero died. On July 15, 1911, Theresa Bernero died testate and she exercised in her will the power of appointment given to her in the devise hereinabove mentioned. At the time of Manuello's death, he left surviving him one child by the name of Louis Bernero, Jr., who sought to establish himself as the sole heir at law of Theresa Bernero, deceased, with respect to the devise.

This proceeding was first commenced in the probate court to assess the collateral inheritance tax in the estate of Louis Bernero, Sr., who died, as we before noticed, in 1904. After a judgment was obtained in the probate court, the proceeding was thereafter appealed to the Circuit Court of the City of St. Louis, and the court entered its order on December 6, 1915, assessing a collateral inheritance tax on the interest to be received. Thereafter the case was appealed to the Supreme Court. The appellant contended that the judgment must be reversed because the probate court after final settlement in the Louis Bernero, Sr., estate had no jurisdiction to entertain the present proceeding to assess a collateral inheritance tax. Secondly, that the first assessment of collateral inheritance tax in the estate which was made during the pendency of administration of said estate operated as res adjudicata of the right to the making of an assessment at this particular time. Therefore, any other assessments are barred. Final settlement was made in the Louis Bernero, Sr., estate in December, 1908, and the proceeding to make assessment of collateral inheritance tax was not attempted in the probate court until January, 1912.

The court in reaching its conclusion that the probate court did have jurisdiction to make an assessment of collateral inheritance tax, observed at page 123, that:

> "* * * the assessment of collateral inheritance tax does not directly involve the administration of a

> decedent's estate. The proceeding is one, not against the property of a decedent; it is not a claim against the estate as such, but is against the interest or property right which the heir, legatee, devisee, etc., has in the property formerly held by the decedent."

Thus, it is to be observed from the above that the collateral inheritance tax law was of the same nature as our present inheritance tax law, in that the tax is imposed upon the right to receive property. In Re Rosing's Estate, 85 S. W.(2d), 495.

The section of the statute which we noticed above in our present inheritance tax law is very similar to the section of the statute upon which the court based the right of the probate court to entertain the proceeding for the assessment of a collateral inheritance tax. As to contention number one of the appellant's, the court said:

> "This being true, unless the statute otherwise directs, no good reason would appear limiting the right to make such assessment to such time as the decedent's estate was in the course of administration. Appellants contend that the language of section 326, Revised Statutes 1909, to wit, 'The Court of Probate having * * * * * jurisdiction of the settlement of the estate of the decedent shall have jurisdiction to hear and determine all questions in relation to said tax that may arise.' etc., does so limit the jurisdiction of the probate court; that the phrase 'having jurisdiction of the settlement of the estate' means 'then exercising jurisdiction of the settlement of the estate,' and that, once the estate is closed, its jurisdiction over collateral inheritance tax matters against property formerly owned by such decedent is also at an end. We are unable to agree with this construction. We are of the opinion that the phrase 'the court of probate having jurisdiction of the settlement

> of the estate' simply means the particular court of probate in any instant case upon which the law has conferred the right of administering the estate."

In ruling appellant's second contention, the court made the observation that:

> "At the time of the first assessment of collateral inheritance tax against any of the property formerly owned by decedent, it was not then definitely known, nor could it be definitely foreseen, that any of the property involved in the present proceeding would ever be subject to such a tax. As the property then stood, it was subject to a life estate in decedent's wife, with power of appointment in her, under which, upon the happening of certain contingencies, she could, by will, dispose of this very property. As pointed out by the learned attorney for the respondent if she had exercised such power of appointment, by devising the property to some educational, charitable, or religious purpose in this state, the property would not have been subject to the assessment of the tax. Section 309, Revised Statutes 1909. In other words, until a valid exercise of said power of appointment had been made, or until the contingency of the possible exercise of the same should become removed, it could not be foreseen that the property would be subject to a tax.
>
> "Under the facts as disclosed by this record, whether the wife would or would not undertake to exercise such power of appointment could not have been known until her death on July 15, 1911, which was long after the first assessment was made. Under such conditions the former proceeding against the other property formerly owned by decedent, then known to be subject to such a tax, would certainly not operate as res adjudicata as to the right to tax the present property not involved, for the reason that it could not have been involved, as explained above, in the original proceeding. As to whether it would have been res adjudicata if the present property had

> then been subject to such an assessment, we do not decide, because not here involved.
>
> "After a careful consideration of the same, we have reached the conclusion that this point should be ruled against appellant's contention."

You will particularly notice the court did not rule upon whether or not the administration proceedings would have been res adjudicata if the property before the court at that time had been subject to an assessment of collateral inheritance tax. In the instant case, from the facts presented by your request, it is not known whether or not the property of the decedent was subject to the payment of a tax. In the course of this opinion we have not considered that question.

If the estate in the present case may be opened for the purpose of determining the clear market value of said estate for an inheritance tax, it must be by reason of the authority of Section 585, heretofore considered. We believe the Bernero estate case, above reviewed, is sufficient authority for the reopening of the estate which you have referred to in your request for an opinion.

From what has been said it logically follows, would the statute of limitations apply in a case of this kind even though the estate may be reopened for the purpose of assessing an inheritance tax? Ordinarily, where the statute makes no provision with respect to the time within which a suit for inheritance taxes may be brought, such taxes may be recovered irrespective of the time. This general proposition of the law is stated in 61 C. J., Section 2688, p. 1739:

> "Suits to collect transfer or inheritance taxes may be begun at any time within the period limited by statute, or, <u>if no period is so limited, inheritance taxes may be recovered irrespective of time</u>."

This above general proposition of law presupposes that taxes have been duly assessed, and unless such taxes have been duly assessed, then suits may not be instituted. While your inquiry is limited to whether or not an estate may be reopened for the purpose of assessing an inheritance tax, we deem it essential in support of our conclusion reached to determine whether or not the statute of limitations would apply.

In the case of State ex rel. Hammer, Collector, v. Vogelsang, reported in 183 Mo. 17, the Supreme Court had before it for consideration the question whether or not a suit could be maintained by the Collector of the City of St. Louis to collect taxes on certain real estate for the years 1885 to and including 1890 that had been omitted from assessment during those years. It is disclosed that such omission for assessment was discovered in 1896 and at that time the assessment was made. Thereafter suit was instituted in December, 1901. It was contended by defendant in this case that the assessments against the omitted property for the years in question were barred by the statute of limitations. In this case it disclosed there was a specific statute giving the Assessor the right to make an assessment against the property which had been omitted for previous years. For this reason the statutes referring to omitted assessments may be likened unto Sections 585 and 598 of the Revised Statutes, 1929. In this case, the statute of limitations was five years and the court tersely said at page 24:

> "that no right of action accrued until the taxes were assessed and had become delinquent."

In support of the court's view in the above case they cited the case of State ex rel. v. Fullerton, 143 Mo. 682, wherein it was held that the statute of limitations did not run against the property that was omitted from the Assessor's books until after the discovery of such omission and the assessment of taxes.

In the case of State ex rel. Western Union Tel. Co. v. Markway, 341 Mo. 976, 110 S. W. (2d), 1118, the Supreme Court considered the case above noticed, and said at page 981:

> "In the case of State ex rel. Hammer v. Vogelsang, 183 Mo. 17, 81 S. W. 1087, we held that where property omitted from taxation is subsequently assessed, the taxes thereon do not become delinquent until after expiration of the year in which such taxes were actually assessed. In that case we were construing Section 9789 which deals with real property, but we see no real distinction on principle between that section and the section dealing with railroads."

From these considerations you will have noticed that unless an assessment has been made against property

and the taxes so assessed have become delinquent, no cause of action accrues, therefore the statute of limitations does not commence to run until after the assessment of the taxes. We think, by analogy, such general proposition of law is here applicable in determining whether or not the taxes in this instance are subject to the statute of limitations.

CONCLUSION

In view of the above, it is the opinion of this department that any estate may be reopened by any interested person for the purpose of determining whether or not an inheritance tax is due and payable upon the interest of property succeeded to by others. Further, that the probate court which grants letters of testamentary or administration may, of its own motion, reopen an estate for the purpose of assessing a tax.

We further rule that the statute of limitations does not apply to the collection of inheritance taxes until such time as the taxes have been duly assessed.

Yours very truly,

APPROVED:

RUSSELL C. STONE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

RCS:VC

CITIES OF THE FOURTH CLASS - Two questions of extension of boundaries.
COURTHOUSES- Right of County Court to sell.

July 10th, 1939.

FILED
2

Honorable William Anderson,
Director,
Missouri State Planning Board,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you submit four (4) questions for our opinion. We shall answer your questions in the order set out in your letter.

I.

HOW MUCH TERRITORY, IN ACRES, CAN A CITY OF THE FOURTH CLASS VOTE INTO ITS PRESENT CITY LIMITS?

Section 6947 R. S. Mo. 1929 provides in part as follows:

> "The mayor and board of aldermen of such city, whether the same shall have been incorporated before becoming a city of the fourth class or not, with the consent of a majority of the legal voters of such city voting at an election therefor, shall have power to extend the limits of the city over territory adjacent thereto, and to diminish the limits of the city by excluding territory

> therefrom, and shall, in every case, have power, with the consent of the legal voters as aforesaid, to extend or diminish the city limits in such manner as in their judgment and discretion may redound to the benefit of the city: * * * * *"

It will be seen from the foregoing section of the statutes that no limit is placed on the amount of land which may be voted into a city of the fourth class. The mayor and board of aldermen, with the necessary approval of the voters, may extend the limits of the city over territory adjacent to the city in such manner as in their judgment and discretion may redound to the benefit of the city. How much adjacent territory shall be taken into a city of the fourth class is left to the discretion of the mayor and board of aldermen, subject to the approval of the majority of the legal voters of the city. The courts have held, however, that even though this grant of power to the city is a broad one, yet the actions of the city in extending its limits is subject to the power of the courts to nullify for unreasonableness. In other words, if the city undertakes to extend its limits in an unreasonable manner, the courts can declare such attempted extension void. (See State ex rel. vs. Birch, 186 Mo. 205, State ex rel. vs. City of West Plains, 163 Mo. App. 166). As to what extension is reasonable will be discussed under Division II of this opinion.

CONCLUSION

In answer to your first question, we would therefore say that it is the opinion of this department that a city of the fourth class can vote into its limits as many acres of land as may be decided upon by the mayor and board of aldermen and consented to by the majority of the legal voters of the city, subject to the condition that the extension of the city limits must be reasonable. What is reasonable in each case is a question of fact.

II.

CAN THE PRESENT CITY LIMITS BE EXTENDED BY A STRIP SOME 20 OR 30 FEET WIDE FROM ITS PRESENT SITE TO THE NEW SITE WHICH MAY BE LOCATED FROM ONE TO SIX MILES FROM THE PRESENT SITE?

To answer this question we must determine whether the proposed extension would be reasonable. Your inquiry does not contain any facts about the kind or character of the land proposed to be included in the extension. It is, therefore, impossible for us to say definitely whether the proposed extension would be reasonable. However, we will point out the rules by which the courts determine whether extensions of city limits are reasonable and then make some observations.

In the first place, ordinances extending city limits are presumed to be reasonable and those asserting their unreasonableness have the burden of proving same. In the case of Hislop v. Joplin, 250 Mo. l. c. 599, the Supreme Court said:

> "Since it was within the statutory power of the council to provide by ordinance for the extension of the city limits the particular ordinance here involved is presumed to be reasonable and valid until that presumption is overthrown by evidence which clearly shows the contrary and courts will not 'look closely into mere matters of judgment where there may be a reasonable difference of opinion.' (City of St. Louis v. Weber, 44 Mo. l. c. 550; Copeland v. St. Joseph, 126 Mo. l. c. 431; 2 Dillon on Mun. Corps., sec. 649.) The burden was upon plaintiffs to prove facts clearly establishing the unreasonableness of the ordinance assailed."

The rule by which courts determine whether those asserting the unreasonableness of an ordinance extending city limits have met the burden of proof was set out in the case of State ex Inf. v. Kansas City, 233 Mo. l. c. 213, in the following language:

> " '1. That the city limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale or use as town lots, (2) whether platted or not, if they are held to be brought on the market and sold as town property when they reach a value corresponding with the views of the owner, (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary, (4) when they are needed

> for any proper town purpose as for the extension of its streets, or sewer, gas or water system, or to supply places for the abode or business of its residents; or for the extension of needed police regulation, and (5) when they are valuable by reason of their adaptability for prospective town uses; but the mere fact that their value is enhanced by reason of their nearness to the corporation would not give ground for their annexation, if it did not appear that such value was enhanced on account of their adaptability to town use.
>
> " '2. We conclude, further, that city limits should not be so extended as to take in contiguous lands, (1) when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use; (2) when they are vacant and do not derive special value from their adaptability for city uses.' "

The foregoing rule has been followed in all subsequent cases involving the reasonableness of the ordinance extending city limits, some of which are:

Hislop v. City of Joplin, 250 Mo. 588.
Seifert v. City of Popular Bluff, 112 S. W. (2d) 93.
Winter v. City of Kirkwood, 296 S.W. 232.
Algonquin Golf Club v. City of Glendale, 81 S. W. (2d) 1. c. 398.

In the case of State ex rel. v. City of Joplin, 62 S. W. (2d), l. c. 398, the Supreme Court in discussing when the courts could or should hold an ordinance of a city unreasonable, said:

> "If the question of whether or not the territory involved should be included within the city limits was fairly debatable, that is, if there was substantial evidence each way so that reasonable men would differ about its necessity, then the decision of that question was for the city council and the city electorate and not for the court. When the evidence shows a fairly debatable question about the matter, then neither way the question might be decided would be unreasonable. On the other hand, if there was substantial evidence tending to show that there was no fairly debatable question about it, and that reasonable men could not differ about it, but would have to agree that it was not necessary to annex the territory, then a trial court's finding that it was unreasonable would be binding (in spite of testimony to the contrary), and would have to be sustained."

Therefore, to determine whether the proposed extension of the City of Greenville would be reasonable, we may ask ourselves the question, "could reasonable men differ as to whether the extension was necessary?" If they could, then the decision of the city authorities and the electorate would be final on the question. However, if reasonable men would be compelled to say that the extension was not necessary, then the extension would be unreasonable.

We assume from your letter that the people of Greenville have in mind voting to extend their present city limits by adding a strip of land twenty (20) to thirty (30) feet wide extending from the present city limits for a distance of several miles, and at the end of said strip to include a large acreage of land which is at present agricultural land or at least land which has no connection with the present city. We assume that no part of the proposed addition is occupied by any number of citizens of Greenville. We assume further that the present city is not expanding to where additional territory is needed. In short, we assume that the plan in mind is simply to move an entire city by the subterfuge of extending its boundaries.

If our assumptions are correct, we do not believe that the extension proposed would be reasonable. The purpose of allowing cities to extend their boundaries is to allow for normal expansion and growth of the cities and their needs. Territory cannot be added except for such purposes. The land proposed to be taken in is evidently agriculture land which is vacant and does not derive special value from its adaptability for city use.

CONCLUSION.

It is, therefore, the opinion of this department that a city of the fourth class cannot legally extend its limits by voting to take in a strip of land twenty to thirty feet wide from its present boundaries to a new site from one to six miles from the present site and by taking in territory at the end of such strip which has no present connection with the city, and which is not needed to take care of the city's growth and needs.

III.

HAS THE COUNTY COURT THE POWER TO OPTION OR SELL THE PRESENT COURT HOUSE SITE TO THE GOVERNMENT FOR FLOOD CONTROL PURPOSES? IF SO, UNDER WHAT CONDITIONS?

Section 12043, R. S. Mo. 1929 provides as follows:

> "There shall be erected and maintained in each county, at the established seat of justice thereof, a good and sufficient courthouse and jail."

The foregoing section clearly contemplates that there shall be maintained at the county seat a courthouse. If a county had need of a courthouse and there was enough money available to build one, the county court could proceed to build such building. (Section 12056). The purpose of the law is that the county shall have a courthouse at all times. If the county court can sell a courthouse when the county has no other one to use, then the manifest purpose of the law would be defeated. If the county court should sell the present courthouse but could not realize enough from the sale to build a new one, then the county would find itself without a courthouse for an indefinite time. There is no assurance that the people of the county would vote bonds to erect a new courthouse, and experience shows that ordinarily counties do not have a surplus of general funds which could be used for the erection of a courthouse.

We are not unmindful of Section 2078, R. S. Mo. 1929, which reads as follows:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating

> the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

This section has been cited as authority for a county court selling swamp lands or other property not being used for county purposes, but we have never found where it has been held to authorize the county court to sell a courthouse, jail or other property actually being used for county purposes. The general rule as to the power of the county court to sell county property is stated thus:

> "Ordinarily, a county cannot, without legislative authority, dispose of real property after it has been acquired and devoted to public service."
> 14 Am. J. 207.

Since, therefore, the county court cannot dispose of the courthouse until another has been provided, it follows that the county court could not option the courthouse. The option could not be effected until the county court had the right to execute a conveyance which would be when another courthouse had been provided. In other words, a sale is necessary to complete the option, and the sale cannot be made until another courthouse is provided. Of course, if a county had sufficient revenue on hand to build a new courthouse, the county court could proceed to build it and when that was done the county court could then sell the old courthouse. Therefore, if a county has enough revenue on hand now and contemplates building a new courthouse, the county court would perhaps be authorized to give an option on its present courthouse to be closed when the new courthouse is complete; otherwise not.

CONCLUSION

It is, therefore, the opinion of this office that a county court cannot sell the courthouse of the county and the site thereof, so long as said courthouse is being used by the county and there is no other courthouse owned by the county. It is also our opinion that the county court cannot give an option on the courthouse of a county unless such county has sufficient funds to build a new courthouse and actually contemplates the building of such new courthouse, said option, in any event, not to be closed until the new courthouse is provided.

IV

HAS THE COUNTY COURT THE RIGHT OR POWER TO RELOCATE AND ERECT A COUNTY COURT HOUSE IN A NEW TOWN SITE, WHICH TOWN WILL STILL BE GREENVILLE IF THE CITY LIMITS CAN BE EXTENDED, OR WILL A VOTE OF THE PEOPLE OF WAYNE COUNTY BE REQUIRED TO REMOVE THE COURT HOUSE FROM ITS PRESENT SITE TO ANY OTHER SPECIFIED SITE WITHIN THE NEW TOWN OF GREENVILLE?

As heretofore pointed out, Section 12043 requires a courthouse to be erected and maintained "at the established seat of justice thereof".

Section 12058, R. S. Mo. 1929, provides in part as follows:

> "The county court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary: **"

Section 12060, R. S. Mo. 1929, reads as follows:

> "The county court shall designate the place whereon to erect any county building, on any land belonging to such county, at the established seat of justice thereof."

Section 12061, R. S. Mo. 1929, provides for the selection of a site by the superintendent of the building in certain cases, but by Section 12063, R. S. Mo. 1929, the county court must approve the selection before the same can be paid for.

Therefore, if a court house is to be erected by a county, the county court can select the exact spot for the location of the building. Such selection would have to be within the town theretofore selected as the county seat. Additions to such town would be a part of the town for this purpose since Section 2 of Article 9 of the Missouri Constitution provides:

> "The General Assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law; and no county seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in five years. All additions to a town which is a county seat shall be included, considered and regarded as part of the county seat."

If, therefore, a courthouse is to be erected at Greenville, the same could be erected at any site within the original town or within any lawful addition thereto.

CONCLUSION

It is, therefore, the opinion of this department that the county court has the right to select the particular site or piece of ground upon which a courthouse is to be erected and said site may be anywhere within the original town selected as the county seat or within any lawful addition thereto.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(ACTING) Attorney General

HHK:RV

COUNTY DEPOSITORIES: Contract made by County Court with County Depository, which has duly qualified, prior to Laws of Mo., 1927, page 502, binding and legal until expiration.

February 2, 1939

FILED
3

Honorable Richard C. Ashby
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This Department is in receipt of your letter of some time ago, wherein you make the following inquiry:

> "Where a County Depository has duly qualified according to the statutes, prior to the effective date of the 1937 amendment, and has entered into a contract with the county court, and the contract has been approved, and made effective for the period of the designation, and has also filed, as in the instant matter, a personal bond guaranteeing the payment of the deposit, and that bond has been approved by the county court, does this designation and contract and bond become invalid and of no effect after the effective date of the 1937 legislation? Or, is the contract binding and legal until date of expiration?"

With reference to the 1937 amendment, we assume you refer to Laws of Missouri, 1937, page 502, entitled "State Department of Finance," Section 1, "Deposits shall be secured," said section being as follows:

"Notwithstanding any provisions of law of this state or of any political subdivision thereof, the public funds of every county, township, city, town, village, school district of every character, road district, drainage or levee district, state hospital, Missouri State School, Missouri School for the Deaf, Missouri School for the Blind, Missouri Training School for Boys, Industrial Home for Girls, Confederate Soldiers' Home, Federal Soldiers' Home, Missouri State Sanatorium, earnings of Missouri Penitentiary, State University, Missouri State Teachers' Colleges, Lincoln University, which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes of Missouri 1929, and all amendments thereto. The said securities shall, at the option of the depositary banking institution, be delivered either to the fiscal officer or the governing body of the municipal corporation or other depositor of said funds, or by depositing such securities with such disinterested banking insti-

> tution or safe depository as trustee as may be satisfactory to both parties to the depositary agreement. The rights and duties of the several parties to the depositary contract shall be the same as those of the state and the depositary banking institution respectively under Section 11469 of Article 2 of Chapter 72 of the Revised Statutes of Missouri 1929 and all amendments thereto, provided, however, that in the event a depositary banking institution should deposit the bonds or securities with a trustee as above provided, and the municipal corporation or other depositor of funds shall give notice in writing to the trustee that there has been a breach of the depositary contract and shall make demand in writing on the trustee for the securities, or any part thereof, then the trustee shall forthwith, surrender to the municipal corporation or other depositor of funds a sufficient amount of such securities as may fully protect the depositor from loss and the trustee shall thereby be discharged of all further responsibility in respect to the securities so surrendered."

Evidently the question arises as to the deposit of county funds under Section 12184, R. S. Mo. 1929, said section being as follows:

> "It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county. For the purpose of letting such funds such county court shall, by order of

> record, divide said funds into not less t[illegible]wo nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. Notice that such bids will be received shall be published by the clerk of said court twenty days before the commencement of said term in some newspaper published in said county, and if no newspaper be published therein, then such notice shall be published at the door of the courthouse of said county: Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: Provided, also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting."

The County Court having proceeded under Section 12184, supra, and rights having accrued under said section, the question in the final analysis is: Does the new Act abrogate or take precedence over said Section 12184?

The general rules with reference to abrogating rights which have accrued under statutes are contained in State ex rel. v. Hackman, 272 Mo. 600, l. c. 608, a portion of which is herewith quoted:

> "Limited to this reason alone the conclusion would be justified that it was the purpose of the Legislature in the enactment of the repealing law

to obliterate or destroy the power of counties to issue bonds to provide funds for road purposes; and in the absence of a saving clause to have a like drastic effect upon this power when partly exercised under the statute repealed. No special saving clause was attached to the repealing act. Except by way of emphasis to give explicit application to general laws, such special saving clause was unnecessary. A repealing statute which construed alone would paralyze partly executed powers is, under our legislative system, so modified by Sections 8060 and 8062, Revised Statutes 1909, as to perpetuate such powers to the extent of authorizing the completion or consummation of the purpose sought to be affected under a former law. Section 8060 so far as applicable to the case at bar is a follows: 'nor shall any law repealing any former law, clause or provision be construed to abate, annul, or in any wise affect any proceedings had or commenced under or by virtue of the law so repealed; but the same shall be as effectual and be proceeded on to final judgment and termination, as if the repealing law had not passed, unless it be otherwise expressly provided.' This court in Rogers v. Railroad Co., 35 Mo. 153, discussing a question as to the modifying effect of said section upon a repealing statute, said, in effect, that this provision (Section 8060) preserves the relator's right of action notwithstanding the repeal of the statute under which the right was given. The Legislature,

however, not satisfied with leaving the validity of acts done to implication, where the facts in regard to a repeal were as in the case at bar, enacted Section 8062, which provides that: 'The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force.' These sections, construed together, so modify a repealing statute, as to not only render valid initiatory or preliminary acts in the exercise of a power conferred by a former statute, but authorize such subsequent acts as may be necessary to effect the purpose originally contemplated. This conclusion does not require us to travel over an untrodden field in this jurisdiction. In a mandamus proceeding against the county court of Vernon County in State ex rel. Stone v. County Court, 53 Mo. 128, the purpose of which was to compel the completion of action by a county court, which had been initiated under a statute then repealed, the Supreme Court construed and applied what are now Sections 8060 and 8062, and held that a repealing statute, although express in its terms and having no special saving clause attached, did not, on account of the modifying effect of said general saving sections, render nugatory preliminary acts done or prohibit further

> action in the completion of same. The limitation of the operative effect of these sections to judicial transactions as contended for by respondent, is not in accord with their terms, nor with the evident purpose of their enactment. Their general nature authorizes the conclusion that they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed. This was the construction placed upon them in the cases cited, and we have been unable to reach a contrary conclusion."

In the recent cases of Cleveland v. Laclede-Christy Clay Products Co., 113 S. W. (2d) 1065, and State ex rel. to the Use of Bar Producers Gravel Company, 111 S. W. (2d) 521, the rule is again enunciated to the effect that statutes must be construed to operate prospectively only, unless legislative intent to the contrary clearly appears.

Conclusion.

In reading the Act of 1937, we find no saving clause or any statement in any of the statutes to the effect that the new Act is to abrogate or affect rights which have already accrued and action which has already been taken by the County Court. Therefore, we conclude that the Act of 1937 is prospective in nature and that the present contract made by the County Court with the County Depository, which has duly qualified, is binding and legal until the expiration of the same.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT

OWN:BG

ASSESSORS: May be removed by county court for failure to perform duties and a successor appointed.

September 9, 1939

9-17

FILED
3

Honorable Wilbert Aust
Judge of the County Court
Miller County
Tuscumbia, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 6, 1939, which reads as follows:

> "The County Clerk of Miller County at the proper time delivered to the assessor of this county all the necessary books, papers, and blanks for the making of all the lists and assessments of the county, including the proper blanks for the taking of the merchants lists. The County Board of Equalization for Merchants Taxes met at the appointed time and place to-wit; at the Court House on the first Monday in September of this year, for the purpose of equalizing the merchants taxes, that is the assessments. The assessor had not returned his book as required by the law and had returned no lists or any other thing from which the board could proceed to equalize the assessments. Since the first Monday in September the said Board of Equalization has adjourned from day to day in hopes that the assessor would appear with his books. The Court has had search made for the assessor but he cannot be found. The Court has been informed that the assessor is not even in the state and his wife and father are now searching for him but so far have been unable to find him.
>
> I wish to inquire of you what steps the Court should take in this matter. Does the Court, under Sec. 9755 or any other

> section of the laws of the State, have the power to remove said official from office? If so, is the removal permanent or is he removed just long enough to allow the man appointed to complete the merchants assessment? If the Court has such power of removal who should they pay, that is should they pay the man appointed for the work or should the pay be given to the present assessor and rely on getting it back from the assessor and his sureties as provided in the above quoted section? If the Court does not have the power to remove is it your opinion that an ouster suit should be filed and if so by whom?
>
> I appreciate that your office is busybut since we must do something within the next few days I would appreciate getting this information just as soon as is convenient."

The laws in regard to the assessment and taxation of merchants are found at page 360, Laws of Missouri, 1931, and read as follows:

> "On the first Monday in June in each year it shall be the duty of each person, corporation or co-partnership or persons, as provided by this article, to furnish to the assessor of the county in which such license may have been granted, a statement of the greatest amount of goods, wares and merchandise, which he or they may have had on hand at any one time between the first Monday in March and the first Monday in June next preceding; said statement shall include goods, wares and merchandise owned by such merchant, and consigned to him or them for sale by other parties. It shall be the duty of the county assessor to enter such statements in a book to be prepared for that purpose at the expense of the county, suitably ruled, with columns for

the name of the merchant, the amount of his or their statements as returned to the assessor, the valuation of such statements as equalized by the county board of equalization, and for state, county and school taxes, and such other columns as may be found useful or convenient in practice; such book shall be verified by the affidavit of the assessor, annexed thereto, in the following words, to-wit: '..... being duly sworn, makes oath and says that he has made diligent efforts to secure sworn statements from all persons, corporations or firms, doing business as merchants in the county of which he is assessor; that so far as he has been able to secure such statements, they are correctly set forth in the foregoing book.' Said book shall be returned by the assessor to the county board of equalization on the first Monday in September in each year, which said board, as constituted in section 9811, Revised Statutes of 1929, is hereby required to meet at the office of the clerk of the county court on the first Monday in September in each and every year, for the purpose of equalizing the valuation of merchants' statements, and to that end shall have the same powers and shall proceed in the same manner as provided in article 3 of chapter 59, Revised Statutes of 1929, for the equalization of real and personal property, so far as is consistent with the provisions of this article; but after the board shall have raised the valuation of any statement, it shall give notice of the fact to the person, corporation or firm whose statement shall have been raised in amount, by personal notice through the mail, specifying the amount of such raise, and that the said board will meet on the fourth Monday in September to hear reasons, if any may be given, why such increase should not be made. After the county board of equalization shall have completed the equalization of such statements, the clerk of the county court shall extend on such book all proper taxes at the same rate as assessed for the time on real estate, and he shall, on or before the first day of October thereafter,

make out and deliver to the collector a copy of such book, properly certified, and take the receipt of the collector therefor, which receipt shall specify the aggregate amount of each kind of taxes due thereon, and the clerk shall charge the collector with the amount of such taxes; and such clerk shall receive as compensation for making such tax book, copy, filing statements, and certifying to same the sum of six cents for each name or firm, one-half payable by the county, the other by the state. The county assessor shall receive as compensation for his services in taking the statements herein required and entering them in the book herein provided for, the sum of twenty-five cents for each statement, and the members of the county board of equalization shall receive the same per diem for services under this article as fixed by section 9818 Revised Statutes of 1929, and the sum of the valuation of the statements as equalized by the county board of equalization shall be included in and made a part of the total valuation of property taxable for all purposes: Provided, that in counties under township organization the statements herein provided for shall be delivered to the clerk of the county court, who shall perform the duties hereinbefore required of the county assessor, and return the book to the county board of equalization on the first Monday in September, and thereafter the same proceedings shall be had thereon as in other counties: Provided, that in the city of St. Louis the duties in this section required to be performed by the county assessor, county clerk and collector, shall be performed by the license collector of said city of St. Louis, but said license collector shall not receive any fees or other compensation for such services than his salary as license collector; and provided further, that in the city of St. Louis the powers of this section vested in, and the duties required to be performed by, the county board of equalization, shall, as to the city of St. Louis, be vested in and performed by a board to be known as the board of merchants' and manufacturers' tax equalization,

> which board shall consist of three discreet and experienced real estate owners of said city, of a prior residence therein of ten years, who shall be appointed by the mayor of said city annually in the month of May and shall meet at the office of the license collector of said city on the third Tuesday of June in each and every year, for the purpose of equalizing the valuation of merchants' statements, and shall have the same powers and proceed in the same manner as hereinabove provided with respect to county boards of equalization, except that the time for the meeting of said board to hear reasons, if any, why any increase made by the board should not have been made shall be the second Monday of July. The length of time that said board shall continue in session and the compensation to be paid the members of said board shall be fixed by ordinance of said city."

Section 9755, R. S. Mo. 1929, reads as follows:

> "Every assessor who shall fail to perform any duty enjoined upon him by law, in the time prescribed, shall be removed from office by the county court, who shall appoint another in his stead. Such new assessor shall take a like oath and give a like bond as required of the first, and the county court shall enter up judgment summarily upon the bond of such delinquent assessor, against him and his sureties, for such amount as shall be sufficient to complete the assessment of the county."

From the foregoing statutes, it appears that one of the duties of the county assessor is to enter the statements of the various merchants within his county in a book prepared for that purpose and to return said book to the county board of equalization on the first Monday in September of each year. Section 10081, as set out above, also provides the compensation to be received by the county assessor for his services in taking such statements, and is twenty-five cents for each statement so taken and returned.

Since, according to your letter, your county assessor has failed to perform this duty, we believe that your county court has the right and power to remove said assessor from office.

You also raise the question of the compensation to be paid the assessor to be appointed by the county court. In the case of State v. Gomer, 101 S. W. (2d) 57, l. c. 68, we find Section 9755 R. S. Mo. 1929, cited and discussed in the following manner:

> "Section 9754, R. S. 1929 (Mo. St. Ann. Sec. 9754, p. 7871), requires an assessor to give bond 'conditioned for the faithful performance of the duties of his office.' Section 9752, R. S. 1929 (Mo. St. Ann. Sec. 9752, p. 7871), requires him to 'take an oath that he will faithfully and impartially discharge the duties of his office, and that he will assess all the property in the county in which he assesses at what he believes to be its actual cash value.' Section 9755, R. S. 1929 (Mo. St. Ann. Sec. 9755, p. 7872) provides the county court shall remove from office any assessor 'who shall fail to perform any duty enjoined upon him by law, in the time prescribed,' and 'shall enter up judgment summarily upon the bond of such delinquent assessor, against him and his sureties, for such amount as shall be sufficient to complete the assessment of the county.' It seems apparent that the primary purpose, of requiring assessors to give bond, is to require the payment of the cost of assessment in case of failure to promptly enter upon the performance of the duties of the office or to faithfully and diligently seek to correctly list and properly assess all taxable property in the county, and to protect citizens, the county, and the state from loss from failure to properly perform these duties."

From the foregoing, it would appear that the county court has the power and should in its order removing the assessor who has failed to perform his duty, enter judgment against such assessor and the sureties on his board for such amount as they

sufficient to cover any loss suffered by reason of the assessor's failure to perform his duties. It occurs to us in the present case that the county has suffered no loss since it has not paid any part of the fees for making the merchant's assessment.

Upon the appointment of a successor to the office, the county court should pay such successor for the work performed by him as set out above. It is apparent that both the removal of the delinquent assessor and the appointment of another to fill that office are permanent within the time for which the original assessor was elected.

CONCLUSION

It is our conclusion, therefore, that you have the right, by order duly entered upon the records of the county court, to remove a county assessor who has failed to perform a material duty enjoined upon him by law, and to appoint a permanent successor to fill his unexpired term who must qualify in the same manner as the first and who shall thereafter be entitled to receive the compensation prescribed by statute for the fulfilment of the duties of an assessor.

We suggest that you have your county attorney draw up notices to be left at the residence of your present assessor, if he cannot be found, and served upon his bondsmen, advising them of the date set for disposition of the matter in order that they may be represented before you if they consider it necessary.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JET:VC

TAXATION:
SALES TAX:

Municipal corporation is a user and consumer of tangible personal property bought by the corporation to be used upon W.P.A. projects and is liable for the sales tax therefor.

March 2, 1939

3-7

FILED
5

Mr. G. H. Bates, Supervisor
Sales Tax Department
Office of the State Auditor
Jefferson City, Missouri

Attention: Mr. John H. Hendren

Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

> "Are sales made by a material house to a municipal corporation in Missouri and used by the municipal corporation on W.P.A. projects subject to the Two (2) Per Cent Sales Tax now in effect in this state, Laws of Missouri 1937, Page 552?"

Subsection (a) of Section 1 of the Sales Tax Act 1937, page 555, Laws of Missouri, 1937, provides as follows:

> "'Person' includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency (except the State Highway Department,) estate, trust, business trust, receiver, syndicate, or any

other group or combination acting as a unit, and the plural as well as the singular number."

Subsection (g) of said section 1, page 556, Laws of Missouri, 1937, provides as follows:

"'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this Act and the tax imposed thereby, it shall be construed to embrace:

"(1) Sales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events.

"(2) Sales of electricity, electrical current, water and gas (natural or artificial), to domestic, commercial or industrial consumers.

"(3) Sales of service to telephone subscribers and to others through equipment of telephone subscribers for the transmission of messages and conversations, both local or long distance, and the sale, rental or leasing of all equipment or services pertaining or incidental thereto.

"(4) Sales of service for transmission of messages by telegraph companies.

"(5) Sales or charges for all rooms,

meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other place in which rooms, meals or drinks are regularly served to the public.

"(6) Sales of tickets by every person operating a railroad, sleeping car, dining car, express car and such busses and trucks as are licensed by the Public Service Commission of Missouri, engaged in the transportation of persons for hire."

Section 2, page 557 of said act provides as follows:

"From and after the effective date of this Act and up to and including December 31, 1939, there shall be and is hereby levied and imposed and there shall be collected and paid:

"(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

The section of the federal act which is pertinent to the W.P.A. projects is Section 6 of Title 15, par. 728, page 211, U.S.C.A., and it provides as follows:

"'Sec. 6. Federal agencies having supervision of projects prosecuted under the appropriations in this title are authorized to receive from sponsors of non-Federal projects con-

> tributions in services, materials or money, such money to be deposited with the Treasurer of the United States. Such contributions shall be expended or utilized as agreed upon between the sponsor and the Federal agency."

By this section it seems that the city which is a co-sponsor with the federal agency retains jurisdiction of the materials and moneys which it puts into a project to the extent that they cannot be used or spent unless the city agrees to it. Section 5 of this bill found in Title 15, par. 728, page 211, by virtue of which such projects as a municipality and the federal government prosecute or undertake certain projects, provides as follows:

> "Sec. 5. No Federal construction project, except flood control and water conservation projects authorized under other law, shall be undertaken or prosecuted under the appropriations in this title unless and until there shall have been allocated and irrevocably set aside Federal funds sufficient for its completion; and no non-Federal project shall be undertaken or prosecuted under such appropriations unless and until the sponsor has made a written agreement to finance such part of the entire cost thereof as is not to be supplied from Federal funds."

This section requires the municipality, by an agreement in writing, to furnish its proportionate part of the materials or money for the project. Its portion may be furnished in materials or money which will depend upon the circumstances of each particular case. From the reading of Sections 5 and 6, supra, we do not think that these acts could be so construed that it would be said that the municipality sells that part of the materials which it furnishes as a co-sponsor on the project to the government.

It only furnishes them as its part and as a co-sponsor of the project. If the municipality uses material to comply with its part of the project, then it would seem that it is the user and consumer that is contemplated by the Sales Tax Act. We fail in our research to find where such a question as you have submitted has been before the courts of any of the states.

CONCLUSION.

If the project is one in which a contractor undertakes to do a certain piece of work, he furnishing the materials therefor, then the contractor is liable for the sales tax, but if it is a project on which the city is to furnish the materials and the contractor does the work, then the city is the user and consumer and is liable for the payment of the sales tax.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:DA

TAXATION AND REVENUE: When a petition for correction and abatement of an assessment of income is filed, collectors are not to certify taxes to the State Auditor.

March 15, 1939.

FILED 5

Mr. Wm. F. Baumann,
Collector of Revenue
St. Louis City,
St. Louis, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an opinion, reading as follows:

"When a petition has been filed pursuant to Section 10135, Revised Statutes of Missouri, 1929, asking for an abatement of income taxes, but no bond has been posted in accordance with certain provisions in said section, should the Collector consider the bill for income tax, which is attacked by the petition filed as aforesaid, a delinquent bill after the expiration of thirty days from its reception in his office and should he, consequently, certify same to the State Auditor as any other delinquent income tax bill?

"In other words, this situation has been presented to us. The State Auditor set up against a certain taxpayer, on December 2nd, 1938, a tax against said taxpayer's 1935 income. Thereafter, and within forty-five days from the time this tax was assessed, the taxpayer filed, in the Circuit Court of the City of St.Louis, a petition asking for an abatement of the additional tax. However, no bond was posted, as is required by that section of the statutes governing such a petition, and although we do not believe that the posting of a bond is jurisdictional, still we are of the opinion that without the bond the tax becomes delinquent as any other tax would, and the filing of the

> petition alone does not stay its delinquency. The pertinent part of the section referred to says, in effect, that the taxpayer may file a bond double the amount of the indebtedness and in that event the taxes will not be deemed to be delinquent until thirty days after final judgment on the petition. We assume, that conversely, if no bond is filed, the tax does become delinquent in accordance with Section 10134 (as amended) and that, therefore, it should be certified by the collector to the State Auditor even during the pendence of the suit for abatement."

Preliminary to the consideration of the precise question involved in your request for an opinion, we make these observations:

A review of our Income Tax Act, in detail, discloses that the State Auditor is the supervisory officer over all other officers in the administration of the Act. It is provided in Sec. 10134, R. S. Mo. 1929, that,

> "* * * He shall give instructions for carrying this chapter into effect and all such instructions shall be strictly complied with by the officers in the performance of their duties, as required by this chapter. * * *"

Whenever the State Auditor determines that any taxpayer has failed to file a return of income, or has filed an insufficient return of income, he may determine the proper income and certify the same to the assessor for assessment, and,

> "* * * the assessor shall thereupon make the assessment in accordance with such certificate including all penalties provided.* * *" Sec. 10132, R.S. Mo. 1929.

It should also be observed that assessors, in assessing incomes, have all the powers granted to assessors by law in assessing real and personal property, together with the right to estimate incomes, excepting, however, when

> "* * * the state auditor certifies to any assessor the amount of income of a taxpayer who has made no return or who has made an insufficient return or against whom the assessor has made an insufficient assessment, such assessor shall make an assessment against the taxpayer in accordance with the amount of income as certified by the state auditor including all penalties, and the assessor shall have no power to estimate the income of any taxpayer after the auditor has certified to the assessor the amount of income of such taxpayer."
> Sec. 10142, R. S. Mo. 1929.

Under the provisions of Sec. 10128, R. S. Mo. 1929, it is provided, in effect, after an assessment against income has been made by the assessor, such assessor is to certify the result of such assessment to the county clerk to compute the tax, and, thereafter, the county clerk delivers the tax book to the collector, who collects the tax.

Thus it will be noticed that the assessor, under the statute, is required to follow the directions of the state auditor in making an assessment against income. This is equally true as affects the duties imposed by law upon the collector. In this respect we have been advised that the State Auditor has instructed all collectors of income taxes not to certify the taxes as being delinquent to him under the provisions of Sec. 10136, as amended, Laws of Missouri, 1935, at page 410, where a petition for correction and abatement of the assessment has been duly filed within forty-five days after the assessment has been certified by the assessor to the county clerk.

Prior to 1929 assessments made against incomes were subject to review by the Board of Equalization, and any assessment made against incomes, unless changed by the Board, became final. In this respect it should be noted that the Supreme

Court, in the case of State ex rel. Ford Motor Company v. Gehner, 27 S.W. 1, 3, in speaking of the assessor and Board of Equalization, said:

> "* * * This body and the assessor act judicially.* * *"

It was also pointed out in the above case that these officers could not increase an assessment without notide to the taxpayer. The court said, at page 4,

> "Nor may these officers increase the assessment without notice to the taxpayer."

Hence, it is to be thus observed, whenever the State Auditor certifies income to the assessor, as a basis for an additional assessment, (1) The assessor must make an assessment in accordance with the certificate of the auditor, (2) notice must be given by the assessor to the taxpayer of the assessment, and (3) the assessor acts judicially in making the assessment.

In 1929 the Legislature substituted a new procedure for the reviewing of assessments made by the assessor, thus eliminating the Board of Equalization, and providing:

> "At any time within forty-five days after assessment or additional assessment of income has been certified by the assessor to the county clerk, the taxpayer shall have the right to apply for abatement or correction of same to the county court of the county in which such assessment is made except in the city of St. Louis, and to the circuit court in such city. Such application shall be made by petition, which petition shall be sworn to by the taxpayer or some one as agent who has actual knowledge of the facts, and which petition shall show the net income

> of the taxpayer, showing all matters of income, deduction and exemption as defined by law. Upon the filing of such petition a copy thereof shall be served by the sheriff, upon the assessor who made the assessment or additional assessment, and a copy thereof shall be served upon the state auditor by the clerk of the court by registered mail addressed to the state auditor at Jefferson City, Missouri. * * * * At the time of filing the petition, the taxpayer may submit a bond with good and sufficient security, payable to the state of Missouri, in double the amount of the tax based on the assessment attached, conditioned that the taxpayer will pay any tax, together with all interest and penalties under the judgment in the said proceedings; if said bond shall be approved by the court, the taxpayer shall not be regarded as delinquent and no penalties shall be added until the thirty-first day after judgment in the proceeding shall become final, but the tax shall bear interest at the rate of 6 per cent per annum from its due date to date of payment; if paid on or before thirty days after such judgment becomes final; in case of non-payment within said period, interest at the rate of 6 per cent per annum shall cease thirty days after such judgment shall have become final, and penalties shall be added commencing with the thirty-first day.* * *"
> Sec. 10135, R. S. Mo. 1929.

The situation presented by your request for an opinion was occasioned by a certificate received from the assessor by the State Auditor. We are not unaware of the fact since this assessment was made on December 2, 1938, that you

have numerous persons on your tax book that have not been certified to the State Auditor, in accordance with the provisions of Sec. 10136, supra.

Clearly Sec. 10135, supra, affords to the taxpayer an opportunity to be heard whenever he is aggrieved by reason of any assessment against his income. Therefore, the purpose of this section of the statute is to attack the judgment of the assessor who is the only officer authorized to make an assessment against incomes.

A review of the Income Tax Law reveals that this procedure is exclusive to correct or abate an assessment. Since the purpose of the statute is to correct or abate an assessment, then it follows, what effect, if any, does the filing of a petition,as provided have upon the officers charged with the collection of a tax when no bond has been filed? We think the answer to this inquiry is solved by analogy from the expressions in 61 C.J., 776, 1004, reading,

> "* * * the effect of an application thus to review or correct an assessment is to suspend the power of the assessing and collecting officers to act upon the particular assessment until the board shall have decided the case; * * * The assessing and collecting officers are subservient to the boards established for review and correction of assessments, and any change the boards see fit to make in assessments supersedes the determination of the assessing officers and, so far as they are concerned, are final.* * *"

Your attention is respectfully directed to the case of State ex rel. Vance v. Dixie Portland Cement Company, 267 S.W. 595. This was a case involving an action that was instituted by the State of Tennessee to recover delinquent taxes. The facts in this case disclose, under the statutes considered, that as soon as the county assessor assessed the taxes, the

taxpayer had the right to appeal to the Board of Equalization to review the assessment. The statute provided that the action of the State Board of Equalization was final and conclusive as to all matters passed upon by them, and that the taxes shall be collected upon the valuation as was fixed by the board. It was provided that, after the board had completed the equalization of property, it was their duty tc certify the assessment not later than October 1st to the county clerk. Thereafter, it was the duty of the county clerk, upon receipt of the assessment, to make out and deliver a tax book to the county trustee the first Monday of October.

In this case, the State Board of Equalization certified the result of their action upon the assessment to the county clerk. The county clerk received the order of the State Board and entered the assessment upon the tax books. Thereafter, a petition was filed in the circuit court to review the action of the State Board in fixing the assessment. Among other things, it was alleged, in the petition that was filed, that the assessment was illegal, excessive and unjust. The State Board of Equalization and the County Clerk were made parties to the suit, and were duly served.

In ruling the case, as to whether or not the application to review the assessment would bar a recovery of the taxes while such application for review was pending, the court said at page 596:

> "Upon allegation that its property was assessed in violation of law, and that it was guilty of no laches in presenting the petition, which was done before the tax was due December 1st, it lay within the sound discretion of the circuit judge to grant the writ of certiorari. The writs arrested the proceedings before the board of equalization, and removed the inquiry to the circuit. The assessment was incomplete when the tax bill was filed. There could be no recovery of the taxes pending the action in the circuit court of Davidson county to review the assessment."

We believe that the ruling in the above case is here applicable in support of our conclusion.

It is further believed that, since a petition has been filed by a taxpayer to correct or abate an assessment under Sec. 10135, supra, such assessment is immediately challenged, whether or not any bond is filed, and any tax which has been computed thereon is subject to the final judgment of the court. In the event the taxpayer is successful, it obviously follows that the assessment will have to be changed and a new tax computed, and a new tax bill rendered.

It is also to be gleaned from this section of the statute that no assessment made against income becomes final until forty-five days after the assessor has certified the taxes to the county clerk for the computation of the tax.

The only advantage to be obtained by the taxpayer, by the filing of the bond, is to prohibit the tax from being regarded delinquent, from the standpoint of the accruing of interest. In the event no bond is filed, it is to be implied from the statute that a taxpayer is to be regarded delinquent and shall pay the rate of interest that all other delinquent taxpayers are required by statute to pay. This, of course, is conditioned upon the fact that the taxpayer is unsuccessful in the prosecution of his suit for correction and abatement. But, the fact the taxpayer is to be regarded as delinquent does not mean that the assessing and collecting officers shall, as is contemplated by Sec. 10136, supra, where no petition for correction and abatement has been filed under the provisions of Sec. 10135, certify the delinquent tax to the State Auditor, and subsequently the State Auditor to the Attorney-General.

Section 10136, supra, is to be regarded as a procedural statute for the purpose of effecting collection of delinquent income taxes which have not been paid, as provided. Therefore, Sec. 10135, supra, limits the application of Sec. 10136, supra, with respect to the certification of delinquent income taxes.

CONCLUSION.

In view of the above, it is the opinion of this department that, when a petition to correct and abate income taxes is filed, and no bond has been filed with the petition, such taxes, when regarded as delinquent, shall not be certified by the collector to the State Auditor, as is required under the provisions of Sec. 10136, supra.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney-General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

RCS/LD

CITIES TOWNS AND VILLAGES:) The officers of a village may pass
AUTHORITY TO PASS ORDINANCES:) ordinances regulating peddlers.

May 10, 1939

5-11
FILED
5

Honorable William Barton
Representative Montgomery County
House of Representatives
Jefferson City, Missouri

Dear Mr. Barton:

This is in reply to yours of recent date wherein you request an opinion from this Department based on the following question:

> "May a village with a population of less than 500 and more than 400 regulate peddlers, hawkers, itinerant merchants, and transient vendors of merchandise in the manner as indicated by the enclosed ordinance?"

It is a general rule of law in this State that since cities, towns and villages are creatures of the statutes that the officers of such corporations must look to the statute for their powers and duties.

On the question of whether or not the officers of a village may pass an ordinance regulating peddlers, hawkers, etc., we find that Article 9, Chapter 38, Revised Statutes of Missouri, 1929, sets out certain powers and duties of the officers of towns and villages, and especially Section 7097 of said article and chapter pertains to this question. This section provides in part as follows:

> "Such board of trustees shall have power to pass by-laws and ordinances to prevent and remove nuisances;

> to prevent, restrain and suppress bawdy houses, gambling houses and other disorderly houses within the limits of such town, or any addition to said town, or any commons thereto attached; to restrain and prohibit gambling; to license, tax and regulate merchants, peddlers and auctioneers, and to regulate and prohibit the sale or giving away of intoxicating liquors under merchants' licenses in such towns: * * * "

The language of this section is so certain that it is unnecessary to construe it in any other manner than it is written. This section in no uncertain terms authorizes the board of trustees of a village to pass such ordinances as they may deem proper to regulate peddlers.

Section 7287, R. S. Mo. 1929, specifically limits the officers of municipal corporations in their powers and duties, and this section is as follows:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

In the case of City Of Ozark v. Hammond, 49 S. W. (2d) 129, 131, the court in referring to this section said:

> "This section is applicable to all cities in the state, regardless of whether their charter powers are derived from special charters or from general statutes. Pierce City v. Hentschel (Mo. Sup.) 210 S. W. 31; Siemens v. Shreeve, 317 Mo. 736, 296 S. W. 415; Keane v. Strodtman, 323 Mo. 161, 18 S. W. (2d) 896. As heretofore construed,

> it operates to limit the powers of municipal corporations to impose occupation taxes; no such corporation can impose a license tax upon any business avocation, pursuit, or calling, unless such business avocation, pursuit, or calling is specially named as taxable in its charter, or in the statute which confers upon it its charter powers. (See cases last cited.)"

From a review of the cases in reference to the powers of city officers to enact ordinances licensing and regulating businesses and callings, it seems that the courts have strictly construed such sections of the statute applicable thereto and unless the statute specifically sets out the business which the city may license and tax, then such city is not authorized to regulate such business or calling.

We note from the ordinance which you have submitted that an attempt is being made to define the person who solicits orders or takes orders for the sale of goods, wares or merchandise for future delivery in the village, as a "peddler," a "hawker," an "itinerent merchant" or a "transient vendor." Whether or not the definition that the city has attempted to make of such avocations is correct would be a matter which would be determinable by the court. However, we will say that if by this ordinance the officials have intended that it apply to orders which may be within the class of inter-state commerce transactions, then it would not be applicable for it would be an interference with commerce and trade and unconstitutional.

The word "peddler" is defined in Words & Phrases, Vol. 1, at page 5262, as follows:

> "A peddler is a small retail dealer who carries his merchandise with him, drives from house to house or place to place either on foot or horseback, or in a vehicle drawn by one or more animals, exposing his

goods for sale and selling them. State v. Hoffman, 50 Mo. App. 585, 589."

In the case of City of Carrollton vs. Bazzette, 159 Ill. 284, it was held that an "itinerent merchant" could not be construed as synonymous with a "peddler." So, if that rule is followed in Missouri, since villages are only authorized to license peddlers, then it would not be authorized to license and regulate itinerent merchants or transient vendors or hawkers unless they were performing the acts of a peddler.

Conclusion.

From the foregoing it is the opinion of this Department that a village may pass an ordinance to regulate peddlers, but may not pass ordinances licensing and regulating hawkers, itinerent merchants and transient vendors of merchandise unless such persons are performing acts such as would class them as peddlers.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

TWB:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRIMINAL PROCEDURE: Return on death warrant may be made to circuit clerk if court not in session.

May 16, 1939

5-17

FILED
5

Hon. William E. Barton, Judge
Nineteenth Judicial District
Houston, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 9, 1939, requesting our interpretation of Section 3725, Laws of 1937, page 223, as to the return of a death warrant.

This statute reads:

> "After the execution the warden must make a return upon the death warrant to the court by which judgment was rendered, showing the time, mode and manner in which it was executed."

Prior to the repeal and reenactment of this section, it read (Sec. 3725, R.S. 1929):

> "The officer executing a sentence of death shall make return on the warrant of the execution thereof, * * * * and be by said officer returned to the clerk of the court from which said warrant was issued. * * * *."

The question here turns on the meaning to be given to the deletion from the old section - that part requiring the warrant to be returned to the clerk of the court and now requiring the return to be made "to the court".

Does this mean the warrant must be returned into open court while in session or does mere filing with the clerk still suffice?

There is no statute in our criminal code which would seem to throw any light on this question. However, Section 3680, R.S. Missouri, 1929, makes "the provisions of law in civil cases, * * * * to enforce the remedies * * * of parties" extend to criminal cases "so far as they are in their nature applicable thereto." The return on a death warrant would seem to be incident to the enforcement of a remedy of the state.

A death warrant is nothing more than an execution issued by the circuit court on its judgment. Section 1155, R.S. Missouri, 1929, provides, "Every execution issued from any court of record shall be made returnable at the next succeeding term", or if the party entitled thereto shall otherwise direct, it is "returnable to the second succeeding term".

It has never been doubted that this provision means that executions must be returned in open court. United States Bank v. Pritchard, 20 S.W. (2nd) 939 (Mo. App.).

However, this provision to our minds, does not settle the question. In a civil case, the circuit court can know that once an execution is issued, nothing can delay the levy and return at the next term, absent an appeal and supersedeas bond. But in a criminal case, there are several things which might prevent an execution being had on the date fixed. An appeal would stop the execution, and if affirmed, the Supreme Court fixes the date. A sanity inquisition would delay the date. The Governor may grant a reprieve. Any of these, if they occurred, would prevent the execution from being had on the date fixed by the circuit court. If the delay was of sufficient length, then the warden could not make his return on the death warrant at the next term or second succeeding term of court.

It is, no doubt, for these reasons that the Legislature in Section 3725, R.S. Missouri, 1929, made the death warrant returnable to the clerk of the court.

The only reason or purpose for requiring a return of the death warrant to the court (or clerk) is so that the court may know and the records reflect that the judgment has been carried out. "To get at the true meaning of language employed in a statute we must look to the whole purpose of the act, the law as it was before the enactment and the change in the law to be made". (Pembroke v. Houston, 180 Mo., l.c. 636). Neither will a statute be so construed "as to make it require an impossibility or to lead to absurd results if it is susceptible of a reasonable interpretation". (State v. Irvine, 72 S.W. (2nd) l.c. 100).

What change in the law was there to be made? The mode and place of execution was the change to be made. There was cause for that since county executions by hanging had become gala occasions, but the reasons for the return to be made to the clerk of the court still exist. There is no certainty that an execution will take place on schedule.

The term or word "court" when used in a technical sense means the court in session, not the judge or clerk thereof (State ex rel. v. Woodson, 161 Mo., l.c. 453; State v. Horn, 79 S.W. (2nd) l.c. 1045). But there is nothing in Section 3725, Laws of 1937, page 223, which indicates to us that the Legislature used it in a technical sense. On the contrary, to so construe it leads to an absurd result, in that the court, if compelled to call a special term to receive the return on this death warrant, would find it impossible to give to the deceased defendant the five days' notice required by statute (Sec. 1852, R.S. Missouri, 1929). Thus, we think the word "court" should be construed in a non-technical sense and to mean a return to the repository of the court's records which is the office of the clerk of the court.

If the return of the warden be made during term time, however, we think it should be received in open court. The practice in this state is to file all instruments, during term time, with the court.

It might be well also for the court, at the first regular term after the warden has made his return and filed it with the clerk, to call the matter up and formally receive the return in court. This would effect a literal compliance with the statute since it fixes no definite date for the return to be made, nor does Section 1155, supra, apply to fix a date for the reasons above given.

CONCLUSION

Therefore, it is our opinion that the warden's return of a death warrant may be made to the clerk of the court which rendered the judgment if, when the return is made, the court is not in session. If the court is in session, said return should be received and filed in open court.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAC

CONSTABLES: (1) May serve anywhere in state warrant issued out of any justice court in county; (2) May arrest without warrant if sees offense committed, or with warrant if he has one, and cause prisoner to be arraigned in township where offense was committed, if a misdemeanor if felony, may cause prisoner to be arraigned anywhere in county. (3) If represents himself to be deputy sheriff, and hold no such commission is guilty of impersonating an officer. (4) Cannot charge fee for service he does not perform. (5) His duty to take prisoner before justice if warrant of arrest was directed to him.

June 6th, 1939.

Hon. A. A. Bayles,
Sheriff of St. Francois County,
Farmington, Missouri.

6-10

FILED
5

Dear Sir:

This will acknowledge receipt of your letter of May 29th, 1939, presenting several questions pertaining to the powers, duties, and legality of the actions of a constable in your county.

I

"The Constable in question has brought prisoners from Fredericktown, Missouri, St. Louis, Missouri and various other distant points on Warrants issued from Townships in St. Francois County, other than the Township in which he was elected. Would this be legal or not?"

Section 11756, R. S. Mo., 1929, provides that:

"Constables may serve warrants * * * * and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

It is the duty of the constable to serve warrants issued out of any justice court in the county. (See Section 3418, R. S. 1929, on misdemeanors, Sections 3467, 11756, R. S. 1929, on a felony). In the case of Bick v. Wilkerson, 62 Mo. App. 31, it is held that the terms of Section 2380, R. S. 1889 (now section 11756, supra,) authorized a constable to serve process issued out of any justice court in the county.

Section 3469 R. S. Mo. 1929, provides that the warrants of a justice of the peace "may be executed in any part of the county within which he is an officer, and not elsewhere, unless indorsed in the manner directed in the next section." The next section (3470 R. S. 1929) provides the mode by which the warrant of a justice of the peace may be executed in another county. This by the endorsement of said warrant by "any magistrate authorized to issue a warrant in the county in which such offender may be, or is suspected to be, on proof of the handwriting of the magistrate issuing the warrant * * * and thereupon the offender may be arrested in such county by the officer bringing such warrant, * * *." Also, such warrants may be executed in any county in the state "if the clerk of the county court of the county in which the warrant was issued shall endorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

Thus a constable is authorized to execute misdemeanor and felony warrants, issued out of any justice court of his county, throughout his county, and if properly endorsed, such warrants may be executed by the constable in another county or in any county in the state.

It is our opinion that it is legal, if the proper procedure is followed, for a township constable to execute warrants, issued out of any justice court in his county at any place in his county or the state.

II

"This same Constable rides the roads of St. Francois County making arrests with and without Warrants, arraigning prisoners before justices of the peace in Townships other than his own Township. Would this be legal or not?"

What we have said in Part I of this opinion answers that part of this question as to the right of the constable to arrest with a warrant any place in the county and cause his prisoner to be arraigned before the justice court out of which the warrant was issued. This, because, the constable having the right, as above decided, to execute a warrant issued out of any justice court in the county, it necessarily follows that he has the right to bring in the prisoner to be arraigned.

As to said constable's right to do this without a warrant, we see that by Section 11756, supra, constables are empowered to "exercise all other authority conferred upon them by law throughout their respective counties". We assume, for the purpose of this question, that the constable is only making these arrests without a warrant, when he actually sees the offense committed.

In State v. Holcomb, 86 Mo. l. c. 380, the court reaching back into the common law said, "'From time immemorial, constables * * * * had authority, without warrant, to arrest those whom they saw engaged in an affray, or breach of the peace, and to detain them until they should find proper security.'"

Again in State v. Pritchett, 219 Mo. l. c. 706, it is said that a constable is "authorized by the law of this state to arrest persons charged with crime * * * *, when armed with a warrant for that purpose and without warrant when the offense is committed in his presence."

Thus, we think a constable may arrest without a warrant when he sees the crime committed. There is no statute which we can find which confers the authority on him or takes it away. Consequently the common law prevails (Sec. 645 R. S. Mo. 1929). This authority extends to any place in his county because his authority is county-wide. (Sec. 11756, supra; Bick v. Wilkerson 62 Mo. App. 31).

It is our opinion on this question that a constable may arrest with or without (if he sees the crime committed) a warrant any place in his county and arraign the prisoner before a justice in the township where the offense was committed, if a misdemeanor (Sec. 3414 R. S. Mo. 1929) or before any justice in the county if a felony. If with a warrant, the arraignment, of course, is before the magistrate who issued the warrant.

III

"This office has certain information which indicates that this Constable is representing himself in St. Francois and other Counties of Missouri as a Deputy Sheriff when in fact he has no Commission whatsoever as a Deputy Sheriff and holds only the title of a Township Constable. What, if any, penalties are provided by law for a person representing themsevles as a Deputy Sheriff for gain, when, as a matter of fact, he is not a Deputy."

Section 4235 R. S. Mo. 1929, provides:

"Any person or persons who shall, in this state, without the authority, exercise or attempt to exercise the functions of, or hold himself or themselves out to any person or persons, company, association or corporation as a deputy sheriff, marshal, policeman, constable or peace officer, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, be punished by imprisonment for not less than three months nor more than one year."

In our opinion if this constable represents and holds himself out as a deputy sheriff of St. Francois County he is violating this statute.

IV

"Where State Patrolmen make certain arrests in various Townships of St. Francois County, would a Constable of St. Francois Township, St. Francois County have al legal right to take the Warrants served by the State Patrolmen and make a return charging arrest, commitment, and mileage for themselves?"

Section 11791 R. S. Mo, 1929, provides, "Sheriffs, county marshals or other officers shall be allowed for their <u>services</u> <u>in</u> <u>criminal</u> <u>cases</u> * * * *, etc.,"

Section 11792 R. S. Mo. 1929, provides, "Sheriffs, county marshals or other officers shall be allowed for their services in criminal cases * * * *, etc.,"

These two sections deal with fees and mileage respectfvely.

Note the language used - "services in criminal cases." The use of the word "services" denotes that the officer shall have done that for which he charges.

In State ex rel. v. Scott, 270 Mo. l. c. 153, a county court clerk had charged the fee allowed for extending taxes on the assessment book, when he had not actually extended said tax. The court said on this point:

> "That this action (a suit to recover certain illegal fees) would lie to recover back the amount paid the defendant for extending the tax on the assessment book had the work not been done, we have no doubt; for section 11549 Revised Statutes, 1909, under which it claimed, allows the compensation for 'services rendered' in 'extending the tax on the assessment book', and these services are not rendered until the work was done."

The court, however, did not rule the case on that point because the clerk did actually do the work before the suit was instituted. Nevertheless, this obiter statement of the court is indicative of what they would have held had the point been before them. We follow this in ruling the instant question.

It is our opinion that no constable is entitled to fees and mileage for anything unless he or a deputy performs the act for which the charge is made.

V

"When a Constable makes an arrest and brings the prisoner in to the County jail to await trial on a misdemeanor or felony charge, would this Constable have the right to take the prisoner out on the trial date and arraign him before the Justice of the Peace, or would this be the duty of the Sheriff's office to do the arraigning?"

There is no express statute which we can find which seems to answer this question. By Section 3467 R. S. Mo 1929 (felony) it is stated that the warrant shall command the officer to whom directed, "forthwith to take the accused and bring him before such magistrate, to be dealt with according to law." By Section 3418 R. S. Mo. 1929 (misdemeanor) the justice, upon complaint being made, must "issue a warrant for the arrest of defendant."

With respect to felonies it is expressly made the duty of the officer to whom the warrant is directed to bring the prisoner before the justice. On a misdemeanor this is also true, even though there is no statute to that effect. A warrant of arrest is nothing more than a command by the magistrate, to the officer, to apprehend and bring before him a named person. In each instance the command is, in part, to bring the prisoner before the magistrate. That command is directed to the officer to whom the warrant is directed and is not literally obeyed until <u>that officer</u> brings the prisoner before the magistrate. From this we deduce that it is the duty of the officer to whom the warrant of arrest was directed to produce the prisoner before the magistrate at the appointed time. We add that there is no mileage allowance for taking a prisoner from jail to the justice court. Section 11791, R. S. Mo. 1929, provides "no compensation shall be allowed under this section for taking the prisoner or prisoners from one place to

another in the same county, excepting in counties which have two or more courts with general criminal jurisdiction."

It is our opinion that it is the duty of the officer to whom the warrant of arrest was directed to convey the prisoner apprehended thereunder to the justice court for arraignment.

Respectfully submitted,

LAWRENCE L. BRADLEY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB/RV

TAXATION: COUNTY COURT: The county court has authority to settle excessive taxes by reducing assessment down to the fair valuation as of the date the taxes are assessed.

July 26, 1939

FILED
5

Honorable Latney Barnes
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This acknowledges receipt of your request, which is as follows:

"Some years ago the Farm and Home Savings and Loan Association of Missouri took over the properties of Hardin College, now defunct, when the college was unable to meet its indebtedness to Farm and Home. Since that time it has remained idle with the exception of from April 1936 to September 1937 when it was used exclusively by the N. Y. A. Administration as a camp for girls. The Farm and Home contends that at least during that period it was used for educational and charitable purposes, and refused to pay the taxes for the years 1937 and 1938, contending that on June 1st, 1936 and 1937 when the property was being assessed for the ensuing year, it was under the control of the Federal Government. The property is under contract to be sold to the Mexico Public Schools to be returned to educational uses.

Further, the property was assessed at $100,000 for the 1937 and 1938 tax years, and was reduced to $50,000 for the 1939 tax year. The property is actually under contract of sale to the Mexico School Board for $25,000.

> In addition to contending that the property was not taxable at all, Farm and Home contends that even if it was taxable the tax was erroneous within the meaning of Section 9946, Laws of Missouri 1933 page 424. Will you inform me under the situation set forth above whether or not the County Court of Audrain County, Missouri may compromise the back taxes assessed against Farm and Home?
>
> I am informed that an opinion was written by your office under date of November 24, 1934 to Walter Miller, Assessor of Jackson County, Missouri, which may cover this situation. I would appreciate an early reply to this inquiry as all interested parties are anxious to get the matter settled."

Section 36 of Article VI of the Missouri Constitution is the source of power of the county court. It reads in part as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law."

Pursuant to that section of the Constitution, the legislature, Session Acts, 1933, page 424, passed the following law:

> "In all cases where any assessor or assessors, the county court, or assessment board, or any city council or assessment board, shall have assessed and levied taxes, general or special, on any real estate, according to law, whether the same be delinquent or otherwise, and until the same are paid and collected, with all costs, interests and penalties thereon, the city coun-

> cil of any city and the county court of any county shall have the full power to correct any errors which may appear in connection therewith, whether of valuation, subject to the provisions of the Constitution of this state, or of description, or ownership, double assessment, omission from the assessment list of books, or otherwise, and to make such valuations, assessment and levy conform in all respect to the facts and requirement of the law. Any description or designation of property for assessment purposes by which it may be identified or located shall be a sufficient and valid description or designation."

The evident purpose of this law was to invest the county court with the power to faithfully, fairly and impartially correct errors in connection with the valuation or taxing of property. The provisions of said section are general, and it would seem that the authorization there given to the county court to correct errors of valuation would invest the county court with the power to determine a fair valuation of the property that is taxed, although that property may have been valued at an excessive valuation by the assessor or other officers anterior thereto.

Your situation seems to be in a nut shell that property was assessed at a valuation higher than the actual valuation of the property as of the date of the assessment. You now desire to know whether the county court has authority to relieve against the excessive amount of tax standing against that property so that the property will properly pay only the correct amount of tax on the fair and proper valuation of said property as of the date the assessment was made.

We do not understand your inquiry to raise the question as to a changed valuation of the property as of the date it is payable as compared with the fair value of the property as of the date it was assessed, and we are not discussing the value of it as of the date it is payable but are confining this discussion to the fair value of the property as of the date the assessment was made, which would be June 1st of the year prior to the year in which the taxes are payable.

It appears to us that the law passed by the 1933 legislature, and set out here above, was intended to meet the situation that is before us and that under the provisions of that law the county court of Audrain County is authorized to correct the valuation of the given piece of property so that the valuation, as fixed by them, will be the fair and true valuation of said property as of June 1st of the year preceding the year in which the taxes are payable.

Respectfully submitted,

DRAKE WATSON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

DW:VC

MORTGAGES: RELEASING OF MORTGAGES SECURED BY SERIES, NOTES OR BONDS:

Mortgages or deeds of trust providing for issue of series of notes or bonds aggregating $100,000.00 or more and given by public utility not under jurisdiction of Public Service Commission, may be released in accordance with the provisions of Section 3083, Laws of Mo. 1933.

September 6, 1939

FILED 5

Mr. John T. Barlow
Recorder of Deeds
Newton County
Neosho, Missouri

Dear Sir:

We have received a request for an opinion written by Honorable Leo H. Johnson, Attorney at Law, which request appears to be in your behalf since it is on the question of the manner of releasing a certain mortgage. This request is as follows:

> "Our Recorder of Deeds and mutual friend, John T. Barlow of Neosho, is presented with a question of entering a release of record as offered by the Cities Service Gas Company of Bartlesville, Oklahoma, a Delaware Corporation. This release purports to cover some thirty million dollars worth of bonds.
>
> "The release contains these two clauses: Whereas -- (said bonds) 'were uncancelled and outstanding immediately preceding the execution and delivery of this indenture of release; and
>
> "'Whereas all the debts, claims, and interest arising by virtue of said mortgage and indenture of trust and indenture supplemental thereto have been fully paid and satisfied by Cities Service Gas Company, etc.'

"Thus the release contains two contrary statements as to the satisfaction of this mortgage indebtedness in two paragraphs, one following the other. This is one matter we have been unable to reconcile.

"The next question is whether or not the release of such a deed of trust should be in accordance with Section 3080 Laws of 1933, Page 194, or Section 3083 on said page.

"In the letter of Mr. Julien, attorney for said company, dated at Bartlesville August 21, he states: 'Cities Service Gas Company is not, of course, a public utility and therefore Section 3080 does not apply'.

"To secure a release the Cities Service Gas Company by the trustee named, or its successor, has executed a release of indenture in due form as of date of December 29, 1938 with the exception of the contradictory statement hereinabove quoted. This was submitted for recording January 9, 1939 and under date of June 21, 1939 submitted the enclosed instrument referred to by Mr. Julien as a Certificate in compliance with and under Section 3083. This certificate is short and I thought you might be willing to look it overand return at your earliest convenience.

"If the Cities Service Gas Company of Bartlesville, Oklahoma is a public utility, then certainly Section 3080 controls. And if such latter section controls, then affidavits are required from the president or vice president of the utility and by the president and vice president of the trustee or trustees to the effect that all of

> such bonds have been paid or sufficient funds deposited for that express purpose with the Banker Trust Company to retire the bonds, etc. outstanding and unpaid."

I.

The first part of your request deals with the question of whether or not there are two contradictory statements in a form of release which is submitted by the company. These statements are as follows:

> "Where - - (said bonds) 'were uncancelled and outstanding immediately preceding the execution and delivery of this indenture of release; and
>
> "'Whereas all the debts, claims, and interest arising by virtue of said mortgage and indenture of trust and indenture supplemental thereto have been fully paid and satisfied by Cities Service Gas Company, etc.'"

While these statements might sound somewhat inconsistent, we do not think they are contradictory. By the first statement that the bonds were uncancelled immediately preceding the execution of the released deed, we think that the writer of that statement meant that these obligations were uncancelled and outstanding in so far as the records in the office of recorder of deeds reveal. Then the statement following that they have been paid by the company is for the purpose of showing that it is authorized to make the release as is provided by law. Therefore, we think the recorder should not refuse to make this release and enter it of record on account of the foregoing clauses.

II.

The next question submitted is under which section of the statutes should this release be made.

You state that the mortgage which is sought to be released was executed by the Cities Service Gas Company. It purports to cover thirty million dollars worth of bonds.

I note from Mr. Johnson's letter that the attorney for the company stated that the Cities Service Gas Company is not a public utility. In my inquiry at the Public Service Commission for this state I find that that Commission is exercising no jurisdiction over this company.

In your inquiry you ask whether or not Section 3080, Laws of Missouri, 1933, at page 194, applies, or whether Section 3083 of the same laws and page applies. Section 3080 is as follows:

> "The trustee, or trustees, in any mortgage or deed of trust given or which may hereafter be given by a railroad company or other public utility company which is subject to the regulation of the Public Service Commission, or successors, upon its property or any part thereof, may enter satisfaction of said mortgage or deed of trust upon the records where the same has been recorded without producing the bonds, notes or coupons secured by said mortgage or deed of trust: Provided, however, that said mortgage or deed of trust shall not be entered as satisfied until the trustee, or if said trustee is a corporation, its president and vice-president, and the president or vice-president of the railroad company or other public utility company, or of its successors or assigns, shall make and file with the recorder affidavits stating that all of the bonds, notes or coupons secured by said mortgage or deed of trust have been paid or that sufficient funds have been

> deposited with a bank or trust company to pay all the bonds, notes or coupons still outstanding and unpaid; and that said money is deposited for the express purpose of paying said bonds, notes or coupons when the same shall be presented at said bank or trust company for payment."

It appears from the request that you are under the impression that Section 3080 applies for the purpose of making this release.

If the Cities Service Gas Company is not one of the companies described in said Section 3080, then the release comes within the class described in Section 3083 of said laws. This section provides in part as follows:

> "Whenever any mortgage or deed of trust heretofore or hereafter executed, providing for the issue of a series of notes or bonds aggregating one hundred thousand dollars or more not including interest or interest notes or coupons secured in whole or in part by property located in this state, by its terms confers authority upon the trustee or trustees therein named, or either of them, to release the property or any part thereof encumbered by any such mortgage or deed of trust from the lien thereof, such release may be so made and it shall be the duty of the recorder of deeds of the county in which the property is released from such mortgage or deed of trust shall be situated to accept and record in the proper records any deed of release executed and duly acknowledged by such trustee, pursuant to the authority conferred by such mortgage or deed of trust, releasing the whole or any part of such mortgaged property, without the notes or bonds or coupons secured by such mortgage or deed of trust being

> produced: Provided, however, that no such release shall be made unless such mortgage or deed of trust shall contain a provision requiring that the amount due under the mortgage or deed of trust or the amount of money or other consideration received from the sale of the property described in such release or such portion thereof as may be stipulated in such mortgage or deed of trust shall be deposited with some banking firm or banking corporation or trust company named in such mortgage or deed of trust for the benefit of the holders of such notes or bonds, or a provision requiring that there shall have been reinvested in property subject to the lien of such mortgage or deed of trust and amount of money equal to the value of the property so released: * * * * *"

The copy of the certificate for release, which was enclosed with the request and which was submitted to you with the release, has been noted. This certificate was made by one of the trustees under the mortgage and shows that the mortgage was for more than one hundred thousand dollars, and that the mortgage provided for the issuance of a series of notes or bonds.

Since you have requested that this copy be returned to you, we are copying the same here:

> "CENTRAL HANOVER BANK AND TRUST COMPANY (formerly Central Union Trust Company of New York), one of the Trustees under a Mortgage and Indenture of Trust dated as of May 1, 1927, between Cities Service Gas Company, a Delaware corporation, and Central Union Trust Company of New York (Now Central Hanover Bank and Trust Company) and Commerce Trust Company (Kansas City, Missouri), Trustees, hereby certifies that First Mortgage Pipeline 5½% Gold Bonds, Series of 1927, due May 1, 1942, in

the principal amount of $16,277,800, and First Mortgage Pipeline 5½% Gold Bonds, Series of 1928, due May 1, 1942, in the principal amount of $14,352,000, were outstanding under said Indenture at the close of business on December 28th, 1938; that Cities Service Gas Company has this day surrendered for cancellation $1,211,600 principal amount of said bonds, Series of 1927, together with all unmatured coupons appertaining thereto, and $14,352,000 principal amount of said Bonds, Series of 1928, together with all unmatured coupons appertaining thereto, and has irrevocably deposited in trust with the undersigned the sum of $15,486,245.66 which will be sufficient to redeem on February 28, 1939, at the redemption price of 101% of the principal amount thereof plus accrued interest to the redemption date, all remaining Bonds outstanding under said Indenture, and has irrevocably authorized the undersigned to apply said sum to the redemption of all said outstanding bonds in accordance with the provisions of said Indenture; that Cities Service Gas Company has also irrevocably deposited with the undersigned in trust the sum of $38,618.25, which sum will be sufficient to pay all installments of interest maturing prior to February 28, 1939 in respect of Bonds outstanding under said Indenture, other than interest on fully registered Bonds as to which the undersigned has received satisfactory evidence of the payment thereof by or on behalf of the Company and other than interest represented by coupons which have been surrendered to the undersigned and cancelled, and has irrevocably authorized the undersigned to apply said sum to the payment of all such unpaid interest.

"Said Central Hanover Bank and Trust Company further certifies that it has received irrevocable authority from Cities Service Gas Company to publish and mail notice of redemption of all said outstanding Bonds in the manner provided in said Indenture.

"Dated: New York, N. Y., December 29, 1938.

"CENTRAL HANOVER BANK AND TRUST COMPANY

By F. Wolfe
Vice-President

"(SEAL)

"Attest: J. T. Harrigan
Assistant Secretary"

Apparently when this certificate was drawn the trustees thought that Section 3083 applies for the purpose of making this release. Referring back to said Section 3080, it will be noted that the release authorized under this section only applies to mortgages or deeds of trust that are given by a railroad company or other public utility company which is subject to the regulation of the Public Service Commission. As stated above, the Public Service Commission of this state does not regulate the Cities Service Gas Company and, therefore, said section does not apply to such releases.

CONCLUSION.

It is, therefore, the opinion of this department that the release of the mortgage which was submitted to you by the trustees of the Cities Service Gas Company should be made as provided for in said Section 3083, Laws of Missouri, 1933, page 194.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTY COURTS:
CONTRACTS BINDING SUCCEEDING COURTS:

County court may appoint a superintendent of a poor farm for a term extending into that of their successors in office provided there is no fraud or collusion in connection with such contract.

January 12, 1939

FILED
6

Mr. G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

This is to acknowledge receipt of your request for an official opinion which is as follows:

"Crawford County, Missouri, owns and maintains a farm upon which is located the County poorhouse, as is provided by Sections 12950 to 12967 of the Revised Statutes of 1929. On January 1st, 1938, the then County Court of Crawford County, Missouri, entered into a written contract with one Henry Jenkins in which they attempted to employ the said Henry Jenkins as Superintendent of the County Farm for the term of two years, said term ending March 4, 1940. On January 1st, 1939, we had a new County Court entirely, all of the personnel of the said Court having been changed by the election of 1938. The present County Court is now desirous of terminating the employment of the said Henry Jenkins as Superintendent of the County farm and poor house. The question is this: Could the County Court of Crawford County, in January, 1938, legally bind the County of Crawford to a contract that extended over a period of time in

> excess of the term of office of that County Court?
>
> "Our present County Court has served notice on Mr. Jenkins that his employment will be terminated March 1st, 1939, and Mr. Jenkins claims that he has a valid contract, and that he is employed until March 4, 1940.
>
> "I would like to have the opinion of your office as to the validity of this contract that was made with Mr. Jenkins back on January 1, 1938. Would the County of Crawford be bound at this time by this agreement?"

The superintendent of a poor farm is appointed by virtue of the provisions of Section 12958, R. S. Missouri, 1929, which is as follows:

> "Whenever such poorhouse or houses are erected, the county court shall have power to appoint a fit and discreet person to superintend the same and the poor who may be kept thereat, and to allow such superintendent a reasonable compensation for his services."

It appears from your request that all of the personnel of the county court has changed since the contract was entered into with the present superintendent at the poor farm, and that the present court takes the position that they are not bound by the acts of former members of the court in entering into this contract which will not expire until March, 1940.

It does not appear from your request whether or not the court claims there was any fraud or collusion in connection with this appointment and it does not appear whether or not the present incumbent properly qualified and is properly performing his duties, so we assume those questions are not at issue.

As to the authority of the members of one county

court by contract to bind the members of a succeeding court we find that the courts of various states have differed, but generally they had a different state of facts thereby causing the difference. On this question we find the rule stated in 15 C. J., page 542, as follows:

> "Although it has been held in some cases that the contract of a county board may be valid and binding, even though performance of some part may be impossible until after the expiration of the term of the majority of the board as it then existed, yet the general rule is that contracts extending beyond the term of the existing board and the employment of agents or servants of the county for such a period, thus tying the hands of the succeeding board and depriving the latter of their proper powers, are void as contrary to public policy, at least in the absence of a showing of necessity of good faith and public interest. * * * * * * * * * * "

An exception to the rule that one court may bind its successors is stated in 70 A. L. R., page 799 as follows:

> "In most jurisdictions where a board appoints an officer, or contracts for services, and the duties of the officer or the services to be rendered are duties delegated to the supervision of the board, such appointment or contract for a period beyond the term of the board is not valid. And the same rule applies to confidential relations, such as counsel for the board."

We do not think that the position of superintendent of a poor farm falls within the class referred to in 70 A. L. R., supra.

In the case of Aslin v. Stoddard County, 106 S. W. (2d) 472, the question was up where the county court on December 31, 1932, had appointed certain parties including a superintendent of a county home, the terms of whom would extend over into the next court. Only the presiding judge of the county court of Stoddard County held over. At l. c. 474 the Supreme Court, in the Stoddard County case, said:

> "* * * * The county court is a court of record, having certain judicial functions. It also has many administrative duties in connection with the care and management of county property and funds, school funds, highways, etc., and the business affairs of the county generally. When new or different district judges are elected and qualify, no 'reorganization' of the court is required. The presiding judge continues to be such. If he is replaced by another, his successor becomes, by operation of law, presiding judge. In view of the constitutional and statutory provisions creating county courts and prescribing their functions and duties, it is clear that the county court is a continuing body--not a succession of different boards or 'courts.'"

In the Stoddard County case it seems that the only appointment that was contested was that of the janitor at the courthouse. At l.c. 476 in the Stoddard County case the court further said:

> "In Manley v. Scott, supra, the Minnesota Supreme Court had before it a question similar to that we are now considering. On December 31, 1908, the board of county commissioners appointed and by written contract employed one Shaffer as morgue keeper

for the year 1909. The terms of two of the five members of the board expired at midnight that night, two new commissioners having been elected at the preceding November election. When the two new commissioners took office, soon after January 1, 1909, the board elected a new chairman and vice chairman, as required by statute, and attempted to rescind the contract with Shaffer and make a new contract with one Manley as morgue keeper for the year 1909. The court held that the board of county commissioners had power to make the contract with Shaffer when it was made and, 'Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office'; and that, the contract with Shaffer being fair and reasonable and there being no question of fraud or collusion, said contract was binding and the board, after the qualification of the new members, had no power to rescind it without cause being shown. Speaking of the question of power of the board of county commissioners to 'make a contract with an employee which extends beyond the expiration of the terms of office of certain members of the board,' the court said, 108 Minn. 142, 121 N. W. 628, 629, 29 L. R. A. (N.S.) loc. cit. 655: 'While there is some apparent conflict in the authorities, it is reasonably clear that the weight of authority is to the effect that the board has such power,' citing numerous cases. The court further said (108 Minn. 142, 121 N. W. 628, 629, 29 L. R. A. (N.S.) loc. cit. 659), quoting

approvingly from Board of Com'rs of Pulaski County v. Shields, 130 Ind. 6, 29 N. E. 385:

"'It (the board) is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason.'

* * * * * * * * *

"We regard said case of Manley v. Scott as in point and as being soundly reasoned. The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs. * * * "

The Stoddard County case sets out the law as it is to be followed in this state.

CONCLUSION.

We are, therefore, of the opinion that the present county court is bound by the contract of appointment of the superintendent of the poor farm made by the former county court in March, 1938, provided there was no fraud or collusion between the parties to the contract.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

OFFICERS: Excess fees - recovery may be had.

January 26th, 1939.

FILED
6

Honorable Noah Bell,
Presiding Judge,
Oregon County Court,
Alton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 17, 1939, requesting our opinion on the following questions:

> "No. 1. The sheriff is claiming fees for days the County Court was out taking up right of way, (Court in Vacation). Is he entitled to pay for these days? If so, does it outlaw, and how long before it does?
>
> No. 2. The ex-sheriff drew fees as a member of Board of Equalization. Can those fees be recovered by the County? Will that outlaw and if so in what time?
>
> No. 3. The last six months of 1933 and all of 1934 the Sheriff drew about $52.00 more than the law allowed for taking each patient to insane hospital. Can that be recovered at this time?"

In answer to your first question, we are enclosing a copy of an opinion rendered, on August 15, 1938, to L. L. Robinson, Chamois, Missouri, in which it is held; that the sheriff is only required to be in attendance upon the courts of record in his county when said courts are in session; that he is only to be paid for <u>actual</u> attendance upon the court at the time it is in session.

We shall treat your remaining questions together.

Section 9811, R. S. Mo., 1929, is in part as follows:

> "There shall be in each county in this state, except the city of St. Louis, a county board of equalization, which board shall consist of the county clerk, who shall be secretary of the same, but have no vote, the county surveyor, the judges of the county court, and the county assessor, which board shall meet at the office of the county clerk on the first Monday in April of each year: Provided, that in any county having adopted township organization, the sheriff of said county shall be a member of said board of equalization: Provided further, that in counties containing a population of more than seventy thousand, such board shall meet upon the first Monday of March in each year."

Under this statute the sheriff in counties not under township organization (Oregon County being such), not being a member of the Board of Equalization, is not entitled to the fee granted to members of said board.

The last question does not ask for our opinion on the legality of the fees received by the sheriff for transporting patients to state hospitals, so we assume that you are satisfied that the amount received was excessive.

Thus, we have the sheriff receiving fees, in one instance, to which he had no right, and in the other, fees which were in excess to that which the law allowed. In this situation, the question before us is: May said sums, which we assume were paid to the sheriff under mistake of law, be recovered from the sheriff, and if so, are they barred by the statute of limitations?

The authorities are in dispute on the answer to this proposition.

In State ex rel, Scotland Co. v. Ewing 116 Mo. 129, (Div. 1), a county collector had received commissions in excess of that which the law permitted. On attempt being made to recover said excess, it was shown that the collector had made his settlement with the county court, receiving the court's approval of the fees received. They held the settlement not to have the conclusiveness of judgments, and said l. c. 136:

> "The final inquiry then is whether these settlements, giving them only the force of settlements between individuals, can be avoided on account of an error of law committed by the county court, and the commissions voluntarily paid, or allowed, which comes to the same thing, recovered back. The rule is that a settlement can only be opened for fraud or for errors or mistakes of fact. Moore v. McCullough, 8 Mo. 401; Kronerberger v. Bintz, 56 Mo. 122; Quinlan v. Keiser, 66 Mo. 603.

further at l. c. 138, the court said:

> "The supreme court of Indiana denied a county the right to recover back excessive fees which had been allowed a treasurer by the county commissioners, under circumstances very similar to those disclosed in this case. The court held that the money was voluntarily paid, upon a mistake of law, and without fraud or mistake of fact; and in ordinary cases, in transactions between individuals, money this paid could not be recovered back. The court held further that the commissioners having authority to make the settlment in behalf of the county, it could not be impeached. Snelson v. State, 16 Ind. 31.

In State ex rel, v. Shipman, 125 Mo. 436 (Div.2) a situation the same as in the preceding case existed. The court adhered to the Ewing case, and said:

"This question has been recently decided by division number one of this court in State ex rel. v. Ewing, 116 Mo. 129, in which it was held that, in the absence of fraud, collusion or mistake of fact, the settlement made by a collector with the county court was binding on the county.

We have considered the argument of counsel for the county, calling in question that decision, but we are satisfied that it announces correct principles, and approve it."

This ruling was followed in State ex rel, v. Hawkins, 169 Mo. 615 (Div. 2). Again in State ex rel, v. Sanderson, 336 Mo. 114, 118 (Div. 2), the court held the same by saying:

"The annual settlement, which is required to be made, is recognized by law as something more than a mere report of the collector of the amounts collected and taxes remaining delinquent. It partakes of the nature of a settlement of the collector's accounts with the county and State. The county court has been designated by the Legislature as the agency to represent the State and county. It was held in State ex rel v. Shipman, 125 Mo. 436, 28 S. W. 842, and State ex rel. v. Ewing, 116 Mo. 129, 22 S. W. 476, that in the absence of fraud, collusion or mistake of fact, settlements made by a county collector were binding on the county. It was held that excessive commissions paid to the collector in those cases could not be recovered because they were paid under a mistake of law. On the same theory a collector was denied redress where he had been paid a less commission than permitted by law. (Hethcock v. Crawford County, 200 Mo. 170, 98 S. W. 582.)

The ruling was subsequently affirmed in State ex rel, v. Thompson, 337 Mo. 328, 335 by the court en banc, where, quoting from another case, the court stated:

> "It is settled law that settlements made between a county collector and the county court do not have the force and effect of a judgment and are not res adjudicata. In making such settlements the county court acts as a public accountant or financial agent of the county, and settlements so made amount to no more than an accounting between the principal and agent, or a settlement between individuals, and may be inquired into and corrected or set aside on the ground of fraud or mistake of fact. (State ex rel, Scotland County v. Ewing, 116 Mo. 129, 136, 22 S. W. 476; State ex rel, Lawrence County v. Shipman, 125 Mo. 436, 28 S. W. 842."

The group of cases above cited refuse the right to recover excess fee on the ground that a mistake of law cannot be corrected or set aside, and that this can only be done for fraud or mistake of fact. In other words, the county courts mistake of law cannot be corrected.

On the other hand, there is the case of Lamar Township v. City of Lamar, 261 Mo. 171, 183 (Div. 2). In this case the township collector paid over certain taxes collected by him to the city treasurer, when the city had no right thereto, and such payment was a mistake of law. On this question the court said:

> "The payments having been so made, can the plaintiff recover the money by action at law? The authorities are not uniform on this question, and in the judgment of the court it is the most doubtful question involved in the case. As between individuals, payments under a mistake of law cannot be recovered. The court has examined the authorities cited in briefs of counsel, and has reached the conclusion that, in Missouri and in the best reasoned cases elsewhere,

municipalities constitute an exception to the general rule. The case of Morrow v. Surber, 97 Mo. 1. c. 161, clearly recognizes the exception to the general rule and is much in point. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, cited by defendant's counsel, supports the contention that payments under mistake of law cannot be recovered back. The facts in this case, without the application of this rule, clearly warrants the decision on the recognized rule that a municipality cannot accept the benefits of a void contract and retain them and recover back the consideration paid. This principle was recognized in the case of Aurora Water Co. v. Aurora 129, Mo. 1. c. 574, in a very able opinion by Judge Sherwood. In other words, municipalities will not be permitted to ignore every principle of common honesty, even though their officers do exceed their authority under the law in dealing with the public. In the Schell City case the officers of the city bought machinery from the defendant and paid part of the purchase price. The contract of purchase was held void, being unauthorized by law. Thereupon the city while retaining the fruits of the contract, brought suit to recover back the money paid on the contract, and the Court of Appeals denied the right to recover back the money paid on the contract and based their opinion on the general rule that money paid under a mistake of law cannot be recovered back. But reading that case in connection with Sparks v. Jasper County, 213 Mo. 237, it will be seen that the case is only treated as authority for the proposition that municipal corporations cannot retain property bought on a valid contract and recover back the consideration paid for it. The language of the court in Ada County v. Gess, 4

> Idaho, 611, appeals to this court as a correct statement of the law. That court, among other things, says: Some authorities go so far as to hold that payments of public moneys under mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot consent to carry the doctrine beyond settlements between individuals.
>
> "A settlement made by an individual and a corporation binds the individual and these cases have caused some misunderstandings as to the law. The court holds that the public money of municipal corporations paid out by its officers under a mistake of law can be recovered back at the suit of such corporation."

further at l. c. 186, the court had this to say:

> "The serious question and the one as to which appellant most earnestly and strenuously contends, is whether the rule that money paid without protest or duress, under a mistake of law, cannot be recovered, applies as between officers of municipal corporations dealing with the money and the property of the public. That individuals may not recover money so paid, absent fraud, protest or duress, is too well settled for argument. (Needles v. Burk, 81 Mo. 569; Savings Institution v. Enslin, 46 Mo. 200; Campbell v. Clark 44 Mo. Appl 249). Likewise in other jurisdictions this rule so far as it applies to individuals, sui juris, dealing with their own property, is well nigh without exception. (30 Cyc. 1313, and cases cited). The reason for the

rule as between individuals (which while sometimes provocative of great miscarriages of justice, and while largely predicated upon expediency) is yet bottomed upon some considerations which are logical and well settled. Among these (but when wrong is being done, clearly not chief among these), is the maxim ignorantia legis neminem excusat. Likewise the rule touches nearly upon the doctrines of accord and satisfaction, and of estoppel; as also upon the rule forbidding the unsettling of things settled and thereby disturbing repose by clamorous litigation. Other maxims, e. g. volenti non fit injuria, have likewise been invoked; but confessedly even among individuals, unless the peculiar facts of the case also warrants the application of the rule ex aequo et bono, there is little logic and less of honesty in putting it upon such an excuse. The best that may be said of the rule even as applied to individuals, is that it is a handy ruly to apply in those rare cases where the application of it prevents gross injustice. (See, argumndo, Schell City v. Rumsey Mfg. Co., 59 Mo. App. 264.)

Certainly in a case like this of dealing between public officers with the public's money, no excuse for invoking this rule can be found in logic, nor in our opinion can such excuse be found in the decided cases. The rule in such case is thus stated in 30 Cyc. 1315: "Although there are cases holding the contrary, the better rule seems to be that payments by a public officer by mistake of law, expecially when made to another officer, may be recovered back." (Ada County v. Gess, 4 Idaho, 611; Heath v. Albrook, 123, Iowa, 559; Ellis v. State Auditors, 107 Mich. 528; Allegheny Co. v. Grier, 179 Pa. St. 639; State v. Young, 134 Iowa, 505; McElrath v. United States, 12 Ct. Cl. 201.)"

and at l. c. 189 the court said:

> "Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. Persons dealing with them do so always with full knowledge of the limitations of their agency and of the laws which, prescribing their duties, hedge them about. They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them and the law by which they in turn pay it out. Manifestly, none of the reasons which operate to render recovery of money voluntarily paid under a mistake of law by a private person, applies to an officer. The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority.
>
> "Neither, so far as counsel have invited our attention or we have been able to find, is this view in conflict with anything which has been ruled by us in this State. The case of Schell City v. Rumsey Mfg. Co., 39 Mo. App. 264, applies a different rule. But there were among the facts there held in judgment a peculiar condition of estoppel existing, which fairly distinguishes that case from this. Besides, that was not a case where one officer of a municipality was dealing with another officer of another municipality; there a muni-

cipality was dealing with a private business corporation. Concededly, however, the broad rule laid down largely by dictum in that case is not in harmony with the views we are now here holding. In Campbell v. Clark, 44 Mo. Appeal 249, the rule here urged was approved.

"The case of Morrow V. Surber, 97 Mo. 155, is in accord with what we here hold, though the court there went beyond the precise point up for ruling, in order to say that upon the facts there a private individual even would have been entitled to recover. Upon the two points touching the rule as it affects a public officer, and as it affects a private person, the court said in that case:

"Such a mistake as is here described furnishes ground for recovery of the money in this action. The plaintiff is the custodian of the county funds and sues here in his official capacity. He is agent of the county for the purposes defined by law, and the public is bound to take notice of the limitations of his agency. He cannot give away county funds or disburse them contrary to law. Any such disbursement is entirely invalid. If this case were between priviate citizens, the undisputed facts would support the judgment given by the circuit court under the settled law of this state. (Columbus Ins. Co. v. Walsh, 18 Mo. 229; Koontz v. Bank, 51 Mo. 275)."

The court in this case (l. c. 190) sharply criticized the holdings in the Ewing, Shipman and Hawkins cases, supra, but distinguished them rather than overruling. The distinguishing point was, so the court said, there was no settlement to contend with in that case (Lamar Township Case).

In State ex rel. v. Scott, 270 Mo. 146, 153 (Div. 1), a case in which the county clerk charged fees for work he had not done, but before the institution of the suit concerning said charge he did perform the work. The plaintiff contended that the work even though done, was not done at the time required, and for that reason plaintiff ought to recover. The court held against this contention, but said:

> "It is suggested by defendant that if the money was honestly paid, and received with a full knowledge on the part of the officers of the State of all the circumstances, it was paid under mistake of law, and cannot, therefore, be recovered back. We do not think this rule is applicable to this transaction. All the participants were officers, each acting solely in his official capacity. When one assumes to represent the State in the disposition of the people's money, he and those dealing with him must look to the law for his authority; and no subsequent act of approval, acquiescence or settlement non-judicial in character, can operate to extend that authority over an unlawful act."

In State ex rel. v. Hackman, 265 S. W. 532 (Mo. Supreme en banc), the court had this to say, l. c. 536:

> "In State ex rel. Barker v. Scott, 270 Mo. 146, 192, S. W. 90, where a clerk of the county court wrongfully certified that he had extended certain taxes, and had been

> paid therefor by the state before such work was done, it was held that the state could recover money so paid out under a mistake of law. But such recovery was not allowed in that case, because the work was subsequently done by the clerk. However, the right tc recover money paid out under mistake of law under such circumstances was clearly recognized.
>
> "The same rule had previously been laid down in Lamar Township v. Lamar, 261 Mo. 171, 169 S. W. 12, Ann. Cas. 1916D, 740."

Thus we have two lines of ruling which seem to be hopelessly in conflict with each other. The latter line represented by the Lamar Township case criticizes the principal cases in the other line and establishes that recovery can be had, even though there exists a mistake of law, The latter cases while not overuling the rule laid down in the Ewing, Shipman and Hawkins cases distinguishes them because there the officers had had a settlement with the county court. Yet, in the Thompson case, it was held that these settlements are not conclusive, but the court there went back to the holding that for mistake of law they could not be inquired into.

The latest expression of the court is found in State v. Gomer, 101 S. W. (2d), 57, 69 (Mo. Sup. Div.1). There the question involved was one concerning what compensation a county assessor should receive. The court settled that question, but because the state's evidence was such that the amount due could not be ascertained refused to pass upon the right to recover any excess fees received by the assessor. The court said however:

> "Nevertheless, we do not mean to hold that an assessor or any other officer is entitled to keep more than he is allowed to collect by law for his services even if overpayment is due to an honest mistake of law: that question is not presented by this record because it cannot be determined therefrom what this assessor was paid or was entitled to be paid. See note Ann. Cas. 1915B, 811; State v. Young, 134 Iowa, 505, 110 N. W. 292, 13 Ann. Cas. 345, and cases cited."

The authorities pointed to by the court in the Gomer case throw a very different light on the right of the county to recover excess fees. The Young case in 110 N. W. 292, 13 Ann. Cas. 345 (Iowa) was one in which it was contended that the State Binder (an officer in that State), had received pay for in excess of that to which he was entitled for binding various state publications. The statute required certain publications to be "stitched" and others to be "sewed" and the fees were governed accordingly. The binder stitched some documents which should have been sewed,and charged and received the higher compensation allowed for stitching. The court, in deciding this case, pointed out the statute pertaining to the duties of the Secretary of State in this respect and stated that it did not give the Secretary of the State authority "to fix the compensation or reclassify the reports and other documents to be bound. In so far as he is called upon to audit the accounts of the state binder as presented, he acts in a ministerial capacity, and makes the computation and executes the certificate merely to enable the binder to draw his compensation." The court then commented that the Secretary of State's duties were comparable to that of a County Board of Supervision and stated (l. c. Ann. Cas. 347C:

> "The finding of such bodies is in no sense an adjudication, to be regarded as res adjudicata. The allowance of a claim presented is in the nature of settlement between individuals and is accorded no greater effect. Poweshiek County v. Stanley, 9 Ia. 511. And, in the absence of fraud or mistake, the allowance of a claim by such body can no more be set aside than an adjustment of different items between individuals. Poweshiek County v. Stanley, supra; Commissioner's Ct. v. Moore, 53 Ala. 25. Even to be accorded such effect as will hereafter appear, the items allowed must be such as might have been considered by the board or council, and, if prohibited by law, the municipality will not be bound by the action of its agents."

Further at l. c. 348, the court said:

> "It is conceded that the secretary held the work to have been properly done, and of this no complaint is made. The contention of the state is that, though properly done, the secretary certified that the state binder was entitled to an amount of compensation therefor in excess of the fees fixed by law, and this is conclusively shown by the record before us. Under these circumstances, can the payment of the excess to the state binder be regarded as voluntary? Where the amount to be paid is definitely fixed by law, as a salary, the state is universally held not to be bound by a mistake in amount paid by the officer issuing the warrant. Such officer is regarded as the trustee or agent of the state, and in making any payment other or in excess of that to which the law allows is plainly acting beyond and outside

> the scope of his duty; and this is not only within his knowledge, but that of him with whom he deals, for every one is presumed to know the law. There is a broad distinction between the acts of a public officer in this respect and the agent of an individual or private corporation. In the case of the latter, it is enough that the agent be clothed with apparent authority and that third persons deal with him innocently. Then, even though he violated his private instructions, the principal is bound. Good faith requires this much, for the principal has held him out as competent to act.
>
> But it is not so with public officers acting in a ministerial capacity. Their authority is written in the statutes. All men are charged with knowledge of the extent of such authority. Necessarily they must know when their powers are exceeded, and act at their peril."

The court after reviewing a number of cases holding that such amounts can be recovered had this to say, l. c. 348, 349:

> "There are decisions holding that payments of claims in mistake of law by public officers may not be recovered; but these are planted either on the theory that the allowance of a claim is an adjudication, as Heald v. Polk,County, 46 Neb. 28, 64 N. W. 376, and Richland County v. Miller, 16 S. C. 236, a doctrine which, as seen, does not obtain in this state, or that the payment is voluntary. State v. Ewing, 116 Mo. 129, 22 S. W. 476; Painter v. Polk County, 81 Ia. 242, 47 N. W. 65, 25 Am. St. Rep. 489. These last cases rest on

the proposition that voluntary payments by a public officer may not be distinguished from such payments by an individual. See Kraft v. Keokuk, 14 Ia. 86; Ahlers v. Estherville, 130 Ia. 272, 104 N. W. 453. This is not so, as was clearly pointed out in Heath v. Albrook, supra, in overruling Painter v. Polk County, supra; for the individual acts for himself, and no question of exceeding his authority is involved when he makes payment to an officer or other person, Money cannot be taken from the public treasury lawfully, save for the purposes and in amounts as directed by statute, and the officer, in doing so, acts, not for himself, but in behalf of the public; and if he does so in violation of law he necessarily exceeds his authority, and the public is no more bound by his act than is any principal by the unauthorized act of his agent. It is to be noticed that the opinion in the Painter case was based on a decision of the Supreme Court of the United States which expressly recognized this principle, but denied recovery of a salary paid Gen. Badeau on the ground that he was a de facto officer during the period for which he had received it. See Badeau v. U. S., 130 U. S. 439, 9 S. Ct. 579, 32 U. S. (L. ed.) 997. That case, as said, was overruled by Heath v. Albrook, supra, and all the more recent opinions are to the effect that the rule with respect to voluntary payment by individuals has no application, where ministerial officers have made illegal payments of public money to public officers. These proceed upon the ground that such officers are merely the agents of the public, and in acting beyond the scope of their authority do not bind their principals. In other words, the mistake is the mistake of the agent, and not that of his principal.

> The officer may have thought that he had authority of law to make payments or to execute certificates upon which payments should be made; but in this he was mistaken."

And in conclusion the court stated, l. c. 349, 350:

> "Our conclusion rests on the general principle that the public is not bound by the acts of its officers when outside of or beyond the scope of their authority. The public law, of which courts and individuals are bound to take notice, and of which no party can claim ignorance, is the source of the power of the secretary of state, as well as every other official, defining such power with clearness and certainty. It does not clothe him with authority to create any new claim, or to amend statutes, or to increase the compensation of any other officer with whom his duties are connected; and to support the bills he has certified in behalf of the state binder, resort must be had, not to his act in certifying, but to the statutes fixing the compensation to which the latter official is entitled. If payments have been made, owing to his certificates computing compensation at higher rates than those fixed by law, these, to the extent of the excess, cannot be regarded as voluntary. The money, but not the title thereto, has been transferred, and restitution may be enforced in an appropriate action. Any other rule, especially one which would countenance the contention of the appellee that a public officer who has received money from the public treasury from another public officer without warrant

> of law may obviate restoration to the owner, the public, on the pretext that the paying officer misconceived his duty to the public, would encourage official corruption by collusion and be opposed to sound public policy."

This case illustrates, we think, (see quotation from pp 348, 349) the vice of the first group of Missouri holdings. This is that it applies the same rule, on mistakes of law, that exists between individuals. This rule cannot apply because it is firmly established in this state that a principal cannot be bound when his agent acts beyond the scope of his authority, and especially is this so where the authority of the agent is known. Tate v. Evans, 7 Mo. 419; Burnham v. Williams, 198 Mo.App. 18. No citation of authority is needed for the principle that the county court is merely the county's agent and only has such authority that is conferred upon it by statute. The same is also true with respect to every man is presumed to know the law.

Thus, the sheriff presumably knew that he was not entitled to these excess fees and knew that the county court was acting in excess of its authority when they paid the same to him.

The annotator in 13 Ann. Cases, 351, where a number of cases are compiled from all jurisdictions, sums up their holdings with this statement:

> "On grounds of public policy, the rule as to voluntary payments or payments made under a mistake of law is ordinarily, as pointed out in the reported case, held not to apply to fees or compensation paid out of public funds to public officers. In the first place, in as much as public revenues are trust funds and ministerial officers are trustees for the

> administration of those funds, it is not within the scope of their authority to make payments unauthorized by law. Ellis v. State Auditors, 107 Mich. 528, 65 N.W.577; Jones v. Lucas County, 57 Ohio St. 189, 48 N.E. 882,63 Am.St.Rep.710. In the second place, the fidelity which public officers owe to the government in whose services they are makes restitution a duty. Allegheny County v. Grier, 179 Pa.St. 639, 36 Atl.353. Accordingly, it is a general rule that fees or compensation paid illegally or by mistake, out of public funds, by ministerial officers or boards to public officers, or amounts collected by public officers which they have been permitted illegally to retain as fees or compensation, may be recovered back."

Another case where this question is discussed is County Court of Tyler County v. Long, 77 S. E. 28, Ann. Cas. 1915B, 808 (W.Va.). There the court said l. c. Ann. Cas. 811:

> "Lastly, the question is presented whether the county court, having voluntarily paid these items, can recover them from the defendant? If private individuals alone were involved the right would be very doubtful; indeed the genral rule seems to be that voluntary payment, made by mistake or ignorance of law, but with full knowledge of all the facts, and not induced by fraud or improper conduct on the part of the payee, cannot be recovered back. But this rule, it seems, is inapplicable to unauthorized payments of public money by fiscal bodies, such payments being regarded as in fact no payments and not voluntary payments."

The annotator in the case l. c. 811, summing up the cases collected has stated:

> "The rule relative to the recovery of payments made under mistake of law, is generally considered to be inapplicable to fees or compensation paid out of public funds to public officers, and it is accordingly held, as stated in the reported case, that fees or compensation paid illegally or by mistake, out of public funds, by ministerial officers or boards to public officers, or amounts collected by public officers, which they have been permitted illegally to retain as fees or compensation, may be recovered."

It will be noticed that the Missouri authorities heretofore cited for the most part, reached their conclusion by the assumption that the settlements of the county court were in the nature of judgments which could not be inquired into on mistake of law, although they do not come right out and say so in so many words. But in the Thompson case (337 M. l. c. 335) this was held not to be so. There the court held claim merely to be the same as settlements between individuals, but then held mistakes of law could not be corrected.

A more literal and exact description of what this function of the county court is, appears in Howe v. State, 53 Miss. 57. There it is said, concerning Mississippi's Board of Supervisors, comparable to our county courts, when it was claimed the approval and settlement of the county treasurer's account was final, that:

> "The duties of the board are ministerial, and not judicial, in this respect. The board has no power to decide what commissions the county treasurer should have. The law fixed that at a certain rate per centum on receipts and disbursements. It was a mere matter of calculation. That the board considered and decided that (the treasurer) was entitled to greater commissions than allowed by law did not sanctify his wrong in claiming it, did not change the law, and did not make the money in his hands belonging to the county his money."

The holdings heretofore set out that a mistake of law cannot be set aside by the principal (the public), when the mistake occurs between an individual (officer) and an agent (county court) is directly in conflict with the case of Huntsville Trust Co. v. Noel, 12 S. W. (2d) 751 (Mo. Sup.). That is a case where a bank failed to legally qualify as county depository. The bank attempted to qualify, but for some reason, (not quite clear from the opinion), failed to do so. The failure was in some connection with the bond given under a statute which all parties misconstrued. On this the court said l. c. 754:

> "As heretofore stated, all county funds are required by law to be deposited in a county depository. The officers of the county charged with duties relating to the deposit of such funds for safe keeping are agents of limited powers, and as such they have no authority to deposit these public moneys with any other than a county depository. Now a bank or trust company does not become a county depository merely by being designated as such in an order of the county court;

> it must qualify as a depository by giving the security prescribed by section 9585. If, therefore, the trust company had not so qualified on June 27, 1927, the deposit of the county funds with it was unlawful; and it, in receiving such funds under color of being a county depository, wrongfully obtained possession of them. The county moneys so obtained thereupon became, in the hands of the trust company, a trust fund by operation of law. These funds entered into, became commingled with, and to that extent augmented, the trust company's assets as a whole. Such assets may therefore be impressed with the trust to the extent of the funds so wrongfully obtained and commingled with them."

We have pointed out the cases in this state which bear on this subject. They are, as can be seen, not uniform. We have pointed out the inconsistency of the rule, that where the public money is concerned and a mistake of law exists no recovery can be had, with other established rules on principle and agency and in cases involving public funds. We have shown that in other jurisdictions such rule has been repudiated and was repudiated in this state in the Lamar case, but seemly reinstated in the Thompson case. The last expression of the court (Gomer case) and the cases cited therein are indicative that the rule might have been clarified if the question had been presented in the Gomer case.

Before reaching a conclusion in this opinion, there remains the question of limitations to be disposed of. Section 863 R.S.Mo. 1929, covers this situation and is as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In Putnam County v. Johnson 259 Mo. 1. c. 85, it is held that fees although illegal and excessive, were within the purview of the above statute and any suit to recover the same would be barred three years after the statute commenced to run, that is, when the illegal fees were received.

CONCLUSION

Our conclusion is that, in the face of decided cased directly in point (Ewing, Shipman and Hawkins cases), we cannot say that recovery of these illegal fees can be had, but we are impelled to the decision that if this matter were presented to the courts, in the light of the cases we have reviewed here, that recovery is entirely feasible.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY,
Assistant Attorney General.

J. W. BUFFINGTON
(Acting) Attorney General.

LLB:RV

BOMBING: Approved form of information for destruction of buildings by explosives.

September 7, 1939

FILED
6

Honorable G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

We are in receipt of your letter of September 4, 1939, enclosing form of an information drawn by you in the case of State of Missouri v. Isadore Londe, said information, omitting caption, reading as follows:

> "Comes now G. C. Beckham, Prosecuting Attorney within and for the County of Crawford and State of Missouri, and upon his official oath informs the Court that in the township of Benton, County of Crawford and State of Missouri, on or about the 7th day of June, 1939, one Isadore Londe did then and there wilfully, maliciously and feloniously injure a building, to-wit, a factory building then and there located, the property of Edward F. Wall, A. J. Barnett and George B. Hamilton, trustees for the Business Men of Cuba, Missouri, by the use of two bombs composed of black powder or other high explosives unknown to the Prosecuting Attorney, against the peace and dignity of the State."

We are suggesting three minor changes, which are:

1. That the building be described more exactly, both as to composition and location.

2. That said building be described as the property of the proper trustees by virtue of their offices as trustees of the business men of Cuba, and you

should set out the nature of the organization, whether a corporation or co-partnership.

3. We are suggesting that you omit any description of the contents of the bombs used since the statute does not require it and since you possibly would have some difficulty in proving the exact contents. The word "bomb" is defined in the Laws of Missouri, 1935, at page 226, which, we believe, will cover any imaginable device which could have been used by the offender in your case.

We are unable to find any cases in which an information for bombing is set out, but are suggesting the following form:

"Comes now G. C. Beckham, Prosecuting Attorney within and for the County of Crawford and State of Missouri, and upon his official oath informs the court that in the Township of Benton, County of Crawford and State of Missouri, on or about the 7th day of June, 1939, one Isadore Londe did then and there wilfully, maliciously, unlawfully and feloniously injure a building, to-wit, a factory building composed of (brick, wood, stone or other materials) located on the following described real estate, situated in the Town of Cuba, County of Crawford and State of Missouri; (give legal description of real estate on which building is located) the said building being the property of Edward F. Wall, A. J. Barnett and George B. Hamilton by virtue of their offices as trustees for the business men of Cuba, Missouri, (state whether a corporation or co-partnership) by the use of two (2) bombs, against the peace and dignity of the State."

We believe that the above form of information fully complies with the statute and sets out all necessary requirements.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:VC

CONSERVATION COMMISSION: Agents are entitled to certain fees under Section 8287 for making arrests.

October 10, 1939

FILED 6

Mr. G. C. Beckham
Prosecuting Attorney
Crawford County
Steelville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 19, 1939, which is as follows:

> "The various Conservation agents operating over the State have been instructed by the State Conservation Commission that they are entitled to collect a fee of $3.00 for each person they arrest and who is convicted of violating the fish and game laws, said $3.00 to be taxes as costs and retained by the agent individually. Will you kindly give me your opinion as to whether or not that said $3.00 should be taxes as costs, and if so is the Conservation agent entitled to retain it in his individual capacity?"

Section 8287, R. S. Mo. 1929, provides:

> "When an arrest for a violation of this article is made by any commissioner and the defendant is convicted, there shall be taxed as costs in favor of such commissioner making the arrest the same fees as a constable is entitled to in a case of misdemeanor, and, if collected from the defendant, shall be paid

> over to such a commissioner, and shall be his personal perquisite, for which he need not account, but no fees shall be allowed in case of acquittal, nor shall any county or the city of St. Louis be liable for such fees in any event."

In Laws 1937, page 614, there appears the Constitutional Amendment creating the Conservation Commission and defining its powers. Of this amendment, it is said in Marsh v. Bartlett 121 S. W. (2nd) l.c. 744, "There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith."

Section 8287, supra, was in existence at the time the above amendment was adopted, thus we must determine if said section is inconsistent with the amendment creating the Conservation Commission.

By said amendment the "control, management, restoration, conservation and regulation" of all wild life resources of the State is vested in the Conservation Commission. Section 8287, supra, merely gives certain fees to a game warden for the performance of his duties. Without further discussion of the point, we do not see how a statute granting a fee can in any way be inconsistent with the control, management, etc., of the wild life resources of the state that is vested by said amendment in the Conservation Commission. Said section not being inconsistent with said amendment it still remains a law of the state.

The fees that a constable is entitled to for his services in a misdemeanor case are fixed by Sections 11777 and 11791 R. S. Mo. 1929. An examination of these sections does not disclose that said officer is entitled to any flat fee of $3.00 for making an "arrest." The only pertinent provisions in said sections that can be conceivably construed as applying to give fees to these conservation agents are found in Section 11777, and they are as follows:

> "Constables shall be allowed fees for

their services as follows:

For serving warrant in any criminal case, for each defendant	$1.00
For taking a criminal to jail	1.00
And for every mile traveled in taking a criminal to jail and returning therefrom, provided the distance so traveled be more than five miles, the sum of, per mile	.10
For each mile actually traveled in serving any process	.10"

We have deleted from this statute other provisions for fees that do not apply to the instant question.

As we read the above statute, it authorizes fees to be taxed as costs for the services of a conservation agent in the following cases and amounts. (1) If the agent makes an arrest under a warrant there is to be taxed as costs $1.00 for serving that warrant and ten cents per mile for each mile he actually traveled in serving the warrant. (2) If the agent makes an arrest without a warrant (and this can only be for offenses committed in his view) there is to be taxed as costs $1.00 for taking said offender to jail and ten cents for each mile actually traveled in taking said offender to jail and the return therefrom, provided the distance is over five miles.

Therefore, we are of the opinion that in prosecutions for violation of the rules and regulations of the Conservation Commission where an agent of that body made the arrest, if the defendant is convicted the fees above mentioned are to be taxed as costs and if collected from the defendant belong to and are the personal perquisite of the conservation agent.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

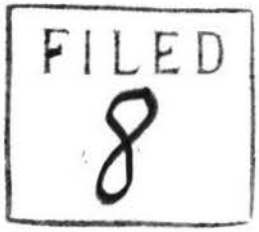
APPROVED:

W. J. BURKE
(Acting) Attorney General
LLB:RT

MARRIAGE: A marriage in Missouri between a man of twenty-one years of age and a woman of sixteen years of age is voidable.

November 18, 1939

FILED 8



Mr. Frank L. Bihlmeier
401 Laurel Building
Muscatine, Iowa

Dear Sir:

We are in receipt of your request for an opinion under date of November 9, 1939, which reads as follows:

> "Please advise me as to the legal status in your State of a marriage consummated between a man of twenty-one years of age and a woman of sixteen years of age.
>
> "The ceremony was performed in your State upon statements or affidavits that the woman was eighteen.
>
> "We desire to be advised if the marriage is legal or null and void under your laws. In your reply, we would very much appreciate if you would quote to applicable sections of your statutes.
>
> "The above is for my guidance in a situation confronting me and I, as well as our court, will appreciate your courtesy in giving us the information and data as promptly as possible."

Section 2973 R. S. Missouri, 1929, reads as follows:

> "Marriage is considered in law as a civil contract, to which the consent of the parties capable in law of contracting is essential."

Section 374 R. S. Missouri reads as follows:

> "All persons of the age of twenty-one years shall be considered of full age for all purposes, except as otherwise provided by law, and until that age is attained they shall be considered minors. (R.S. 1919, sec. 370. Amended, Laws of 1921, p. 399)."

The question confronting us is, briefly, whether in view of the above statutes, the marriage you describe in your set of facts is void or is merely voidable. We have been unable to find any cases in this jurisdiction directly in point on the foregoing proposition.

In 38 C. J. 1283-1284, it is said:

> "While in some states the age of consent as fixed by the common law has been adopted, in a majority of jurisdictions it has been increased by statute. Occasionally such statutes expressly or by clear inference provide that a marriage contrary to their provisions shall be absolutely null and void; but unless they show an unequivocal intention to abrogate the common-law rule they will be construed as directory merely, and as rendering a marriage contrary to their provisions not void, but voidable. * * ."

There is language in the case of Guthery v. Wetzel, 226 S. W. 626, l.c. 628, which seems to indicate that our courts, if a situation such as yours was presented, would follow the general rule set forth in Corpus Juris. In that case was involved the problem of marriage with a person of unsound mind, and the court said:

> "The Legislature in enacting section 8280 and 8281, R. S. 1909, has singled out the marriages that are absolutely void in this state, leaving, I think, a necessary inference that it was the intention that all other prohibitive marriages should be voidable only. * * ."

The above language, as used in the Guthery case, seems to indicate that a marriage such as that described by you, is not void, but voidable.

There is one other related statute, which explains to you the necessity of the woman swearing that she was eighteen years of age. That section is Section 2983 R. S. Missouri, 1929, relating to the issuance of the marriage license, and reads as follows:

> "No recorder shall in any event except as herein provided issue a license authorizing the marriage of any person under fifteen years of age: Provided, however, that said license may be issued on order of the circuit or probate court of the county in which said license is applied for, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable, and no recorder shall issue a license authorizing the marriage of any male under the age of twenty-one years or of any female under the age of eighteen years, except with the consent of his or her father, mother or guardian, which consent shall be given at the time, in writing, stating the residence of the person giving such consent, signed and sworn to before an officer authorized to administer oaths. The recorder shall state in every license whether the parties applying for same, one or either or both of them, are of age, or whether either or both are minors, and if either party is a minor, the name of the father, mother or guardian consenting to such marriage."

Section 2983, supra, was repealed and reenacted in Laws of Missouri, 1939, page 509, virtually word for word.

CONCLUSION

In view of the foregoing authorities, our conclusion and opinion is that a marriage consummated in this

state between a man of twenty-one years and a woman of sixteen years is not void, but voidable.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

COUNTY COURTS: EXECUTING CONTRACTS: SIGNING WARRANTS: FACSIMILE SIGNATURES:

County courts may appoint agent to execute contracts or each member of the court agreeing to the contract may sign it. The elected presiding judge or acting presiding judge may sign county warrants. The county judge may not use a rubber stamp containing his facsimile signature to sign warrants.

January 19, 1939

1-27

FILED

9

Mr. David E. Blanton
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

This is in reply to yours of the 17th wherein you requested an opinion from this department on the following questions:

1. "Where all Three members of the Court are present but the two associate Judges fail to agree with the Presiding Judge, who under the circumstances has the power and authority to sign instruments such as Contracts entered into by the Court."

2. "I also desire the benefit of your opinion as to whether or not any person other than the Presiding Judge can sign County Warrants, in the event he is absent from the Court due to ill health or otherwise. I have been unable to find any provision that provides for the signing of Warrants by anyone other than the Presiding Judge."

3. "I would also appreciate the benefit of your opinion as to whether or not the Presiding Judge would be complying with the requirements of the Statutes in the signing of a County Warrant by using a rubber stamp with a facsimile signature thereon."

I.

As to the first question which you have submitted we find that Section 2091, R. S. Missouri, 1929, has some application to the subject. This section provides as follows:

> "A majority of the judges of the county court shall constitute a quorum to do business; a single member may adjourn from day to day, and require the attendance of those absent, and when but two judges are sitting and they shall disagree in any matter submitted to them, the decision of the presiding judge at the time being, to be designated by the clerk of such court, shall stand as the judgment of the court."

Section 12107, R. S. Missouri, 1929, also provides as follows:

> "The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

In the case of Morrow v. Pike County, 189 Mo. l.c. 616, we find where a contract was entered into by the county court wherein all the members of the court signed it. This contract as to form was not even questioned.

The rule as to the requirements as to form and manner of making contracts is stated in 15 C. J., page 552, section 248 in the following language:

> "Where the mode and manner of contracting are not prescribed, nor the persons or agents by and with whom contracts are

> to be made, counties may make contracts in all matters necessarily appertaining to them in the same manner as individuals or other corporations. If, however, such mode and manner of contracting, or the officers or agents by and with whom contracts are to be made, are prescribed, the mode prescribed must be pursued. More specifically, it may be said that a contract with a county need not be in writing unless required by statute; but it is frequently required by statute that contracts made on behalf of the county shall be in writing and entered on the minutes by the body making the contract as an agent of the county, and a contract not so evidenced is unenforceable, * * * * * * * * * * * * * * * * * * "

County courts, in the execution of contracts, are controlled by the provisions of Section 2962, R. S. Missouri, 1929, which provides as follows:

> "No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

County courts are creatures of the statute and their powers and duties are derived from the statute and they must look entirely to the statute for authority to perform any act that they may undertake. In the case of Cummings v. Clinton County, 181 Mo. 167, we find where two members of the county court entered into an agreement to pay a

reward and the court held that the county was bound by that agreement. In case the presiding judge of the court refuses to sign or execute a contract which has been agreed to by the other members of the court, then the members of the court agreeing to the contract may sign it and bind the county, or such members of the court agreeing to the contract may, by an order of record, designate some agent to execute the contract as is provided by Section 12107, supra. From our reading of the statute pertaining to the question it seems that if the presiding judge and the county clerk execute the contract they are doing so because they have been authorized as agents of the county court as provided by said section 12107. The county court could designate any other person to execute the contract for them. If the presiding judge refuses to perform some administrative duty in connection with the contract that has been agreed to by the other members of the court, then by mandamus he could be forced to perform such duty, such as issuing any warrants that may be required by the contract.

CONCLUSION.

From the foregoing we are of the opinion that in case the presiding judge of the county court refuses to sign or execute a contract which has been agreed to by the other members of the court, then the members of the court agreeing to the contract may sign it or designate the execution of the contract to any other person, and such contract so signed will be binding upon the county.

II.

Your second question goes to the authority of any person other than the presiding judge of the county court to sign warrants.

On this question we find that Section 12170, R. S. Missouri, 1929, provides as follows:

> "Every such warrant shall be drawn for the whole amount ascertained to be due to the person entitled to the same, and but one warrant shall be drawn for the amount allowed to any person at one

> time, and shall be written or printed in Roman letters, without ornament. It shall be signed by the president of the court whilst the court is in session, attested by the clerk, and warrants shall be numbered progressively throughout each year: Provided, that where the claim allowed is for more than twenty-five dollars, the claimant may, on his own motion, in open court, have as many warrants issued for separate parts of such claim as he may desire, the whole amount of said warrants not to exceed the amount of the claim allowed, upon his paying the costs of the additional warrants."

We find that the Supreme Court in the case of Isenhour v. Barton County, 190 Mo. 163, 170, in dealing with the question of county warrants said:

> "County warrants are creatures of the statute, and can only be issued in accordance therewith, * * * * * * * * * Such warrants are merely evidences of indebtedness, nonnegotiable, and the Legislature had the power and authority to prescribe their form, by whom they should be signed and attested, * * * "

And in Steffen v. Long, 165 Mo. App., 255, l.c. 259, in discussing county warrants, the court said:

> "The plaintiff did not have the right to the possession of this particular warrant for another reason, viz., it was not signed by the president of the county court. County warrants are creatures of the statutes and can only be issued in accordance therewith. (Isenhour v. Barton County, 190 Mo. 163, 170, 88 S. W. 759.) The Legislature had the power and authority to prescribe, and did prescribe, that they shall be signed by the president of the county court (Isenhour v. Barton County, supra; R. S. 1899, sec. 6797), and without such

signature they cannot be lawfully issued."

Said Section 12170 provides that the president of the court shall sign the warrant. The term "president of the court" has been construed by the administration officials to mean the presiding judge of the court. Webster's Dictionary defines the word "president" to mean presiding.

As we fail to find wherein the lawmakers have provided for any other person to act as a presiding officer of the court than the presiding judge, we think they have intended that the president of the court and the presiding judge shall be one and the same person and that the presiding judge is the one that the lawmakers have intended who shall sign warrants.

While under the statutes it is the duty of the presiding judge, that is, the judge who is elected from the body of the county to sign the warrants, yet if for any cause he is unable to be in court and perform that duty, then we think the lawmakers, by the provisions of Section 2091, supra, have made provisions for a presiding judge to be authorized by the clerk of the court, when the presiding judge is absent, to designate one of the district judges as presiding judge. Said Section 2091 states that a majority of the members of the court may attend to the business of the county. By attending to the business of the county would necessarily imply the duty of issuing warrants. When the clerk of the county court, as authorized by said section, designates one of the members as presiding judge, then we think the lawmakers intended that that person so designated as presiding judge may sign the warrants as directed by said Section 12170.

CONCLUSION.

From the foregoing it is the opinion of this department that in case the presiding judge of the county court is unable to attend a session of the court and sign the warrants that may be required to be signed at such sitting, then if the other two members of the court who are present and holding court and are doing business with the county that member of the court who has been designated by the

clerk as presiding judge may sign the warrants and his acts will have the same force and effect as those of the regularly elected presiding judge of the county court.

III.

Your third inquiry goes to the question of whether or not the presiding judge of the court may use a rubber stamp which contains a facsimile of his signature thereon in signing county warrants.

Again referring to Section 12170, supra, we find this section requires that the warrants shall be signed by the president of the county court. As hereinbefore stated we have treated the term "president of the county court" and the term "presiding judge of the county court" as to be one and the same person.

In the seventh subsection of Section 655, R. S. Missouri, 1929, it is provided as follows:

> "* * * * seventh, the words 'written' and 'in writing,' and 'writing word for word,' shall include printing, lithographing or other mode of representing words and letters, but in all cases where the written signature of any person is required, the proper handwriting of such person, or his mark, shall be intended; * * * * * "

In the case of Steffen v. Long, 165 Mo. App. 255, 259, the court, in speaking of what the lawmakers provided for officers to do in connection with the issuance of warrants, said:

> "* * * * The Legislature had the power and authority to prescribe, and did prescribe, that they shall be signed by the president of the county court (Isenhour v. Barton County, supra; R. S. 1899, sec. 6797), and without such signature they cannot be lawfully issued."

In Vol. 94 A. L. R., page 766, the case of Smith et al. v. Curran in the Michigan Supreme Court is reported and the following rule is announced:

> "The requirement of a city charter that all bonds issued by the city shall be signed by the mayor, countersigned by the comptroller, and attested by the city clerk, and bear a statement to be signed by the city treasurer, is not satisfied by facsimile signatures printed on bonds, so as to render it incumbent on the comptroller to countersign bonds so prepared, even though the use of facsimile signatures may have been authorized by the common council."

And at l. c. 768, the court said:

> "* * * * The precise, specific, and cautious provisions of the charter surrounding the issuance of bonds, obviously designed to provide checks against issuance of spurious securities and to afford evidence of genuineness for ready marketing, put it beyond doubt that the people intended official action of the four officers to be proved by their own handwriting. If any of them may adopt a facsimile signature, all of them may, and the safeguards imposed by the charter would be impaired."

In a comparison of the Michigan statutes with the Missouri statutes we find them to be somewhat similar on the question of signatures by officials, that is, the authority to use a rubber stamp containing the facsimile signature of a person instead of the person writing the signature in his own handwriting or attaching his mark in place of the signature. If the presiding judge of the county court is permitted to use a rubber stamp to attach his signature to the warrant, then any other person who has a duty to perform in connection with the issuance of such warrants could use a rubber stamp to

attach his signature thereto, and we think that the lawmakers by the language they have used in Section 655, supra, and Section 12170, supra, clearly express their intention that they did not intend for the officer to sign a county warrant in any other manner than in his own handwriting or by placing his mark thereto.

CONCLUSION.

In view of the foregoing it is the opinion of this department that the lawmakers did not intend that the president of the county court or the presiding judge who is one and the same person should use a rubber stamp containing his facsimile signature in signing county warrants, but that such warrants must be signed by him in his own handwriting or his mark must be attached thereto and witnessed instead of his signature if he cannot write his own name.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

TAXATION:
DRAINAGE DISTRICTS:

Lands purchased by drainage districts for the purpose of protecting drainage tax lien are exempt from assessment and sale for general taxes accruing subsequent to its acquisition by the drainage district.

February 13, 1939

FILED
9

Mr. Charles T. Bloodworth, Jr.
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this department which is as follows:

"The Inter-river Drainage District of Butler County, Missouri, is requesting the County Assessor of this county to not assess Inter-river Drainage District lands held by them in this county. Mr. King has asked me to request an opinion from you as to the legality of the proposal of the Inter-river Drainage District.

"The said District has also approached the county court, regarding exemption of their lands from general state and county taxes, apparently, basing their contention on the case of Grand River Drainage District of Cass and Bates County, vs. Reid, 111 S. W. 2nd. 151.

"I have advised the county court to refuse to make the exemption. I would appreciate your opinion regarding that action also."

In your letter of the 10th which was in reply to ours of the 6th relating to your request, you stated that the Inter-River Drainage District case is similar to the Grand River Drainage District case referred to in the case of Grand River Drainage District of Cass County v. Reid, 111 S. W. (2d) 151.

In our research on your question, we find that the Inter-River Drainage District of Butler County was formed pursuant to the provisions of chapter 63, Article I, R. S. Missouri, 1929, provided for the organization of Drainage District by Circuit Courts. It was organized under the same law by which the Grand River Drainage District of Cass and Bates Counties was formed, to which district we will refer later in this opinion.

Since the question which you have submitted is identical with the subject of the suit in the case of Grand River Drainage District of Cass and Bates Counties, 111 S. W. (2d) 151, we will refer to that opinion for the answer to your request.

We will assume that the district has come into possession of the lands sought to be taxed by virtue of the provisions of Section 10766, R. S. Missouri, 1929, which is as follows:

> "To protect said lien of said drainage taxes upon the lands and other property against which said taxes shall be levied, in any case where delinquent lands are offered for sale for such delinquent taxes, and the amount of the tax due, together with interest, cost, and penalties is not bid for the same, the board of supervisors shall have authority to bid or cause to be bid, not to exceed the whole amount due thereon, as aforesaid, in the name of the drainage district, and in case such bid is the highest bid, the sheriff shall sell and convey such lands to such drainage district, and

> such lands shall thereupon become the property of the drainage district, and may be held, disposed of, and conveyed by the board of supervisors at such price and on such terms, as in the discretion of the board of supervisors may be to the best interest of the district. If such lands, or other property, are sold by the board of supervisors the purchasers thereof shall take the same subject to all said drainage taxes thereafter becoming due, the same as all other lands and other property in the district. The board of supervisors shall also have authority to protect the lien of the drainage district for drainage taxes by paying the general, state, county, school and road taxes, and in case the lien of the state for such general, state, county, school and road taxes is foreclosed, and the land, or other property, sold for such general taxes, and the said drainage district is not made a party to the proceedings foreclosing the said lien for such general taxes, the said board of supervisors shall be authorized at any time within one year after said sale to redeem such lands, by paying not to exceed the whole amount of such taxes, together with penalties and costs accrued thereon."

The Grand River Drainage District case holds that a drainage district, such as your district, is a municipal corporation.

Section 6 of Article X of the Constitution of Missouri, exempts from taxation properties of municipal corporations.

The courts, however, hold that such properties may not be exempted if they are used by the municipality in a

proprietary manner. The contention in the Grand River Drainage District case, supra, was that the district was holding and using lands which it had purchased to protect its lien in a proprietary and not a governmental capacity.

At l.c. 153 of the Grand River Drainage District case the court said:

> "The instant case was presented under stipulated facts to the effect that after acquiring the lands involved appellant desired to sell the same to satisfy its drainage taxes; that, although it endeavored so to do, it has been unable to obtain a fair price therefor and is holding said lands to protect its lien for drainage taxes. The record presents no fact reflecting or tending to reflect on the bona fides of appellant's acquisition or retention of the lands in controversy for the protection of its lien for drainage taxes. Appellant is holding the lands until it is practical to dispose of them. Its lease of the lands for agricultural purposes and the application of the rentals, pending a sale, to the discharge of its expenses and bonded indebtedness is a husbanding of its resources for the promotion of its governmental and public functions. Rentals derived therefrom are incidental to the primary object and within the spirit of the statute authorizing the protection of its lien for drainage taxes. Such rentals and any proceeds from sales of the lands will stand in lieu of the taxes. The conduct of a commercial enterprise for profit or speculation in land values is not established by the record. Drainage districts are of statutory origin, possessing only such power as is expressly delegated or necessarily implied from

> those granted. So long as they proceed in conformity with the expressed or implied authority conferred, we perceive no reason why they may not successfully invoke the protection of section 6, art. 10 of our Constitution. * * * * * "

CONCLUSION

By virtue of the foregoing statutes and the ruling in the Grand River Drainage District case, supra, if the Inter-River Drainage District of Bates County has purchased lands for the purpose protecting drainage district tax liens and is now holding said lands for the purpose of satisfying said liens only, then such district may invoke the provisions of section 6, Article X of the Constitution of Missouri and be exempted from having said lands assessed and sold for general taxes while it owns them for the purposes aforesaid.

We are further of the opinion that while a district owns these lands it may lease them or rent them for any purpose, applying the rentals pending the sale to the expenses and to the discharge of the bonded indebtedness of the district.

This rule, however, only applies to taxes which are assessable after the district becomes possessed of the lands.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:DA

COUNTY COLLECTORS: Hold over until their successors are qualified.

June 15th, 1939.

FILED

Hon. David E. Blanton,
Prosecuting Attorney,
Scott County,
Sikeston, Missouri.

Dear Sir:

We are in receipt of your request for an opinion, which is as follows:

> "I have a situation in my County about which I would appreciate an opinion from your office.
>
> "In 1934, One C. E. Felker was elected Collector of Revenue for Scott County, Missouri, and qualified and held the office throughout the period for which he was elected. In 1938, he was re-elected to that office and is at this time occupying the suite in the courthouse designated for the Collector of Revenue.
>
> As yet, however, Mr. Felker has not complied with Section 9885 of the Revised Statutes of the State of Missouri, 1929, as amended by the Laws of 1933 at Page 464, and as amended by the Laws of 1935 at Page 408, which Section requires that the Collector of Revenue in the various Counties in this State before entering upon the duties of his office, shall give bond and

security to the State to the satisfaction of the County Courts and conditioned that he will faithfully and punctually pay over all state, county and other revenue for the Four (4) years next ensuing the first day of March thereafter and that he will in all things, faithfully perform all duties of the office of Collector according to law.

"Section 9902, R. S. Missouri, 1929, requires that the terms for which Collectors are elected shall expire on the first Monday in March on the year in which they are required to make their last final settlement for the Tax Book which was to be collected by them.

"Section 9887, R. S. Missouri, 1929, provides that if the Collector shall neglect or refuse to give bond as required by the next preceding section, his office shall immediately upon such neglect or refusal, be vacant. The next preceding Section, however, is Section 9886, R. S. Missouri, 1929, which refers to the bond of Ex Officio Collector.

"I am of the opinion that inasmuch as the present occupant of the Collector's suite in the Courthouse has not filed a new bond which has been accepted by the County Court, that he has not qualified for a new term and that he is acting as a carry-over from his first term and is acting without bond. I would appreciate an opinion from you as to the steps to be taken by the County Court to vacate the office

and as to whether or not section 9887, R. S. Missouri, 1929, refers to Section 9885, R. S. Missouri, 1929, as amended.

"I am sending a copy of this letter to the State Auditor and will appreciate an opinion from his office to the matter set out in this letter."

Section 5 of Article 14 of the Constitution of Missouri reads:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Also Section 11196, R. S. Missouri, 1929, reads:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

In addition to the above, Section 9883 R. S. Mo., 1929, which is a statute creating the office of Collector of the Revenue, specifically provides that collectors shall hold their office during their respective terms and until their successors are duly elected and qualified. From the above it is apparent that the Collector does not automatically lose his office upon the expiration of his term, which is fixed by Section 9902 R. S. Mo., 1929, but that he

holds over until he is superseded by a duly qualified successor.

As to the method of creating a vacancy under the situation you outline, we believe that the proper procedure would be for the County Court to make an order fixing the amount of the Collector's bond and setting a date within which the same must be filed. If your Collector fails to comply with this order of court, the proper method for removal would be a quo warranto proceeding, since it has been held that statutes requiring bonds are directory in nature. Cantley, Commr. v. Mount Moriah, 49 S. W. (2) l. c. 277, State ex Inf. v. Bernoudy, 36 Mo. 279 and State ex rel Jackson v. Howard County Court, 41 Mo. 165.

Respectfully submitted,

ROBERT L. HYDER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

JET:RV

ANIMALS RUNNING AT LARGE: Where there is a County wide stock law and an injunction has been decreed by Circuit Court against a Constable therein for taking up animals thereunder, such decree would restrain only the party to the record and his privies.

June 29th, 1939.

7-6

FILED 9

Hon. Charles T. Bloodworth, Jr.,
Prosecuting Attorney
Butler County
Popular Bluff, Missouri.

Dear Sir:

We desire to acknowledge your request for an opinion on March 3rd, which is as follows:

"Enclosed please find a copy of a judgment rendered in the case of George Collins and Charles Irby, against Sam Pennell. The following is a statement of facts on which this judgment was rendered:

"In the last general election, the people of this county voted an improved county wide stock law. In a few days thereafter, George Collins and Charles Irby brought a law suit against Sam Pennell, alleging that he was threatening to put up, and restrain their cows and live stock from running at large, and asking that Sam Pennell be enjoined from doing those acts because they alleged that the election was invalid, and that the county court was not authorized to call said election.

"This suit was not contested by Sam Pennell, the Defendant Constable of Black River Township. A Change of

Venue was applied for in January term of Butler County Circuit Court, and granted, and sent to the Wayne County Court. The Wayne County Circuit Court Judge rendered the enclosed judgment as set out by the copy which I am sending you. It is the contention of several lawyers in this city, that there is no stock law in this county, by reason of the rendation of the enclosed judgment.

"Several County officials have requested me to write and ask you for a ruling on this matter, as some of the officials believe that the stock law is only effected in Black River Township, and that Sam Pennell is the only one enjoined from enforcing it.

"The question about which we want information, is whether or not the stock law is in force in other parts of this county, or whether this judgment prevents enforcement of the stock law in all parts of this county."

The decree of court is as follows:

"Now on the 14th day of February, 1939, this cause coming on to be heard, come the plaintiffs in person and by their attorneys, Byron Kearbey and Lawrence E. Tedrick, but the defendant, Sam Pennell comes not but makes default. The plaintiffs herein announce ready for trial, thereupon said plaintiffs adduced evidence in support of the

allegations in their petition. And the Court being informed of said facts and being fully advised in the premises and having considered said petition and the evidence adduced thereon, finds the following facts:

"(1) That the County Court of Butler County, Missouri, called an election to submit to the voters of Butler County, Missouri, the proposition of restraining horses, mules, asses, cattle, swine, sheep and goats from running at large in Butler County, Missouri, on the 15th day of May, 1938, and that at the time of making the order calling said election there was no petition filed requesting said County Court to call same, authorized by Sec. 12805, R. S. Mo. 1929, and that the County Court was therefore without jurisdiction to make its order of May 15, 1938, calling said election.

"(2) That the petition filed requesting the County Court of Butler County, Missouri, to submit to the voters of said Butler County, the question of restraining horses, mules, asses, cattle, swine, sheep and goats from running at large in Butler County was filed on July 15, 1938, and no order of the County Court calling said election was ever made based on said petition so filed.

"The Court therefore finds that said election so held, on the 8th day of November, 1938, by virtue of the order made by the County Court on May 15, 1938, was made without legal authority and is void.

"IT IS THEREFORE considered, ordered, adjudged and decreed by the Court that said election so held on November 8, 1938, is void and of no force and effect and that the defendant, Sam Pennell be and he is, hereby perpetually restrained and enjoined from taking up or attempting to take up plaintiffs' cattle, hogs and other live stock and restraining them from running at large in Black River Township, Butler County, Missouri."

Section 1519 R. S. Mo. 1929, is as follows:

"The remedy by writ of injunction or prohibition shall exist in all cases where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation having no interest in such real estate subject to execution at the time of sale, or an irreparable injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages."

Section 1513 R. S. Mo. 1929, is as follows:

"If any person disobey or violate an injunction after it is served on him, the circuit court to which it is returned, or any judge thereof in vacation, shall issue an

> attachment against him for a contempt; and unless he shall disprove or purge the contempt, if in vacation, the judge may commit him to jail until the sitting of the court in which the injunction is pending, or take bail for his appearance in said court at the next term thereof, to answer for the contempt, and abide the order of the court, and in the meantime to observe and obey the injunction. "

The question presented by your inquiry is whether or not the injunction mentioned in your letter has the effect of binding all officers of your county.

There are cases where parties may bring an action in their own behalf and on behalf of all others similarly situated. However, your letter does not indicate that the injunction suit was so brought. The plaintiffs in the injunction suit did not pretend to act for other people similarly situated and the decree merely restrained the defendant Constable from taking up the stock of the two plaintiffs and restrain them from running at large in Black River Township.

There are also cases holding that a judgment against certain officers in certain matters is conclusive upon the governmental agencies which said officers represent. For instance, in Freeman on Judgments, Vol. 1 (5th Ed.), p. 1095, it is said:

> "A judgment for or against a state or municipal officer or agency in matters as to which they are entitled to represent the city or state in litigation is conclusive for or against the city or state and their other agencies. It is conclusive upon the other officers of the governmental body represented in the first action."

Again in the same work at page 1096, it is said:

> "An officer that has been authorized by law to sue or be sued with respect to the public matters in their control is such a representative."

We do not believe, however, that a Constable is such a representative of the county that a judgment against him would be binding upon all of the people of the county. While it is the duty of the Constable to enforce the stock law, yet he does not act for nor represent the county as a governmental agency. The stock law is a state law, and when the people of a county by a vote adopt the law, it is none the less a state law. The Constable derives his authority and his directions from the statutes enacted by the state Legislature. The county as a governmental agency does not vest the Constable with any authority to enforce the stock law, nor does the county have anything to do with directing the Constable in the enforcement of the stock law. Neither does the Constable have any authority to represent the county as a governmental body. The Mayor of a city is by law the legal representative of a city in many respects. The county court of a county represents generally the county as a governmental body. In view of these facts, we do not think the Constable of a township stands in such relation to his county that a judgment against him is binding on the entire county.

Furthermore, the rule as to judgments being binding upon all persons who may be said to be privies to the suit in which the judgment was rendered is subject to the exceptions that if the matters involved in the suit were not actually adjudicated the judgment will not bind the public. In Freeman on Judgments, p. 958, it is said:

> "And where it appears that the merits of the matter were not actually adjudicated because of compromise or consent judgment, the public is not bound thereby."

There is nothing in the data submitted with your request which justifies the conclusion that there was a consent judgment or even a compromise, but it would appear there was no contest by the defendant and, consequently, the merits were not actually contested in the case. It would be a rather harsh rule to bind the entire public by a judgment in a case in which some officer did not even make a pretense of contesting the issues.

CONCLUSION

It is, therefore, the opinion of this office that the injunction mentioned in your inquiry is binding only upon the defendant in the case in which the injunction was granted, but is not binding upon other officers of the county. If the defendant has deputies, they are, of course, bound as well as the Constable himself, but officers of

of other townships in the county would not be bound.

Very truly yours,

HARRY H. KAY
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

LIQUOR: Local Option Statutes as same existed prior to prohibition, stand repealed and are no longer in full force and effect.

August 4, 1939

87

FILED
9

Hon. David E. Blanton
Prosecuting Attorney
Scott County
Sikeston, Missouri

Dear Sir:

We have received your letter of August 2nd, which reads as follows:

"I would appreciate your advising me as to whether or not in your opinion the Local Option Provisions of the Statutes of the State of Missouri which were in operation prior to the enactment of the Eighteenth Amendment are still in force and effect."

The Local Option Provisions of the Missouri Laws in operation prior to the enactment of the Eighteenth Amendment to the Constitution of the United States were contained in Article 4, of Chapter 52, R. S. Missouri, 1919, sections 6564 to 6571 inclusive. These sections were repealed by the legislature in the year 1931. The pertinent part of the repealing law contained in Laws of Missouri, 1931, page 266, reads as follows:

"That sections * * 6564, 6565, 6566, 6567, 6568, 6569, 6570, 6571, being all of Article 4, Chapter 52, R. S. 1919 * * be and the same are hereby repealed."

CONCLUSION

Since the provisions of the Local Option Statutes as the same existed prior to the enactment of the Eighteenth Amendment to the Constitution of the United States, that is, Article 4, of Chapter 52, R. S. Missouri, 1919, sections 6564 to 6571, inclusive, have been expressly repealed by the legislature, such repealing section being contained in Laws of Missouri, 1931, page 266, the said Local Option Provisions are no longer in full force and effect.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General.

JFA:RW

PURCHASING AGENT: Not required to advertise for bids on sale of merchadise.

August 7, 1939 8/7

FILED 9

Mr. George Blowers
State Purchasing Agent
Jefferson City, Missouri

Attention: Mr. R. W. Meyer.

Dear Sir:

We have your request of August 7th for an opinion, which request is as follows:

> "Your opinion covering the operations of this department specifies that on all purchases of $2,000.00 or over, before purchases can be made, the request for purchase must be advertised in the newspaper.
>
> If the State has merchandise for sale and the approximate sale price of this merchandise will run over $2,000.00, is it necessary that bids for the sale of this property be advertised?
>
> We have at the Missouri Prison for sale, a number of obsolete machines on which we have received bids, the highest bid being $2,041.25. Is it necessary that this transaction be advertised in the newspaper before the merchandise can be sold?
>
> We would appreciate an opinion on this matter today if possible, due to the fact that the high bidder will withdraw his bid in the next few days if not acceptable."

Section 3 of the Purchasing Agent Act (Laws of Missouri, 1933, page 411) provides that all purchases shall be based on competitive bids. Section 2 of that act provides that the Purchasing Agent shall purchase all supplies. We do not find any provision in the act with reference to the sale of property by the state. Section 3 provides that in purchasing supplies for the state the contract shall be let to the lowest and best

bidder, thereby indicating clearly an intention on the part of the legislature to confine the activities of the Purchasing Agent to the purchase of supplies for the state.

Section 9 of the Purchasing Agent Act provides that:

> "* * * * All reports, bids, specifications and contracts, and all records of purchases and sales of any kind, whether by the Purchasing Agent or by departments as authorized by him, shall be kept in the office of the Purchasing Agent and shall be open to inspection by the public."

It would therefore appear that the only duty with reference to sales is the keeping of records relating thereto.

In view of the fact that you have obtained bids on the merchandise to be sold, this office is of the opinion that you should accept the highest and best bid made, since there is no provision in the Purchasing Agent Act requiring you to advertise for bids in two daily newspapers when the transaction involves a sale of merchandise.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:VC

PURCHASING AGENT: Corporation, in which curator, regent or trustee of educational and eleemosynary institution is stockholder, may be let contract by state purchasing agent for supplies to be furnished the institution for which said stockholder is curator, regent or trustee.

August 9, 1939

8-10

FILED
9

Mr. George Blowers
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 7, 1939, requesting our opinion on the following:

> "May a corporation, in which a curator, regent or trustee of one of our educational or eleemosynary institutions is a stockholder, submit bids to the State Purchasing Agent for supplies to be furnished the institution for which said stockholder is curator, regent or trustee?"

There are various acts which prohibit curators, regents and trustees of our educational and eleemosynary institutions from being interested in any contract for supplies bought for said institution. These acts, appearing in R. S. Mo. 1929 are: Missouri University Section 9654; Teachers Colleges Section 9614; Lincoln University Section 9621; Schools for Blind and Deaf Sections 9710, 9711 and Eleemosynary Institutions Section 8620.

Each of these institutions has a statute in existence authorizing the board in charge of said institutions to purchase necessary supplies. Missouri University Section 9626; Teachers Colleges Sections 9596, 9603, 9610; Lincoln University Eleemosynary Institutions Section 8594.

In Laws 1933, page 410, there appears an act creating the State Purchasing Agent. Section 2 of this act provides:

"The Purchasing Agent shall purchase all supplies * * * for all departments of the State except as in this Act otherwise provided."

We assume, because we think it is conceded by all, that the statute revokes the authority heretofore had by the above institution to purchase their own supplies.

The statutes requiring interpretation all contain one or the other of these provisions or ones similar thereto -- that the prohibited persons shall not be, "directly or indirectly interested in any contract for any supplies in any quantity or of any kind to be furnished said institution," nor shall they "keep for sale or be interested in, directly or indirectly, the sale or exchange of any school furniture or apparatus, books, maps, charts or stationary used in said school."

In Forest City Mfg. Co. v. International Labor Union 111 S. W. (2nd) l.c. 940 (Mo. App.) it is said, "A corporation is a creature of the sovereign power which brings it into being, with an entity separate and distinct from the individuals who compose it, * * * ". In State v. Miller 272 S. W. l.c. 1067 (Mo. App.) the court says, "It is a general and well-established principle of law that a corporation has a legal entity distinct from its members, * * * ".

In 14 C. J. p. 52, Section 5, this rule is stated as follows:

> "On the creation of a corporation, as we have seen, the individuality of the corporators or members is merged in the corporate body and the corporation becomes in law, and for most purposes, a legal entity or artificial person entirely distinct from its members and its officers, so that its acts through its members as a corporate body, or through its officers or agents, are regarded as the acts of this legal entity or artificial person as distinguished from the members who compose it, and the property or rights acquired, or the

> liabilities incurred, by it are regarded as its property, rights, and liabilities as such distinct legal entity, * * * "

In 14 C. J. p. 55, Section 9, it is stated:

> "On the same principle the contracts entered into for a corporation by its authorized officers or agents are the contracts of the corporation as a distinct legal entity, and neither confer rights nor impose liabilities or restrictions on the members or stockholders individually."

Under the above authority it is to be seen that stockholders in a corporation and the corporation are, in the eyes of the law, separate and distinct persons. Thus it is not possible to say that a stockholder has any individual interest in a contract of the corporation. The corporation alone is interested in contracts between it and other persons.

There is, however, a time when this corporate fiction is cast aside. In May Department Stores Co. v. Union Electric L. & P. Co. 107 S. W. (2nd) l.c. 55 (Mo. Sup.) it is said:

> "If any intercorporate affiliation is devised for or is being used to accomplish an improper or unlawful purpose, certainly equity does have the authority to tear down technical legal barriers and reach beyond them to impose liability or grant proper relief. If the purpose is lawful, and fair and equitable to those with whom it is intended to deal, legal forms and relationships should be observed."

CONCLUSION

It, therefore, is our opinion that a corporation, in which a curator, regent or trustee of one of our educational or eleemosynary institutions is a stockholder, may submit bids to and receive contracts from, the State Purchasing Agent for supplies to be furnished the institution for which said stockholder is curator, regent or trustee, if the corporate entity submitting said bid or receiving said contract is not a mere sham set up or used by the stockholder-board member for the purpose of evading statutes prohibiting said curators, regents and trustees from being interested in contracts to furnish supplies to their institutions.

Very truly yours,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:RT

PURCHASING AGENT: Must buy supplies for penal institutions from prison industries if they have or can within sixty days manufacture the same.

November 8, 1939

FILED

Honorable George Blowers
State Purchasing Agent
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your opinion request of November 6, 1939, which is as follows:

> "Please advise me at your earliest convenience, if the merchandise which we purchase from the Missouri State Prison for the various State Institutions must be purchased on competitive bids, or, will it be contrary to the Law to issue a direct order to the Prison for the articles which they manufacture and which they raise on the Prison Farms.
>
> I believe this can be done after reading Section 7, Page 413, of the Laws of Missouri of 1933."

Section 8340 R. S. Mo. 1929 provides authority for the Penal Board to establish industries in our various penal institutions in order to give employment to the inmates, "with the view of manufacturing, so far as may be practicable, such articles agreed upon by said board as are needed in any of the institutions hereinabove in this section mentioned or referred to." The institutions referred to in this section are: "the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls, or any other penal or reformatory institutions hereafter created."

Thus, we see that the prison industries were established with a dual purpose.

Section 8342 Laws 1939, page 569, provides:

> "The prices for all articles so manufactured, as hereinabove provided, shall be fixed and determined by said commission, and before any purchase shall be made of any (of) said articles, for the institutions hereinabove mentioned, from any other source, written requisitions shall be made upon said commission by the proper purchasing agents of the state, * * * * for said articles; (,) and duplicate certificates shall be made by said commission that it is unable to furnish or supply the same within sixty days, * * * * * * . Said prices charged by said commission shall not exceed the prices of like articles in the open market. * * * * * * ".

Under these two statutes, it is the duty of the purchasing agent of the state, before any article can be bought for the penal institution in the open market, to try to obtain the same from the prison industries. There is reason behind this command because it is a matter of common knowledge and legislative record that prison made goods cannot be freely sold everywhere, and the legislature being aware of this fact made provision for the state itself to consume as much prison made goods as possible in order that the inmates of penal institutions in this state might be kept employed during their incarceration.

In Laws of 1933, page 411, the State Purchasing Agent was created. The creation of this department took away from the penal institutions the right to make their own purchases, direct, requiring this to be done through the purchasing agent.

Section 2 of said Act provides, "The Purchasing Agent shall purchase all supplies except printing, binding and paper, as provided for in Chapter 115 R. S. 1929, for all departments of the State * * * ". Section 3 requires, "all

purchases shall be based on competitive bids", except where, with the Governor's approval, supplies may be purchased on the open market at a better price.

It is at once apparent that the terms of Sections 3 and 8342, supra, are somewhat inconsistent. How can the purchasing agent buy supplies for the penal institutions on competitive bids when he is directed to buy the same from the prison industries if they have or can manufacture said supplies in sixty days? This inconsistency existing, it became our problem to harmonize and reconcile the conflict or to determine which statute prevails if that cannot be done.

The conflict is so square we think these statutes cannot be harmonized so we proceed to determine which prevails.

The purchasing agent's Act is a general one applying to all departments of the state as well as the penal institutions. Sections 8340 and 8342, supra, are special acts applying only to the prison industries and the manner and place supplies for our penal institutions are to be purchased.

In Tevis v. Foley 30 S. W. (2nd) 68 (Mo. Sup.) the court, with respect to conflicting general and special statutes, said l.c. 69:

> "In this situation the rule of construction is that, 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute."

The legislature repealed and reenacted Section 8342 in

Laws 1939, page 569, but this in fact was only a corrective amendment since the only change made in the statute was to substitute the word "commission" for "board". Sections 8340 and 8342, supra, were enacted prior to the Purchasing Agent Act.

In State ex rel v. Brown 68 S. W. (2nd) 59 (Mo. Sup.) it is stated:

> "' * * where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'"

In Collins v. Twellman 126 S. W. (2nd) 231 (Mo. Sup.) it is held that the:

> "Repeal of a special law by implication, through the enactment of a general law, is not favored."

In the instant case, we have a general and special statute that cannot be harmonized, the general act is later and nothing exists in the later general act to indicate the provisions of the special act are repealed by necessary implication. This brings the case squarely within the rules announced in the above cases, and under these rules the terms of Section 8342, supra, apply to the State Purchasing Agent insofar as they direct where he must first try to purchase supplies for the penal institutions mentioned and referred to in Section 8340, supra.

This conclusion is borne out in principal by the case of State ex rel v. Smith 67 S. W. (2nd) 50 (Mo. Sup.). In that case it was contended that the State Highway Department should have purchased crushed rock through the State Purchasing Agent. The decision of the court, in holding otherwise, rests on two grounds. These are that the highway department had constitutional authority to make its own purchases, and that the act passed by the legislature respecting the purchase of highway construction materials by the highway department was

a special act while the purchasing agent act was a general act which would not operate to repeal the former.

We do not believe Section 7, Laws 1933, page 413, mentioned in your request, can operate to authorize the purchasing agent to "purchase" by way of a transfer, the articles manufactured by the prison industries for the penal institutions. That section contemplates supplies bought through the purchasing agent for a department that are on hand but not needed at the time by the department for which they were purchased.

CONCLUSION

Therefore, it is our opinion that the State Purchasing Agent, when buying supplies for the penal institutions, must first try to obtain the articles desired from the prison industries in accordance with Section 8342, Laws 1939, page 569, before he purchases the same from other sources on competitive bids or in the open market.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
LLB:RT

LIQUOR CONTROL: Brewing corporation may have interest in wholesale business. Neither is brewing corporation liable for violations committed by wholesale corporation.

March 28, 1939

3-28

FILED
10

Mr. Wallace I. Bowers, Chief Clerk
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 16, 1939, presenting the following questions for an opinion:

> "(1) Under the Liquor Control Act and Non-intoxicating liquor laws, may a Brewery have a controlling interest in a corporation licensed to sell 5% and 3.2% beer at wholesale?
>
> "(2) Assuming that such a practice is legal, what would be the Breweries liability in case of a violation of the Liquor Control Act or Non-intoxicating liquor law on the part of the Wholesale corporation?"

I.

Section 3, Laws of 1933-34, Extra Session, page 79, pertaining to intoxicating liquors, provides:

> "Distillers, wholesalers, winemakers, brewers or their employees, officers or agents, shall not, under any circumstances, directly, or indirectly, have any financial interest in the retail business for sale of intoxicating liquors * * * *."

Section 13139-z-14, Laws of 1935, page 399, provides:

> "Neither brewers nor manufacturers of non-intoxicating beer, or their employees, officers, agents, subsidiaries or affiliates shall, under any circumstances, directly or indirectly, have any financial interest in the retail business for the sale of such non-intoxicating beer, * * * *."

These two statutes answer your first question. It will be noted that they only prohibit the brewer from having a financial interest in the "retail business". There is no statutory provision, of which we are aware, preventing a brewer from having a financial interest in the wholesale end of selling intoxicants.

II.

In Forest City Mfg. Co. v. International L.G.W. Union, 111 S.W. (2nd) l.c. 940 (Mo. App.), it is said, "A corporation is a creature of the sovereign power which brings it into being, with an entity separate and distinct from the individuals who compose it, * * *". In Knott v. Fisher Vehicle Woodstock & Lbr. Co., 190 S.W. l.c. 379 (Mo. App.), the court said, concerning the identity of two corporations, "Even if there was identity of stockholders, the corporations would be distinct".

In 14 C.J., Section 19, page 58, appears this statement:

> "Since a corporation is a person distinct from its members or stockholders, it follows that, even though the same individuals may be the incorporators of, or own stock in, two separate corporations, and even though such corporations may have the same individuals as officers, there is no identity between the two corporations, and neither is liable for the acts or faults of the other merely because of the identity of the

> members or stockholders and officers. A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless the facts show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth."

This statement from the text is amply supported by citations of authority from jurisdictions other than Missouri.

CONCLUSION.

Therefore, it is our opinion that a brewing corporation may own stock in a wholesale corporation dealing in intoxicating and non-intoxicating beer. It is further our opinion that a violation of law by the wholesale corporation in no way could subject to penalties the brewing corporation owning stock therein because they are separate entities, absent a showing that the wholesale corporation was set up by the brewing corporation as a sham through which the brewing corporation seeks to violate the law with impunity.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

W. J. BURKE
(Acting) Attorney General

LLB:VAC

PARK BOARD: Administration over roads and bridges in and contiguous to State Parks.

March 29, 1939

FILED
10

Honorable I. T. Bode, Director
State Park Board
Jeffer on City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated March 3, 1939, which reads as follows:

"In a number of State parks we are bothered with the problem of location and maintenance of county roads. As a matter of policy, it would be most desirable for no county roads to extend into any part of a State park, and in those cases that county roads do extend into State parks, it appears highly desirable to make some arrangement for the maintenance of those county roads. It would appear best for all roads in State parks to be recognized as State highways and to be built and maintained by the State Highway Department. The question of law covered in this letter is two-fold:

1. What jurisdiction does the State Park Department have over county roads which may now be located in State parks? In more detail, there are some existing county roads which we would like to close; one in particular is located at Bennett Spring. The maintenance of this road is unnecessary for the people of Dallas County. The maintenance of the road is consequently a problem of the State Park Department and we would like to close the road and maintain only one entrance to Bennett Spring. There

are several similar cases in the State Park System and the point of law on which we would like to have an opinion is, who has precedence, the State Park Department or the county, in the matter of control, location and maintenance of county roads which may be on the interior of State parks?

2. The second point of law on which an opinion is requested is the status of a road on the inside of a State park so far as the State Highway Department is concerned. We consider the best possible policy to be a policy which would include all roads on the inside of the State parks as a part of the State Highway System. Is there any point of law which covers this?"

We also acknowledge your letter of March 23, 1939, which reads as follows:

"Reference is made to my letter to you of March 3, 1939, in which an opinion was requested on the responsibility of the State Highway Department for the construction and maintenance of roads in State parks.

I refer particularly to the last three lines in the fourth paragraph of Section 44a, Article IV of the Revised Statutes of Missouri, 1929, which is found on page 92 of Volume I of the 1929 statutes. These three lines read,

' * * * and empowered to locate, construct and maintain highways and bridges in State parks, now or hereafter established, and connect the same with the primary or secondary highways of the State.'

In recent years many miles of roads have been built in the State parks by CCC and WPA. The maintenance of these roads is a serious problem. My interpretation of the lines quoted above is that the State Highway Department is responsible for the roads and bridges in all State parks and

> is responsible not only for the maintenance but for the construction of these roads.
>
> I would like to know if this part of the Constitution of the State is still in force and if still in force, if it means precisely what it says. I would like to be further advised regarding what steps we should take to cause the State Highway Department to assume the maintenance of all existing roads in State parks and to provide for the construction of new roads in parks.
>
> We are now making preparation to build road systems in the new parks, such as Crowder and Pershing, and in the event this part of the law dictates that the State Highway Department shall be responsible for the building of these roads, I would like to be so advised. In the event the State Highway Department actually is responsible for the maintenance and construction of park roads, the assumption of this responsibility by the Highway Department would prove an enormous help to the Park Department, both from a financial standpoint and from the standpoint of administration."

Article 4, Section 44a, Missouri Constitution provides for a Seventy-five million dollar ($75,000,000.00) bond issue and for establishing the Missouri State Highway System. It provides also that said funds be ear marked for certain definite purposes, and in the ninth paragraph of said constitutional provision, it reads in part:

> " * * * * * * from the funds herein provided for construction of primary and secondary highways and from the state road fund * * * * * The State Highway Commission is hereby also authorized and empowered to locate, construct and maintain highways and bridges in State

> parks, now or hereafter established, and connect the same with the primary or secondary highways of the State. * * * * * * * * "

Article 12, Chapter 42 R. S. Mo. 1929, provides for the establishment of the State Highway Commission and Section 8104 R. S. Mo. 1929 provides in part:

> "The commission shall: * * * * *
>
> (3) Provide for aiding county highway engineers or other officials of civil subdivisions in establishing gradients and alignments, and preparing suitable systems for maintenance of highways and bridges.
>
> (4) Cause standard plans, specifications and estimates to be prepared for the repair and improvement of highways and the construction and repair of bridges by civil subdivisions. * * * * * * * *"

Section 8093 R. S. Mo. 1929 provides in part:

> "Whenever in this article, or in any proceeding under this article, the following words or terms are used, they shall be deemed and taken to have the meanings ascribed to them as follows: 'Civil subdivision,' a county, township, road district or other political subdivision of the state or quasi public corporation having legal jurisdiction of the construction and maintenance of public roads. * * * * * * * "

The State Park Board is a "Civil subdivision" as defined by statute.

Laws of 1937, page 520, Section 2 incorporates the State Park Board and establishes its powers and duties as

follows:

> "The State Park Board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said Park Board or the exercise of its powers hereunder necessary for the recreation of the people of the State of Missouri. In the event the right of eminent domain be exercised it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. Said Park Board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the Legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the Director of State Parks and when presented to the State Auditor shall be paid out of the funds appropriated for such purposes.

By the above statute we see that the Legislature, in creating the State Park Board, was silent as to jurisdictional powers over county highways previously dedicated to public use, yet in or contiguous to state parks.

The power in the State Park Board to make and promulgate rules necessary for the improvement of all state parks is no doubt power to establish and maintain a system of roads and bridges on or through land acquired by a said State Park Board, where the state highway Commission has not assumed its constitutional jurisdiction. Whenever the State Park Board sees fit, the State Park Board, being a corporate body and acting as any proprietor of land, can take steps to vacate county roads con-

tiguous to state parks by following the legislative scheme for vacating public roads.

Section 7836 R. S. Mo. 1929 provides:

> "Any twelve freeholders of the township or townships through which a road runs may make application for the vacation of any such road or part of the same as useless, and the repairing of the same an unreasonable burden upon the district or districts; the petition shall be publicly read on the first day of the term at which it is presented, and the matter continued without further proceedings until the next term. Notice of the filing of such petition and of the road sought to be vacated shall be posted up in not less than three public places in such township or townships, at least twenty days before the first day of the next term of the court, and a copy of the same shall be personally served on all the persons residing in said district whose lands are crossed or touched by the road proposed to be vacated in the same manner as other notices are required to be served by law; and at the next regular term the same shall again be publicly read on the first day thereof. If no remonstrances be made thereto, in writing, signed by at least twelve freeholders, the court may proceed to vacate such road, or any part thereof, at the cost of the petitioners; but if a remonstrance thereto, in writing, signed by at least twelve freeholders, residents of such township or townships, be filed, and the court after considering the same shall decide that it is just to vacate such road, or any part thereof, against the vacation of which the remonstrance was filed, the costs shall be paid by the parties remonstrating, and the original costs, and damages for opening such vacated road shall be paid by the petitioners to those who paid the same: Provided, that if five years have elapsed since the original opening of the same no such reimbursement shall be made."

Section 7837 R. S. Mo. 1929 provides for an appeal from an order and judgment of a county court vacating a public road. Section 7839 R. S. Mo. 1929 defines county roads as follows:

> "All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

CONCLUSION

Answering your first question: If a county road through any state park ought to be vacated, then the statutory petition to vacate should be filed in the county court and the matter decided pursuant to the statutory procedure for such cases. The State Park Board does not have jurisdiction to arbitrarily vacate a county road.

Answering your second question: The constitution above quoted, being the fundamental law of this state, all legislative acts and the conduct of administrative boards dealing with the location, construction and maintenance of roads and bridges in state parks must be construed according to constitutional intentions. We are of the opinion that the State Highway Commission could, at their pleasure, providing there be available constitutional funds, locate, construct and maintain highways and bridges in state parks, and connect the same with the primary and secondary highways of the state.

We are of the opinion that nothing in said constitutional provision makes it mandatory on the State Highway Commission to take over, construct or maintain highways and bridges in or contiguous to state parks. Roads and bridges in state parks become the problem of the State Highway Department only when it assumes to construct and maintain same as a part of the State

Highway System out of state highway funds.

If the public be best served by a public policy wherein all roads and bridges in state parks be taken over and absorbed as a part of the State Highway System, then the State Highway Commission should be approached with the proposition for their serious consideration. The State Highway Commission has in the past been approached with such problems by other "Civil subdivision" of the state resulting in the adoption of roads and bridges into the state highway system.

As provided in Section 8104, supra, prior to said roads and bridges becoming a part of the State Highway System, the State Park Board can demand of the State Highway Commission aid in establishing gradients and in preparing suitable systems for maintenance of highways and bridges and can demand standard plans, specifications and estimates to be prepared for the repair and improvement of highways and bridges in state parks.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

WOS:WW

CONSERVATION COMMISSION: Article 5, Section 26 of Missouri Constitution vests Conservation Commission with authority to dispose of lands.

June 21, 1939

6-26

FILED
10

Mr. I. T. Bode, Director
Conservation Commission
Jefferson City, Missouri

Attention: Mr. A. E. Mayes - Land and Water

Dear Sir:

This department acknowledges your letter of June 15th, as follows:

> "The Conservation Commission inherited some property from the old Fish and Game Department which it would like to dispose of by sale for cash and use the proceeds for the work of the Commission. The particular land which the Commission desires to sell was formerly used for hatchery purposes.
>
> Does the Commission, under the provisions of Amendment 4, have authority to sell this land and use the proceeds for the ordinary activities of the Commission?
>
> An opinion concerning this matter will be appreciated. In the event any further or more specific information is desired, we will undertake to supply it."

59 C. J., Section 280, page 167, states the general rule with respect to the disposition of state property.

> "The power to dispose of state property is vested in the legislature which may make provisions therefor by statute, and the statutory provisions must be complied with or the sale will be void."

Authority for the above statement is found in the case of State of Wisconsin v. Torinus, 26 Minn. 1, 49 N. W. 259 l. c. 260, wherein the court said:

> "The proprietary rights of a state are as absolute and unqualified as those of an individual. It may, in the absence of any self-imposed restrictions in its constitution, sell and dispose of its property upon its own terms and conditions, for cash or upon credit; and it may also take, hold, and enforce notes and obligations received from the purchasers of its property, the same as individuals can. But as the legislative department is the only one that represents the state in respect to such rights, it alone can exercise the power necessary to the enjoyment and protection of those rights, by the enactment of statutes for that purpose."

The above case is cited with approval in the case of Bjurke v. Arens, 281 N. W. (Minn.) 865 l. c. 869:

> "In disposing of such lands the state exercises the same proprietary rights as an individual and may sell and dispose of its property upon such terms, for cash or upon credit, as shall be determined by statute. State of Wisconsin v. Torinus, 26 Minn. 1, 49 N. W. 259, 37 Am. Rep. 395."

And again in the case of Henderson v. City of Shreveport, 160 La. 360, 107 So. 139, l. c. 142, wherein the court said:

> "* * * it follows that public things cannot be alienated without the express consent of the sovereign, and hence, of that branch of the government to which has been given the supreme lawmaking power."

In the foregoing cases it is evident that in order to dispose of state property a legislative act is necessary.

An amendment was adopted by the people which went into effect July 1, 1937, creating a Conservation Commission pertaining to fish, game and forestry and stating its powers, duties and obligations, as follows (Laws of Mo. 1937, p. 614, 615):

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows: one for a term of two years, or until his or her successor is appointed and qualified; two

for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties.

Said commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission.

A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment.

> The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose.
>
> The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

The question now presents itself whether the people, by the above amendment, divested the legislature of the power to dispose of state lands dedicated to fish, game and forestry and vested it in the Conservation Commission.

The case of Marsh v. Bartlett, 121 S. W. (2d) 737, l. c. 742, was an original proceeding in habeas corpus to secure the release of petitioner convicted of violating a statute which was inconsistent with the regulation adopted by the Conservation Commission. The court, in pointing out that the people had by initiative amendment reserved to themselves the power to propose laws and amendments to the Constitution, and that the exercise of such sovereignty by the people deprived the legislature of its powers and functions to deal with fish, game and forestry except by enacting laws in aid thereof, said:

> "This contention overlooks the change resulting from the adoption, in 1908, of the initiative and referendum amendment, section 57, article 4 of the Constitution, Mo. St. Ann. Const. art. 4, sec. 57. As regards that amendment this court has held that the people in adopting it did not intend merely to confer the grant contained in said sec. 1; it served the one purpose, to recall all legislative power theretofore granted to the end that the whole power to be granted should be subject to the initiative and referendum. State ex rel. Gordon v. Becker, 329 Mo. 1053, 49 S. W. (2d) 146. We therefore hold (1) that the authority was delegated by the people to the General Assembly to legislate by enactment, subject to the referendum clause, and to propose constitutional amendments by enactment of joint and concurrent resolutions; (2) that initiative authority in the people was reserved thus: Vesting the legislative authority of the state in the General Assembly, 'the people reserve to themselves power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independently of the legislative assembly * * *'."

And further, in its opinion, the court said (l. c. 743):

> "The reference already made to the power the people reserved to themselves in section 57 of article 4 with the express right to exercise the same without let or hindrance of the General Assembly, will be recalled to mind. This power, a political one, and the exercise of its functions is of the essence of sovereignty which resides in the people. In the Bill of Rights (sec. 1, art. 2) as found in the Constitution, Mo. St. Ann. Const. art. 2, sec. 1, it is declared 'That all political power is vested in and derived from the people; that all government of right originates

> from the people, is founded upon their will only, and is instituted solely for the good of the whole.' In view of these reservations of sovereignty and of the right to exercise functions thereof in the State's government, it seems self-evident that the exercise thereof in this particular instance to provide in the mode selected and to the extent effected by an enduring ordinance, policy forming as to its subject matter and rule-delegating as regards the administrative functions and imposed duties, was valid notwithstanding the general field for action by way of statutory enactments had theretofore been entered solely by successive legislatures. That condition, long existing, continued merely because until of late the people did not attempt to exercise their stated reserved authority.
>
> But the present attempt to exercise it does not deprive the legislative department of the government of its power or functions but relates to only a small portion of the power reserved to the people, the exercise of which suspends and supersedes the power of the legislature as to that portion alone which involves the subject matter and its governance as provided in said Amendment."

The people, having suspended the power of the legislature to enact any laws with respect to fish, game and forestry except those "laws in aid of but not inconsistent with the provisions of this amendment", and having declared that "all existing laws inconsistent herewith shall no longer remain in force and effect", created the Conservation Commission with the power of:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations

> and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws now or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, * * *."

In helping determine what the powers of a Commission generally are, the following statement from 59 C. J., Section 118, p. 11, be helpful:

> "Generally speaking, * * * commissions * * * have such powers as may have been delegated to them by express constitutional and statutory provisions, or as may properly be implied from the nature of the particular duties imposed upon them."

The Commission has the power of "control" and "management", but we seriously doubt whether these words standing alone would give the Commission the power to sell any of its lands. Thus, in the case of Blanton v. Mayes, 58 Texas 422, l. c. 429, the court said:

> "In the management and control of the estate is there an implied power to sell real property for reinvestment so as to secure an income, derivable from the language employed, when considered in connection with the subject matter of the trust? The terms "manage" and "control", standing alone and unaided by other considerations, could not be considered as conferring a power to sell."

The word "regulate", as used in the above Constitutional Amendment, is defined in the case of March v. Bartlett, supra, as follows (l. c. 744):

> "It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules."

Further examination of the Conservation Amendment reveals that in addition to "the control, management, restoration, conservation and regulation" the Commission is authorized to take -

> "The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose."

Thus we find an express declaration on the part of the people that property used for fish, bird, game, forestry and wild life may be sold by the Commission and the funds derived therefrom be used by said Commission for said purposes. And we might go further and say that even though there were a doubt as to the meaning of said language, from the nature of the duties imposed on the Conservation Commission there would be an implied authority to sell such property and to use the funds in furtherance of the purposes for which the Commission was created.

From the foregoing, we are of the opinion that Constitutional Amendment No. 4 (Mo. St. Ann. Const., Art. 5, Sec. 26, supra) vests the Conservation Commission with authority

to dispose of lands inherited by it from the old Fish and Game Department for cash, and use the proceeds for the declared purposes of the above Constitutional Amendment.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

PROSECUTING ATTORNEY: Mandamus not proper proceeding to compel county court to allow stenographic fees to prosecuting attorney.

June 23rd, 1939.

FILED 10

Honorable Fred C. Bollow,
Prosecuting Attorney,
Shelby County,
Shelbina, Missouri.

Dear Sir:

This is to acknowledge receipt of your letter of June 14th, 1939, in which you request an opinion from this office on various questions set forth therein. Your letter is as follows:

"Some two or three years ago your office handed down an opinion to the effect that the office of Prosecuting Attorney was entitled to Stenographic hire; that the Prosecuting Attorney might employ a stenographer and be re-embursed by the County for such sums as were expended by him. I presume that the rate of pay would have to be a reasonable rate of pay under the circumstances and could not be fixed either arbitrarily by the prosecutor or arbitrarily by the County. After such opinion was rendered by your office I employed a stenographer and have been regularly re-embursed by the County for such sums as I have expended for the past two or three years. At the beginning of the year 1939 I made up my budget and included therein an item of $35 per month for stenographic

hire. This budget was approved by the County Court, then the entire county budget was approved by the office of the State Auditor. Thereafter I expended such sum of $35 per month regularly and the bills for the same were honored by the County Court during the months of January, February, and March; but said Court has refused to honor said bills for the months of April and May. I have in fact paid out said sums for said months and since I believe your opinion to be sound and well reasoned, I propose to continue employing a stenographer for my office. I find it to be an absolute necessity.

"My question to you now is what is the proper remedy for me to pursue in order to enforce the payment by the County Court of these bills; whether an ordinary suit against the County or an action of mandamus against the County Court.

"Also I was notified the middle of May by the County Court that the stenographic hire was cut to $25 per month and that that was the only amount they would pay from thereon. This notice of course came to me after I had expended $35 per month for April and agreed to spend such sum for the month of May. It is my opinion that since I budgeted for $35 and this budget was approved by the County Court, that the County Court is not in any position to at this date attempt to arbitrarily reduce

> the rate of pay. I should like to have your opinion on this matter also."

We are herewith enclosing copy of an opinion rendered by this department to Honorable Forrest Smith, State Auditor, under date of April 24th, 1936, in which it was held that "if it is necessary for the prosecuting attorney to hire a stenographer, or other clerical assistants, to perform certain necessary duties in his office, and he thereby is compelled to pay such expenses out of his pocket, he is entitled to reimbursement from the county in reasonable and necessary amounts."

We are also enclosing a copy of an opinion rendered to the prosecuting attorney of Boone County, Missouri, dated September 16, 1937, construing the Budget Act as pertaining to question as set forth in your letter.

In the second paragraph of your letter you inquire as to which is the proper remedy to pursue in order to enforce payment by the County Court of necessary sums expended by you for stenographic hire in connection with your office as prosecuting attorney, whether an ordinary suit shall be brought against the County or a mandamus suit against the County Court.

We refer you to Section 2093, R. S. Mo., 1929, which provides as follows:

> "If any account shall be presented against a county, and the same, or any part thereof, shall be rejected by the county court, the party aggrieved thereby may prosecute an appeal to the circuit court in the same manner as in other cases of appeal from the county to

> the circuit court; and the circuit court shall proceed to hear, try and determine the case anew, without regarding any error, defect or other imperfections in the proceedings of the county court."

It is our opinion that you may present the amount of your claim to the County Court, and if same is disallowed, proceed under this section and appeal from the action of the county Court to the Circuit Court. We do not think that mandamus is the proper proceeding under the authority of the following cases - State ex rel. Carroll v. County Court of Cape Girardeau County, 109 Mo. 248, l. c. 252, wherein it is said:

> "The statutory provisions quoted gave the relator a specific remedy, towit, by appeal; and when this is the case the extraordinary remedy by mandamus cannot successfully be invoked. State ex rel. v. Lubke, 85 Mo. 338; Blecker v. Commissioner, 30 Mo. 111; State ex rel. v. Marshall, 82 Mo. 484; Mansfield v. Fuller, 50 Mo. 338; State ex rel. v. County Court, 39 Mo. 375.
>
> "The position here taken that there being a specific legal remedy provided in this class of cases, and, therefore, that mandamus cannot be employed to give relief, is distinctly recognized in State ex rel v. County Court, Mo. 475, and in the more recent case of Railroad v. St. Louis, 92 Mo. 160."

And the case of State ex rel Mitchell v. Rose, 313 Mo. 1. c. 373, where it is said:

> "We are of the opinion that mandamus is not the proper remedy to compel the payment of the fees claimed by relator. Mandamus is an extraordinary legal remedy and cannot be invoked if relator has and adequate remedy at law. Cases cited."

And this case further holds that a claim may be filed with the County Court and in case of an adverse decision, appeal may be had to the Circuit Court and a trial de novo as appeals from the Justices of the Peace. We cite further the case of State ex rel. Case v. Seehorn, 283 Mo. 508, l. c. 519, and Perkins vs. Burks, 336 Mo. 248, l. c. 253. In view of these cases wherein it is held that under the statutes it is the duty of the County Court to look after the public funds, examine, audit, adjust and settle all accounts to which the County shall be a party and to pay out of the county treasury funds to be due by the county on such claims, that the County Court has certain discretionary powers in auditing the accounts and that mandamus will not lie to compel the payment of same. There are cases which hold that mandamus is the proper remedy to compel the County Court to pay an officer's salary where the salary is definite and fixed by the statute, but these cases are not applicable to the facts as stated in your letter.

We are of the further opinion that the fact that the sum of Thirty-five ($35.00) Dollars was budgeted for the payment of stenographic hire for the prosecuting attorney does not, of itself, create a liability against the county to pay that sum. However, if you, as Prosecuting Attorney, expend for stenographic hire the sum of Thirty-five ($35.00) Dollars per month and it can be shown that the same was expended by you, and that it was a reasonable amount and necessary for

the proper functioning of your office, under those facts it should be allowed by the County Court. But since those are facts to be passed on by the County Court, it has certain discretionary duties in examining into the reasonableness of the claim, and if disallowed, you may appeal to the Circuit Court as above stated.

Very truly yours,

COVELL R. HEWITT,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

CRH:RV

Encls.

BOARD OF PHARMACY: Constitutional to transfer surplus funds of Board of Pharmacy at close of bienium to revenue funds.

July 19, 1939

FILED
10

Honorable Charles R. Bohrer
Secretary
Missouri Board of Pharmacy
West Plains, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion from this department which reads as follows:

> "The Board of Pharmacy respectfully requests an opinion from your office concerning the constitutionality of Section 1, page 415, Laws of Missouri 1933, (a copy of which is attached), as it affects Board of Pharmacy funds, the transfer of these funds to the General Revenue Fund. Also an opinion from your office concerning the legality of the orders of the Secretary of State authorizing the State Treasurer to transfer balances remaining in the Board of Pharmacy fund at the end of any bienium period, and the legality of any transfer by the State Treasurer from the Board of Pharmacy fund to the General Revenue Fund under authority of any such orders or under the authority of the above mentioned statutes.
>
> The Board of Pharmacy is supported in this request by the approval of the officers and Council of the Missouri Pharmaceutical Association."

The act to which you refer and a copy of which you enclose is found in Laws of Missouri 1933 at page 415 and which we must again quote for the purpose of this opinion, in order that it may be preserved in our opinion files:

"All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provisions hereof, shall be deemed guilty of a misdemeanor; provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

In regard to the placing of the moneys collected by your board in the state treasury, we refer you to Laws of 1937, page 231, Section 13151c, which provides in part as follows:

> " * * * * * * * * * All fees collected by the secretary for the examination of pharmacists and for the issuing of the permits authorized by this chapter, and for the renewal of certificates of registration and permits, and all other funds collected by the Secretary of the Board of Pharmacy under this chapter shall by him be paid into the State Treasurer monthly, and shall be placed to the credit of a fund for the use of the Board of Pharmacy. * * * * *"

This is in accordance with Section 15, Article 10 of the Constitution of Missouri, which provides that all moneys belonging to the state be deposited by the treasurer to the credit of the state for the benefit of the funds to which they belong. Section 19, Article 10 reads as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied. * * * *"

From the above it will be seen that regardless of any other statutory provisions, all funds belonging to the Board of Pharmacy must be deposited by the state treasurer in the name of the state to the credit of the Pharmacy Board, but that same can be withdrawn only in accordance with the biennial appropriations of the legislature.

In the case of State ex rel Davis v Smith, State Auditor, 75 S. W. (2d), page 828, we find a decision of our Supreme Court directly on the question which you raise. This was a case in which the power of the general assembly to transfer the balance remaining in the fees collected by the Board of Barber Examiners to the general revenue fund was discussed. The Board of Barber Examiners was included with the Pharmacy Board in the section found in Laws of 1933 at page 415. Prior to 1933, the surplus in the Board of Barber Examiners fund passed to the public school fund of the state. Chief Justice Frank in giving the opinion of the court said:

> "We recognize the right of the legislature to provide by law that the surplus in such fund shall be transferred to the general revenue fund instead of the public school fund * * * * * * the acts simply direct the state treasurer to transfer to the general revenue fund all sums of money in the state treasury to the credit of the numerous funds named in the act, including the Board of Barbers fund."

Since the court in that case upheld the transfer by this same act of the surplus in the Barber Board fund, it is reasonable to presume that they would uphold the law as regards the Pharmacy fund, since both were included in the Act of 1933, and both derived their income from similar sources, that is, application fees and annual license renewal fees.

We conclude therefore, in view of the foregoing case, that the transferring of the balance remaining in the state treasury to the credit of the Board of Pharmacy fund into the general revenue fund was constitutional.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

RLH/ww

STATE CONSERVATION COMMISSION: Not liable in tort.

July 26, 1939

8-10

FILED
10

Mr. I. T. Bode, Director
State Park Board
Jefferson City, Missouri

Dear Sir:

This acknowledges receipt of your inquiry, which is as follows:

> "At some of the parks in the free range part of the State we are having trouble with stray live stock. Since there are no live stock laws in that part of the State, live stock is permitted to run at large and we have fenced the parks in an effort to keep out the live stock. This policy requires that we have cattle guards or gates or some other method of keeping out the live stock and at the same time permit automobile traffic.
>
> The question has arisen of responsibility for damages to live stock which might become injured in attempting to cross our cattle guards. Some of these guards are so constructed that it might be possible for a domestic animal to get caught or stumble and fall or be injured in some other manner in attempting to go through the guard and trespass on State property.
>
> The legal question involved appears to be, is a property owner responsible if stray live stock becomes injured in attempting to trespass in those parts of the State where there is no stock law?"

Replying thereto, the case of Bush v. State Highway Commission of Missouri, 46 S. W. (2d) 854, decided by the Supreme Court in 1932, seems to answer your inquiry. That was a suit for damages brought by the plaintiff against the State Highway Commission for alleged injuries received by him on account of the wrongful collision with an auto truck of the Missouri State Highway Commission. The court there held that the State Highway Commission was a subordinate branch of the Executive Department of the State Government and was not liable in tort for acts of its agents and employees.

At page 857, the court said:

> "The proposition that the state is not subject to tort liability without its consent is too familiar to deserve extended citations of authorities."

At page 858, the court further said:

> "It thus having been determined that the commission is a subordinate branch of the executive department, it is not liable in tort for the acts of its agents and employees upon grounds of public policy heretofore stated."

And at page 859, the court further said:

> "The authority of the state of Missouri, through its highway commission, a branch of its executive department, over its system of highways was completely established by the act of August 4, 1921. And it would be against the public interest to rule that the state highway commission was subject to liability for the tortious acts of its agents and employees."

The creation of the State Park Board was authorized by the act of 1937, (Laws 1937 page 520).

By that act certain powers were conferred upon said board. By analogy, if the State Highway Commission is a branch of the state government, as was held in the Bush case, it also follows that the State Park Board is likewise a branch of the state government and, as was said in the Bush case

> "**** the state is not subject to tort liability *****".

There is no consent given by the state in said laws which create or authorize the creation of said State Park Board by which suit against it might be maintained on account of the tortious acts on behalf of said State Park Board.

Conclusion.

It is our opinion that neither the State of Missouri nor the State Park Board is legally liable on account of an injury received by stray stock, cattle or live stock, becoming injured in attempting to trespass on the parks which are owned by the state through the State Park Board.

Drake Watson.,
Assistant Attorney General.,

Approved;

J. E. Taylor,
Acting Attorney General.,

CONSERVATION COMMISSION: Acquisition of land from Evans-Howard Sewer Pipe Company.

August 26, 1939

FILED.
10

Mr. I. T. Bode, Director
State Conservation Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letters of recent date concerning the property to be acquired by the Conservation Commission from the Evans-Howard Sewer Pipe Company. The facts are as follows:

A. J. Freund proposes to purchase approximately 80 acres of land from the Sewer Pipe Company and give the same to the Commission. The conveyance is to be made direct from the Sewer Pipe Company to the Conservation Commission. There is an "escrow" agreement to be entered into between the Commission and Sewer Pipe Company, separate and apart from the deed, to the effect that the Sewer Pipe Company "reserves" the right to mine and remove all minerals from said land, without payment, for a period of fifteen (15) years, and the right to construct and maintain on said property all things necessary and incident to said mining operations including transportation facilities to a certain railroad line. The Sewer Pipe Company is to defend and hold "purchaser" (apparently meaning the Commission) exempt from all claims for damages arising out of said mining operations and agrees to pay all taxes that "may" be levied on mineral or surface rights or title in said land or reimburse the Commission if it pays the same. The Sewer Pipe Company is to get possession of all buildings on a portion of said land. There is to be no adjustments other than on taxes for the year 1939. These agreements are to be binding on the Sewer Pipe Company, its successors and assigns, without incorporating them in the deed of conveyance.

Upon this statement of fact you ask the following questions:

(1) What title does the Conservation Commission obtain?

(2) Does the fact these "reservations" are contained in the separate "escrow" agreement rather than in the deed make any change in the title obtained?

(3) Is the property subject to taxation after this conveyance is made?

(4) What is the status if, under these same conditions, the deed is delivered to a third party to hold in escrow until the expiration of the fifteen (15) year period?

(5) Is this an acceptable manner to handle such a transaction and will not subject the Conservation Commission to criticism?

(6) Will the Conservation Commission be liable for damages as a result of the mining operations carried on upon said property?

We shall treat question one, two and four together since the law on each point is somewhat inter-related. The manner of conveyance to be used in the instant case is proper and lawful though somewhat unorthodox.

In Engelhardt v. Gravens 281 S. W. 715, 718 (Mo. Sup.) a grantor conveyed a portion of lands owned by him to two different parties in separate deeds. On the same date grantor and his grantees also executed a contract duly acknowledged creating an easement for a road right-of-way over a portion of said land for the use of all. Of this the court said:

> "The deeds made by Ulery to Walton and to Frederick Engelhardt, and the contract made by all three on the same day, and affecting the same subject, are to be read together. They related to the same subject; they were executed contemporaneously; they were executed upon a consid-

eration moving all the parties concerned, and the contract explained, and fully consummated the intention of the parties to the deeds, and made all parts of a complete expression. Cook v. Newby, 112 S. W. 272, 213 Mo. 471."

Other cases wherein this rule has been considered are Pursley v. Good 94 Mo. App. 382, 389; Cook v. Newly 213 Mo. 471, 490; Smith v. Smith 289 Mo. 405, 419. In the last cited case grantor conveyed certain lands to a son. Grantor and grantee then entered into a lease whereby grantor was to get a certain rental off the property for life, along with other stipulations of no concern here. The court said, "The deed and lease were executed contemporaneously, as one transaction, and should be read together. The deed was made subject to the lease."

Assuming (because we do not have the deed) that the grant from the Sewer Pipe Company to the Conservation Commission is to be by warranty deed with the usual covenants conveying a fee simple title we must consider what effect the terms of the "escrow" agreement have upon said title. This "escrow" agreement can be nothing more than a lease or a contract creating an easement. It is not a deed conveying back to the Sewer Pipe Company a certain portion of that which it granted to the Conservation Commission. We say this because there are no words of conveyance in said "escrow" agreement. It is essential for a deed to use "apt and proper words of conveyance necessary to show an intention to convey." Wimpey v. Ledford 177 S. W. 302, 303 (Mo. Sup.) Neither can it be said to be a contract creating an easement. "An easement can only be created by grant", (Kuhlman v. Stewart 282 Mo. 108, 115) and as said above there is no grant or words of conveyance in this "escrow" agreement. This process of elimination leaves only one reasonable conclusion to be reached and that is the "escrow" agreement is a lease of the property and rights set forth therein by the Conservation Commission to the Sewer Pipe Company for a fifteen (15) year period. Apparently the escrow agreement was intended to be a "defeasance." In 18 C.J. p. 153, Sec. 25, this is defined as "a collateral deed made at the same time with an original deed of conveyance, containing conditions which, when performed, will defeat the estate created by the original deed." It is to be noted a defeasance is a collateral deed. A deed must contain words of grant. This escrow agreement does

not contain any such words and therefore can not be a defeasance or collateral deed.

As we understand the situation this deed is to be made subject to the lease, (we think the deed should so recite so there will be no doubt of this fact. Tillman v. City of Carthage 247 S. W. 992 Mo. Sup.), and as such they must be construed together to ascertain what title the Commission will get. The Commission by warranty deed is to get immediately a fee simple title, subject to the terms of the lease (escrow agreement). This creates in the Conservation Commission a present, fixed right of future enjoyment subject for fifteen (15) years to the rights held by the Sewer Pipe Company under the lease, that is, the right to use the land and deplete a portion of the estate by removal of minerals without payment.

You ask what change will be effected in this title if the deed from the Sewer Pipe Company is delivered to a third party to be held for fifteen (15) years while the Sewer Pipe Company carries on its mining operation. Ordinarily, a deed passes no title until said deed is delivered and accepted. Powell v. Banks 146 Mo. 620, 633. However, delivery may be made by placing the deed in escrow with a third party, but even then delivery is not complete unless the grantor in placing said deed in escrow releases all control over it, putting it beyond his power to recall. Peterman v. Crowley 226 S. W. 944, 946 (Mo. Sup.). If in placing the deed with a third party to hold in escrow for fifteen (15) years the Sewer Pipe Company releases all control over said deed, the title obtained by the Conservation Commission would be the same as above set out.

Your third question relates to the tax status of this property after the aforementioned instruments are entered into. In saying the "escrow" agreement was nothing more than a lease we were not unmindful of the rule that "a deed is to be construed as nearly as possible in harmony with the purpose of the grantor to be determined from the terms of the instrument." Elsea v. Smith, 273 Mo. 396, 412. Also in a deed, "its operation, as passing any particular right, is largely a matter of intention." Inlow v. Herren 267 S. W. 893, 895 (Mo. Sup.). Under these liberal rules of construction it may be that the courts would construe the escrow agreement as a

deed from the Commission to the Sewer Pipe Company even though there are no clear words of conveyance therein. At least this question is in the twilight zone with the authorities indicating it to be a lease. If it could be said that the terms of the escrow instrument merely reserve a portion of the title to the Sewer Pipe Company the law is well established that these mineral rights are taxable. Enclosed is an opinion of this department on that subject, rendered to Richard Chamier on April 28, 1937. However, if the escrow agreement is a mere fifteen (15) year lease there is some doubt as to whether this leasehold interest is taxable. This department in an opinion to Andrew J. Murphy on November 22, 1935, ruled that such an interest, if of any value, is taxable, but an examination of this opinion discloses that the point has not yet been definitely decided by our courts. We enclose a copy of t his opinion.

Your sixth question deals with the liability of the Commission in damages on a tort growing out of these mining operations that are to be carried on by the Sewer Pipe Company. By the lease the Sewer Pipe Company agrees to hold the Commission exempt from such claims, but aside from that the Conservation Commission would not be liable in any event. The Conservation Commission is comparable to the State Highway Commission in the powers held and authorized to be exercised. This body was created by the people through constitutional amendment (Laws 1937, p. 614) and as such there can be no doubt that it is an arm of the sovereign, and "a subordinate branch of the executive department." The State Highway Commission was held to be such and there is not a great deal of difference in the two bodies except the source from which they draw their authority. In the case so holding (Bush v. State Highway Commission 46 S. W. (2d) 855 (Mo. Sup.), it was definitely established that a subordinate branch of the executive department of the state could not be sued in tort. Thus, it is clear the Conservation Commission will not be liable in tort for damages arising out of the operation of the mine on this property.

Your fifth question asks if this manner of handling this transfer of the title is acceptable and will not subject the Commission to criticism. We have heretofore expressed the opinion that this mode of transfer was perhaps unorthodox but not invalid. The usual manner of handling such a transaction, if it is the parties intention to reserve a portion of the thing granted, is to do it in the instrument making the grant and not in a separate instrument. To say the least, the nature

of the possessary rights of the Sewer Pipe Company will be open to question, during this fifteen year period.

We assume, with reference to criticism, that you mean by way of public opinion. Public opinion is a fickle thing which no one can accurately predict and for that reason we can not advise you what may be in store from that source. However, we can point out what criticisms are possible. Considering the whole picture this situation could be called an attempt to withdraw land from the tax rolls and still permit private enterprise to get all the benefit of said land at the expense of the sovereign. In the minds of a great many persons the preservation and propagation of game for the delight of the huntsman is one of the luxuries the state fosters for its people. Especially is this so when you place this activity alongside of Education, Health and Public Safety. These absolute essentials are all supported by taxation. If the state is to embark on a policy that permits non-essential functions to deplete its source of revenue, then the necessities must suffer at the hands of a luxury. While not a probability it is not beyond the realm of possibility that the Conservation Commission might, by purchase or accepting gifts, withdraw all or the major portion of taxable land in a county from the tax rolls for a period of fifteen years and as a result that body would perish, along with the Education, Health and Safety it furnished its citizens. This indeed would be tremendous sacrifice for a luxury. The form of government enjoyed in this country is based, not on leaving things to improbability, but rather the elimination of even a possibility that, that which is harmful will occur. There can be no question that withdrawal of land from taxation for non-essential functions is harmful to the state as a whole. The better public policy would be for the branches of the sovereign which have authority to acquire land and hold it tax exempt not to permit private enterprise to enjoy its fruits without paying a just portion of the tax on said land. Any transaction which has that appearance should be studiously avoided, even if it necessitates refusal of the gift.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
LLB:RT

PARK BOARDS: Park Boards may not employ skilled help and pay same from Appropriation Act for repairs and replacements.

September 11, 1939

9-14

FILED
10

Mr. I. T. Bode
Director of Parks
State Park Board
Jefferson City, Missouri

Dear Mr. Bode:

This Department acknowledges your request for an opinion under date of August 28th, in part, as follows:

"While the 1939 session of the State Legislature made more generous provisions for the payment of personal services than did the 1937 Legislature, we are still confronted with something of the same situation.

"It is clear to us that we can pay for some day labor from some of the items of appropriation other than personal services as the word "labor" is specifically included in some of these other items. In order to adequately care for the parks, it may be necessary that some salary items be charged to other parts of our present appropriation than the personal services appropriation. We have specifically in mind employees who would be employed in the development of parks, principally technical men and skilled

workmen who would not come in a day labor class but who would work on a salary.

"Another possible item which we could not charge to the personal services account because of lack of funds would be the matter of the employment of a skilled pump mechanic to maintain our rather extensive system of wells which are scattered over the entire State. Many of these pumps have become old and are beginning to need rather extensive repairs, and from the standpoint of cost we have about concluded that the cheapest procedure would be to employ an expert pump mechanic by the month who would travel from park to park and assume responsibility for the maintenance of our many pumps. If such a man is to be employed it would be better to have the employment by the month instead of day labor basis, and I am wondering if the salary of such a man can be charged to repairs and replacements item of our appropriation. Incidentally, should we employ a special pump man we would expect to use him for the repair and maintenance of our sewer systems, water systems and, in the event we could obtain a qualified man, we would use him for our electric and telephone systems or, in short, for any work which required the services of a skilled mechanic who was familiar with our various park structures.

"We can get through the present biennial period and charge no salaries to any item other than the personal services item. However, should we maintain as large a personnel as it appears desirable to maintain, it will be necessary that we charge some salaries to appropriations

other than personal services.

"An opinion regarding this matter will be appreciated."

As we understand your letter you state that the appropriation given the State Park Board by the Sixtieth General Assembly for personal services is inadequate, and, therefore, you desire to be advised as to whether you may employ a technical and skilled workman, such as a skilled pump mechanic, by the month, and charge his salary to repairs and replacements.

59 C. J. Section 401, pages 262 to 263, discusses the rules for construction of appropriation laws:

> "An appropriation law is to be construed under and by the same rules as other legislation. Where the intention of the Legislature is plain and obvious, there is no room for judicial construction of an appropriation. They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects. The language is to be presumed to have been used in its natural and ordinary meaning, and not to be given a forced and unnatural construction. The whole bill is to be examined in arriving at the true intention of the parties. * * *"

The word "repair" is defined in Webster's Dictionary as meaning, "to restore to a sound or good state after decay, injury, dilapidation, or partial construction; to renew; to restore; to mend; as to repair a house, a road, a shoe, or a ship; to repair a shattered fortune." Berry v. McConnell, 175 S. W. 100, 187 Mo. App. 673, l. c. 677.

In the Case of Marcy vs. City of Syracuse, 199 App. Div. 246, 192 N. Y. S. 674, l. c. 679, the court in defining the term "replacement" said:

> "The word 'replacement' has a broader and more important meaning. It doubtless contemplates the replacing of those portions and parts that have been destroyed."

Can it be said that the words "repairs and replacements" as used in the following appropriation Act includes the payment for a skilled pump mechanic:

> "C. Repairs and Replacements.
>
> Including buildings, fencing, roads, and other structures, building equipment, including light plant, water supply and plumbing and other operative equipment, educational and recreational equipment, household, kitchen and dining room equipment, production and construction equipment (non-industrial), transportation and conveying equipment and structures, and other repairs and replacements necessary to maintain and operate the state parks."

The only case that we have been able to find on the question of whether repairs and replacements would include compensation for personal services is the case of Allen v. Oscar G. Murray, R. Employers' Ben. Fund, 189 N.Y.S. 201, wherein the lessor had a covenant to "keep the premises in good and tenantable repair", and the court held that this did not entitle lessee to reimbursement for compensation paid to a caretaker for caring for a lawn and garden, such work not constituting the making of "repairs".

To attempt to include personal services under repairs and replacements would be to give the language

a forced and unnatural construction. Furthermore, when one examines the whole appropriation act, it immediately becomes obvious that the Legislature did not intend to pay for the services for skilled help out of the repairs and replacements. Thus, under the appropriation for "Personal Services", we find the provision made for "skilled help":

> "A. Personal Service:
>
> Including twenty-seven (27) park superintendents, ten (10) assistant superintendents, forty-three (43) helpers, secretary, chief clerks, clerks, stenographer, engineers, architects, landscape architects, surveyors, draftsmen, inspectors, superintendent of operation, superintendent of maintenance, park planners, park naturalists, superintendent of construction, auditor, attorney, extra labor and skilled help, also extra help and expenses for burning fire protection lines, clearing lands, draining ditches, riding range lands, roadways and walks, life preservers, guards and other necessary services."

Even if we are able, under the law, to permit a judicial construction of the term "repairs and replacements", to include personal services which we are denied by reason of the plain intent of the Legislature. Said term could, at the most, be construed to permit only a temporary hiring of a skilled worker.

It is, therefore, the opinion of this Department that the State Park Board may not employ a technical and skilled workman, such as a skilled

pump mechanic, by the month, and charge his salary to repairs and replacements under the 1939 Appropriation Act.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(ACTING) Attorney General

MW:RV

STATE BOARD OF HEALTH: Fees must be paid on cabins operated in state parks by private individuals, but not when operated by state.

September 11, 1939

9-17

FILED
10

Honorable I. T. Bode, Director
State Park Board
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 5, 1939, in which you inquire as to the liability of the State Park Board and other individuals for the payment of the license fees required by Senate Bill No. 7, passed by the 1939 Legislature, under the situations outlined by you, which are as follows:

"1. In some instances the park superintendent rents the cabins and facilities to the public, remits all collections to this office and this office pays all expenses such as laundry and cleaning. The collections received are turned over to the State Treasurer in due course and the expenses which we pay are paid from our appropriation. This is obviously a case of straight out State operation. An example of this kind of operation is at Alley Spring State Park.

2. In some instances the park superintendent operates the concession on a percentage basis. In this case the park superintendent makes all collections, pays the expenses of operation from these collections, and remits a percentage of the net collections to this office. This percentage of the net collections, or net profit, which is remitted to this office is turned over to the State Treasurer in due course. An example of this kind of operation is at Roaring River State Park.

3. In one case we have a concessionaire who operates on a percentage basis similar to the one above, in which the concessionaire makes all collections and, after the payment of all expenses, the net profit is determined and a percentage of this net profit is paid to the State which is deposited with the State Treasurer. An example of this kind of operation is at Meremac State Park.

4. In some instances the park concessions are leased for an annual fee, a definite amount of money which is determined in advance. When this money is received by us it is forwarded to the State Treasurer."

Senate Bill No. 7, passed by the Sixtieth General Assembly reads as follows:

"Section 1. That Article 7, Chapter 93, Revised Statutes of Missouri, 1929, relating to inspection of hotels, inns, and boarding houses, be and the same is hereby amended by adding a new section thereto, to be known and numbered as Section 13084-A relating to the same subject, and to read as follows:

Section 13084-A. The State Board of Health is empowered and it is hereby made their duty through their deputies to have inspected, at least annually and as often as shall be necessary, for the proper regulation and sanitation thereof, all tourist camps, cabins or resorts of whatever kind kept, used, maintained or advertised or held out to the public to be a place where sleeping accommodations are furnished for pay to transient or permanent guests in which two or more cabins, whether in combination or under separate roofs, are furnished for the accommodations of guests. For this purpose the said inspectors shall have the right of entry and access thereto at any reasonable time.

b. To carry out the provisions of this act the State Board of Health shall be empowered to promulgate such rules and regulations as they deem necessary for the proper cleanliness and sanitation of said tourist camps, cabins or resorts and for the proper regulations of water supplies in connection therewith.

c. No person shall open or conduct a tourist camp, cabin camp or tourist resort in this State without procuring a permit from the secretary of the State Board of Health for such tourist camp, cabin camp or resort and after the passage and approval of this act, the fees contained in subsection 'd' shall be due and payable to the State Board of Health and thereafter all permits shall be issued as of June 1st of each year.

d. The annual fee for a permit to conduct a tourist camp, cabin camp, or resort in this state shall be as follows:

For 2 and less than 5 cabins.....$3.00
For 5 and less than 10 cabins.....$5.00
For 10 and less than 15 cabins.....$7.50
For 15 and less than 20 cabins.....$10.00
For 20 and less than 25 cabins.....$12.50
For 25 and less than 30 cabins.....$15.00
For 30 and over.....50 cents per cabin.

Section 2. The General Assembly determines this bill to be a Revision Bill within the meaning of Section 41, Article IV of the Constitution of Missouri."

Under the first situation outlined by you, and as you indicate in your letter, the cabins in Alley Spring State Park are operated directly by the State Park Board and are plainly exempt from the license fee. The State Park Board, as established by Laws of Missouri, 1937, at page 520, is plainly comparable as a state agency to the State Highway Commission, which has been held a branch of the State Executive Department and a public entity. State Highway Commission v. James, 115 S. W. (2d) 225; Bush v. State Highway

Commission, 46 S. W. (2d) 854, and Manley v. State Highway Commission, 82 S. W. (2d) 619.

It will be noticed that subsection c of the foregoing bill is applicable only to "persons" and would, therefore, not include any state agency.

The general rule in regard to the application of license fees to state agencies is laid down in 37 Corpus Juris at page 217, where we find the following:

> "Nor does a statute imposing license fees apply to state public agencies, unless the intention so to do is clearly expressed."

Under the second situation outlined by you, it is plain that the park superintendent operates the cabins as a private individual. We note that you use the word "concession", which is defined in Webster's Dictionary as "a grant by government or other authority of land, property or a privilege or right to do something."

The further fact that he derived some profit from the operation clearly distinguishes it from a state or public enterprise. Paragraphs 3 and 4 are clearly private enterprises in which the cabins are conducted by individuals, and there is no question but that said individuals are liable for the fees set out in Senate Bill No. 7, provided the law is applicable in other respects.

CONCLUSION

We are of the opinion that all operations conducted in the manner described in paragraph no. 1 of your letter are exempt from the provisions of Senate Bill No. 7, but that in the other three instances the license fee prescribed by said bill must be paid to the State Board of Health provided the number of cabins operated in each instance bring them within the meaning of the bill.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
RLH:VC

COUNTY COURTS: It is the duty of the county to maintain county
ROADS AND roads through State parks.
BRIDGES:

September 12, 1939

9-13

FILED
10

Honorable I. T. Bode, Member
State Park Board
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 6, 1939, in which you inquire as to the counties' responsibility for the maintenance of county roads through State parks. There are several sections in the Revised Statutes dealing with the duties of various agencies in regard to the repair and maintenance of public roads. The first is Section 7826, R. S. Mo. 1929, which reads as follows:

> "Public roads shall be cleared of all obstructions therein that hinder or interfere with travel or traffic thereon, and shall be made firm, and the surface thereof shall be kept in a reasonably smooth and level condition; and all necessary bridges and culverts shall be constructed for same."

Two other sections in regard to the duties of overseers to be appointed by the county court are Sections 7874 and 7876, which are identical in language and which read as follows:

> "It shall be the duty of the road overseer to keep the roads in his district in as good repair as the funds at his command will permit."

Again, in Sections 8013 and 8014, the duties of the county highway engineer in regard to the repair of roads are set out and are as follows:

> "The county highway engineer shall have direct supervision over all public roads of the county, and over the road overseers and of the expenditure of all county and district funds made by the road overseers of the county. He shall also have the supervision over the construction and maintenance of all roads, culverts and bridges. * * * * *"
>
> "The county highway engineer shall personally, or by deputy, inspect the condition of the roads, culverts and bridges of each district as often as practicable, and upon the written complaint of three freeholders in any such district of the bad or dangerous condition of the roads, culverts or bridges of such district, or of the neglect of duty by any road overseer of any such district, or of neglect of any contractor on roads let by contract, it shall be the duty of the county highway engineer to at once visit said road and investigate the complaint, and, if found necessary, to at once cause such road to be placed in good condition."

Section 8017 requires the road overseers to follow the plans and instructions of the county highway engineer in all matters concerning the improvement of the roads. In case the particular counties in which these roads lie have abolished the county highway engineer system, which they may do by vote, the county surveyor is ex officio highway engineer and has the same duties.

The foregoing sections apparently require the various authorities to repair roads without the exercise of their discretion in the matter, however, Section 7946, a later section passed in 1917 and being found in Laws of Missouri, 1917 at page 467, has been interpreted by the courts to give the county court, township board or road commissioners the power to improve only such roads as they consider necessary. In the case of Schmidt v. Berghaus, 223 S. W. 939, being a case in which certain citizens and taxpayers sought a mandamus to compel the repair of certain roads, we find the following in the opinion of the court, l. c. 940:

"As to the mandatory part of the injunction, we find that section 10585, R. S. Mo. 1909, and section 79, p. 467, Session Act of 1917 (which is section 7946), leave it in the discretion of commissioners as to what roads in any road district shall be improved, and the manner of the improvements. The evidence in the record before us fails to show that the commissioners are acting in violation of the law, or are threatening to so act. In such case it is beyond the province of a court of equity to make a special order on a defendant, requiring him to do what the law has already declared. See McLemore v. McNeley, 56 Mo. App. 556; Lester Real Estate Co. v. St. Louis, 169 Mo. 227, 69 S. W. 300."

CONCLUSION.

It is our conclusion, in view of the foregoing authority, that the responsibility for the maintenance of county roads passing into or through the various State parks lies with the county courts of the respective counties, or with the commissioners in special road districts, but that no action will lie to compel the various agencies to repair said roads.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:VC

STATE PARK BOARD: Interpretation of Sections 26a and 26o of House Bill 716 relating to appropriations for parks.

September 13, 1939

9-14

FILED
10

Mr. I. T. Bode
Director of Parks
Jefferson City, Missouri

Dear Mr. Bode:

This department is in receipt of your request for an opinion under date of September 7th, which is as follows:

> "Reference is made to Section 26a and Section 26o of House Bill 716 which was passed by the 1939 Legislature and approved by Governor Stark. This bill is ordinarily referred to as the Omnibus Appropriation Bill.
>
> We would like to use these two appropriations for all expenditures which are made on these two parks from now until the end of the biennial period. This will include the salaries of the resident superintendents, telephone bills, etc. We also have in mind the possibility of charging technical services against these two appropriations.
>
> CCC camps will go in residence on both Crowder and Pershing Parks effective October 1, and in order to start construction on both of these parks it is necessary that proper plans be prepared. We are considering the feasibility of charging these two appropriations for the cost of these plans. We are particularly anxious to relieve our personal service appropriation which is Article A under Section 26.
>
> Any ruling regarding the proper use of the $5,000.00 provided for Crowder Park in Section 26a and the $15,000.00 provided for

> Pershing Park in Section 26o will be appreciated. In any event we shall expect to purchase all possible materials of construction from these two appropriations."

Sections 26a and 26o, respectively, of House Bill 716, passed by the 1939 Legislature, provide as follows:

> "Section 26a. There is hereby appropriated out of the State Treasury, chargeable to the general revenue fund, the sum of Five Thousand ($5,000.00) Dollars for the use of developing Enoch H. Crowder Park located in Grundy County, Missouri.
>
> Section 26o. There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund, the sum of Fifteen Thousand ($15,000.00) Dollars for the use of the State Park Board in developing and improving Pershing Memorial State Park located in Linn County, Missouri, complying with an Act passed by the 59th General Assembly, 1937 Session Acts, page 520."

In the case of Leingang v. Geller, Ward and Hasner Hardware Company, 335 Mo. 549, 73 S. W. (2d) 256, l. c. 261, the court had occasion to examine the term "develop", and pointed out that:

> "One definition of the word 'develop' given in Webster's New International Dictionary is:
>
> '3. To unfold more completely; to evolve the possibilities or power of; to make active (something latent); to perfect; advance; further; to make to increase; to promote the growth of.'"

And in the case of State v. Babcock, 242 N. W. (Minn.) 474, l. c. 476, the court, in considering the words "improve" and"improvement", stated that:

> "The words 'improve' and 'improvement' are frequently used in connection with land. They are used as denoting some betterment, such as by cultivations, clearing, drainage, irrigation, erecting buildings, or otherwise enhancing the value or usefulness of the land. * * * * * The word 'improve' has several meanings: To make better; to increase the value or good qualities of; to ameliorate by care or cultivation -- are some of the common definitions. * * * * *
>
> The word 'improve' is a common word in everyday use. Its meaning is well understood. As commonly used, the word means to make better or to enhance the quality or value of some existing thing or subject."

And in the case of the People v. Clark, 296 Ill. 46, l. c. 59, the court, in considering the meaning of park improvements, said:

> "It is ridiculous to assume, for instance, that improvement of a park means to sow grass, plant flowers and set out shrubbery and trees and then let them grow or die without further attention. Improvement of a park necessarily includes watering and mowing the grass, watering and cultivating the flowers and cultivating and trimming the shrubbery and trees. To do these things it is necessary to have officers and employees to supervise and do the work."

59 Corpus Juris, Section 401, page 262, discusses the rules for construction of appropriation laws:

> "They are to be construed without liberality towards those who claim their benefits; but are not to be construed so strictly as to defeat their manifest objects."

You state that you desire to charge against the above appropriations (1) salaries of resident superintendents; (2) technical services; (3) plans; (4) construction materials; (5) telephone bills, etc.

Although the appropriation act relating to Crowder Park uses only the term "developing", we believe that the term is broad enough to include the term "improving" as used in the appropriation act relating to Pershing Memorial State Park, both carrying out the idea of betterment and enhancement of parks.

Items 1, 2, 3, and 4, supra, would clearly come within the terms "developing" or "developing and improving" of parks, but item 5, including telephone bills, postage, printing, stationery and kindred matters, not being essential and necessary to the development and improvement of the parks, cannot be included. Particularly is this true in view of the case of Meyers v. Kansas City, 18 S. W. (2d) 900, 323 Mo. 200, declaring that appropriation acts are to be strictly construed.

From the foregoing, we are of the opinion that the State Park Board may use funds appropriated under Sections 26a and 26o of House Bill 716, passed by the 1939 Legislature, for (1) salaries of resident superintendents; (2) technical services; (3) plans; (4) construction materials: but not for (5) telephone bills, etc.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

GAME AND FISH: A club is not a commercial establishment within the meaning of Section 8285 Laws of Missouri, 1931.

September 14, 1939 9/18

FILED 10

Hon. I. T. Bode, Director
Conservation Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of September 11th, 1939, which reads as follows:

"In certain instances, the enforcement of 'Section 8285-Regulating sale, storage and serving game -- exception -- penalty' hinges upon an interpretation of the term 'commercial establishment'. The Prosecuting Attorney of St. Louis City has declined to file against a party until advised by your office that the accused operates a 'commercial establishment' within the intent of Section 8285 (1931 Laws pp 225-226).

"A group of individuals operates and maintains a club house where meals, lodgings and other facilities are furnished, at a price to members and their guests. Many of the members do not reside at the club house and visit there only occasionally. Each member is not only obligated to pay a stated membership fee, but he is also expected to pay for personal services received. In addition, he may be subjected to assessments to liquidate any operating deficit. It may therefore be assumed that the membership expects the organization to be self-sustaining and with a minimum of assessments.

"Section 8285, as you know, forbids storing or serving game 'in any commission house, cold storage house or commercial establishment, in this state' etc. Could it be successfully contended that the club is a commercial establishment in its relation to visiting members, while for resident members, it is a home and not a commercial establishment? If such a reasoning is well founded, then can the club be prosecuted for the storage of game in violation of Section 8285, without showing that such game was owned by a non-resident member?"

Section 8285, Laws of Missouri, 1931, reads as follows:

"Any person, firm or corporation, who shall, at any time of the year barter, sell or offer for sale, or who shall store or serve in any commission house, cold storage house or commercial establishment, in this state, either under the name used in this article, or under any other name or guise whatever, any animal or bird protected in this article, unless the same be fur-bearing animals, lawfully taken shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100.00), and an additional fine of five dollars ($5.00) for every bird or animal or part of every bird or animal bartered, sold or offered for sale, stored or served: Provided, that nothing in this section shall be construed to apply to the pelts or parts of fur-bearing animals lawfully taken, or as otherwise provided for taxidermists, or scientific specimens in this article: Provided, nothing in this section shall be construed to prohibit the storing, and serving, in any eating establishment, of deer and elk, raised in captivity, as provided for in section 8310."

In State ex rel. Kansas City Power & Light Co., v. Smith, State Auditor, 111 S. W. 2d 513, l. c. 515, the court said:

> "The ordinarily accepted use of the phrase 'commercial establishment' denotes a place where commodities are exchanged, bought, or sold, * * * "

In the ordinary case of a restaurant, for example, where the dominant purpose of the conduct of the establishment is the buying and selling to patrons, there would seem to be no difficulty in applying the above, and we could say that the business is a "commercial establishment" within the meaning of the court's words. But in the case of a club conducted as the one set out in your request, the prime purpose of the organization is not the buying and selling of commodities, but is the pleasure and convenience of its members. The sale of meals to members is at most merely ancillary to the main purpose of the club.

In 12 C. J. S. 804, it is said:

> "Used adjectivally, business has been held synonomously with commercial."

The word "business" is defined by Webster as "that which occupies the time, attention or labor of men for the purpose of <u>profit</u> or improvement."

As we understand your statement of facts, the club you mention is in no sense run for profit, but is conducted on a strictly non-profit basis. As you point out in your request, it may be assumed that the membership expects the club to be self-sustaining. Regardless of whether the members make the club house their home, or visit it only occasionally, the very important element of expectation of profit to be derived from the conduct of the club is lacking.

The court in Female Orphan Society v. Board of Assessors, et al. 33 So. 592, said:

> "The property in question is no part of the asylum proper but is commercial property; that is property leased out for revenue."

The above seems to further carry out the idea that the words "commercial establishment" in Section 8285 Laws of Missouri, 1931, would refer to a profit seeking undertaking.

CONCLUSION

It is therefore the opinion of this department that the club you describe in your request is not a commercial establishment within the meaning of Section 8285, Laws of Missouri, 1931, either in its relation to visiting or resident members.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

WJB:RW

RPCW:RW

PARK BOARDS: Section 26o, House Bill No. 716, does not authorize purchase of additional land for Pershing Memorial State Park.

9/18

September 18, 1939

FILED
10

Mr. I. T. Bode
Director of State Parks
State Park Board
Jefferson City, Missouri

Dear Mr. Bode:

We are in receipt of your letter of September 15th, wherein you state as follows:

> "Further reference is made to Section 26o of House Bill No. 716 which was passed by the 1939 Legislature and approved by the Governor, and which reads as follows:
>
> 'Section 26o. There is hereby appropriated out the State Treasury, chargeable to the General Revenue fund, the sum of Fifteen Thousand ($15,000.00) Dollars for the use of the State Park Board in developing and improving Pershing Memorial State Park located in Linn County, Missouri, complying with an Act passed by the 59th General Assembly, 1937 Session Acts, page 520.'

> "We are asked by persons who are interested in the development of Pershing Park to purchase some addition land. Under the wording of this appropriation, are we authorized to use a part of this money for the purchase of additional land?"

In the case of Leingang v. Geller, Ward and Hasner Hardware Company, 335 Mo. 549, 73 S. W. (2d) 256, l. c. 261, the court had occasion to examine the term "develop", and pointed out that:

> "One definition of the word 'develop' given in Webster's New International Dictionary is:
>
> '3. To unfold more completely; to evolve the possibilities or power of; to make active (something latent); to perfect; advance; further; to make to increase; to promote the growth of.'"

And in the case of State v. Babcock, 242 N. W. (Minn.) 474, l. c. 476, the court in considering the words "improve" and "improvement", stated that:

> "The words 'improve' and 'improvement' are frequently used in connection with land. They are used as denoting some betterment, such as by cultivations, clearing, drainage, irrigation, erecting buildings, or otherwise enhancing the value or usefulness of the land. * * * * * The word 'improve' has several mean-

> ings; To make better; to increase the value or good qualities of; to ameliorate by care or cultivation -- are some of the common definitions * * * * * * *
>
> "The word 'improve' is a common word in everyday use. Its meaning is well understood. As commonly used, the word means to make better or to enhance the quality or value of some existing thing or subject."

It is evident from the definitions of the terms develop and improve that the expenditure of funds for the "developing and improving" of Pershing Memorial State Park must be to "promote the growth of" "some existing thing or subject." Or, in other words, to enhance the value or usefulness of the existing land. To permit any other construction would be to defeat the manifest object of the statute, for funds expended for new land, would obviously deprive the existing land of funds for development and improvement. Our construction is sustained by reason of the case of Meyers v. Kansas City, 18 S. W. (2d) 900, 323 Mo. 200, which declares that appropriation acts must be strictly construed.

From the foregoing we are of the opinion that Section 26o of House Bill No. 716, passed by the 1939 Legislature, does not authorize the purchase of additional land for Pershing Memorial State Park.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

MW:RV

SCHOOL: Board of Directors of common school may convey real estate upon order of voters at annual meeting.

STATE PARK BOARD: State Park Board has no power to convey State Park property except by act of Legislature.

September 27, 1939

9-30

FILED
10

Honorable I. T. Bode, Director
State Conservation Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 20, 1939, as follows:

"At Chesapeake State Park in Lawrence County there is one-half acre of land on the inside of the park boundary fence which is the property of a rural elementary school which is located across the road from the park. The road referred to is State Highway No. 14. Also, on the south side of the highway, adjacent to this school building and on the opposite side of the road from the park, there is one acre of land which is the property of the State.

* *

Do we have authority in the name of the State of Missouri to give this rural school board a deed to the one acre of land which is south of the highway, and to accept from this rural school board a deed to the one-half acre of land which is north of the highway? Or, should any deed which we accept from this rural school board be signed by the County Court of Lawrence County, or by any other agency? It is the opinion of the local residents that the members of the school board have authority to negotiate this land to the State.

* "

Section 9269, R. S. Mo. 1929, places the title of all school property in the school district in which the same may be located, and is as follows:

> "The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

The only mention found in the statutes of the right of a school district to dispose of its real estate is found in the seventh provision under Section 9284, R. S. Mo. 1929, which sets out the powers of the qualified voters when assembled at the annual meeting, said provision being as follows:

> "Seventh--To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds."

This section is under Article III, Chapter 57, R. S. Mo. 1929, relating to common schools.

Under Section 9330, R. S. Mo. 1929, under Article IV relating to city, town and consolidated schools, we find the following:

> " * * * * * and whenever there is within the district any school property that is no longer required for the use of the district, the board is

> hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

It is apparent from the foregoing provisions that the property of a school district, which is no longer required for school purposes, may be disposed of by the voters of the district assembled at their regular annual meeting, the actual conveyance to be made by the Board of Directors of such district in accordance with the instructions of the voters.

The State Park Board was created in 1937, its powers and duties being found in Laws of Missouri, 1937, page 520, and they are set out as follows:

> "The State Park Board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said Park Board or the exercise of its powers hereunder necessary for the recreation of the people of the State of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. Said Park Board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the Legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the Director of State Parks and when presented to the State Auditor shall be paid out of the funds appropriated for such purposes."

While the above section gives the State Park Board full power to acquire any lands necessary or convenient for its use, we find no provision given the Park Board to sell, exchange or in any manner dispose of any of the lands belonging to the state acquired by it. In the absence of any specific grant of this power, we must assume that the legislators did not intend that such authority be given.

From the foregoing, it is our conclusion that a school district may convey its property to the State Park Board at its annual meeting if the voters of the district so desire, but that the State Park Board has not the power, in the absence of express legislation so directing, to convey any of the property under its control belonging to the state.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

ROADS AND BRIDGES: County road may be vacated by abandonment for a period of ten years.

September 28, 1939

9-29

FILED
10

Mr. I. T. Bode, Director
State Park Board
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 25, 1939, which is as follows:

> "Further reference is made to the matter of county roads in State parks. It is our understanding that a State law exists which provides for the automatic abandonment of a county road if the county does not spend any money for maintenance on any road within a five or ten year period.
>
> We have some county roads on the inside of State parks which we would like to eliminate. On these roads the respective counties have spent no money for maintenance, or for any other purpose, within a ten year period.
>
> Is it true that a county road is automatically abandoned at the end of any specific period of time provided the county court spends no money on it for maintenance? Should this be true, what would be our procedure in getting rid of the road?"

The law which you have in mind is found at the latter part of Section 7839, R. S. Mo. 1929, and is as follows:

> " * * * * * and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same."

It is apparent from the reading of this statute that the question of whether or not public money is expended on any public road for a period of ten years is not material, the only question being that of user by the public.

The leading case in Missouri on this subject is Oetting v. Pollack, 189 Mo. App. 263. The abandonment of a public road is clearly defined in this case, and we quote at length from the opinion of Judge Farrington, l. c. 270, 271.

> "There may be a vacation of a public highway by proceedings under the statute, as we have shown, or the vacation may occur by abandonment under section 10446, Revised Statutes 1909--from nonuser by the public for a period of ten years continuously. That is to say, 'a highway may cease to exist either by abandonment or by vacation according to law.' * * * * * * The court in our case, in its finding of facts, stated that this road has been regarded by most of the people living in the neighborhood of it as an abandoned road. We do not believe this is sufficient to constitute abandonment. If no other way existed of vacating highways, it might be argued with good reason that what most of the people thought who were entitled to use a highway would be a controlling factor. In the case of O'Dea v. State (Neb.), 20 N. W. 299, 300, the rule is thus declared: 'In order to vacate a road by nonuser, there must be a clear and entire abandonment of the road by the public for the statutory period. * * * * * Officers and courts cannot inquire into the extent of the use whether used much or little by the public. If used at all, the road will not 'be deemed vacated.'' (See, also, Cox v. Commissioners of Highways of East Fork Twp. (Ill.), 62 N. E. 791, 793; Kelly Nail & Iron Co. v. Lawrence Furnace Co. (Ohio), 22 N. E. 639, 640.) In the case of Small v. Binford (Ind.), 83 N. E. 507, 510, the court said: 'The fact that the road is rarely, if ever, used by persons other than the

> appellants, makes it none the less a public highway. The law does not fix the number of persons who must travel upon a road to determine its existence'--citing authorities. When a right to use a road as a public highway has become vested in the public it inures to the benefit of all the public; hence such a right cannot be surrendered or abandoned unless all of the public concur therein. The court in this case did not find that the public generally had entirely ceased to travel this road, but did find that it had not been traveled by the public generally to any extent for the last fifteen or twenty years; and that can only mean that the extent of the travel by the public was limited. The fact that defendant in the year 1912 took the law in her own hands and fenced up a highway that at least was still used by the plaintiff and the children who attended the school situated on that road, and one that was recognized as an existing public road in 1907 by the county court, does not constitute an abandonment under the statute. Our Supreme Court in the case of Hickman v. Link, 116 Mo. l. c. 127, 22 S. W. 472, said: 'Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.'"

The same rule has been followed by the courts until the present time, a similar rule being laid down in Rosendahl v. Buecker, 27 S. W. (2d) 471.

From the reading of the foregoing, it is apparent that any user of a public road, once dedicated in a proper manner, is sufficient to maintain the road as a public way, regardless of the frequency of such use. In former opinions we have fully set out the law regarding the statutory method of vacation of roads, and suggest that this is the only procedure open for the closing of such county roads passing into or through state parks.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TAXATION:
SALE OF LANDS FOR DELINQUENT TAXES:
COLLECTOR'S DUTIES:

Collector is not authorized to issue certificate of purchase at sale of lands sold for delinquent taxes until the amount of the bid is paid him.

October 26, 1939

10-26

FILED
10

Honorable I. T. Bode
Director
State Park Board
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following questions:

> "1. In the event the county collector is willing, may we lawfully purchase land sold for delinquent taxes and later clear a check in payment to the county, in due course?
>
> "2. In the event the county collector is unwilling, may we buy this land in spite of the attitude of the county collector and oblige the county collector to wait for payment until we can issue a check in due course?"

It is the general rule of law that a county officer must look to the statutes under which he performs his official duties for his powers and duties. In the absence of a statute authorizing such officer to perform certain acts, then he is not authorized to perform them.

In the first question which you have presented you submit a case in which a county collector is willing to give the bidder time to pay for lands which have been sold for delinquent taxes. We think the duties of the collector in respect to the sale and collection of the purchase price and the issuance of a certificate of title to lands sold for taxes are set out in Sections 9953c and 9953d, page 433, Laws of Missouri, 1933, under what is known as the Jones-Munger Act. Section 9953c provides as follows:

> "Where such sale is made, the purchaser at such sale shall immediately pay the amount of his bid to the collector, who shall pay the surplus, if any, to the person entitled thereto; or if he has doubt, or a dispute arises as to the proper person, the same shall be paid into the county treasury to be held for the use and benefit of the person entitled thereto. In case the purchaser fails to pay his bid, the land shall be again forthwith offered for sale the same as if no sale had been made, and the purchaser so failing shall forfeit and pay for the use of the distributive county school fund of the county a penalty of twenty-five per cent of the amount of his bid, to be recovered by action of debt in the name of the collector, before any justice of the peace, or court having jurisdiction, and the prosecuting attorney shall conduct such suit, and for his services a fee of five dollars shall be taxed against such delinquent purchaser."

It will be noted that this section requires the purchaser to immediately pay the amount of his bid to the collector. It also provides that a penalty shall be imposed upon the purchaser in case he does not pay the amount of his bid at that time, and requires the collector to again forthwith offer the lands for sale.

Referring to Section 9953d, it provides in part as follows:

> "After payment shall have been made the county collector shall give the purchaser a certificate in writing, to be designated as a certificate of purchase, which shall carry a numerical number and which shall describe the land so purchased, each tract or lot separately stated, the total amount of the tax, with penalty, interest and costs, and the year or years of delinquency for which said lands or lots were sold,

> separately stated, and the aggregate of all such taxes, penalty, interest and costs, and the sum bid on each tract.
> * * *"

It will be noted from this section that the lawmakers again provided that the certificate of purchase should not be issued until the bidder has paid the amount offered for the delinquent lands.

The collector is charged with the collection of these taxes and is liable on his bond to the county court for such taxes on the report that such taxes are uncollected; so if the collector were to report a sale of the lands without reporting the amount having been collected thereon, he would be liable on his bond for same. If the collector is willing to assume that responsibility, then we do not see where there would be any prohibition to such an act. If the collector is unwilling to permit the purchaser to pay for the lands after the date of the sale, then under the foregoing statutes there is no way to force him to await payment.

CONCLUSION

From the foregoing, it is the opinion of this department that it is the duty of the county collector when he sells lands for delinquent taxes to immediately collect from the bidder the amount offered for such lands, and that he is not authorized to issue a certificate of purchase to the bidder until the amount bid therefor has been paid to the collector.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:HR

STATE CONSERVATION COMMISSION: **Not liable for back taxes on property purchased for use of state.**

November 16, 1939

11-17 FILED 10

Honorable I. T. Bode, Director
State Conservation Commission
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated September 9, 1939, which is in part as follows:

> "Is it lawful for the Conservation Commission to use Conservation Commission funds for the payment of property taxes? Can the payment of these property taxes be considered to be a delayed consideration or delayed part of the original purchase price? In this particular case it appears that the land was purchased by the State several years ago and that the deeds were not recorded until January, 1938.
>
> The county officials in Reynolds County agree that 1938 taxes are not a lien against this land but take the position that taxes levied prior to January, 1938, are a lien against the land.
>
> In summary, the particular opinion requested in this particular case is, does the Conservation Commission have authority under State law to use its funds for any payment of property taxes?"

The Conservation Commission was determined to be a branch of the sovereign power in the case of Marsh v. Bartlett, 121 S. W. (2d) l. c. 744. It becomes necessary to determine, therefore, whether or not it is necessary for the Conservation Commission to pay taxes assessed against and which have become a lien on property acquired by the Commission. We find no case in Missouri bearing

exactly on this question, but a reference to the cases in other jurisdictions discloses that the question has frequently arisen. In Turley v. St. Francis County (Ark.), 287 S. W. 196, the question arose as to the effect of purchase by the state of property against which there was a special tax lien. We find the following in the opinion of the court:

> "Of course, the forfeiture to the state of lands for general taxes necessarily suspends the enforcement of the special tax lien as long as the title remains in the state, but as the lien, under the terms of the statute, is not extinguished, and continues until the special taxes are paid, the same can be enforced when the land goes back into private ownership. This construction of the statute gives full recognition to the state's paramount right of taxation, and in no wise detracts from the dignity and power of the state as against subordinate governmental agencies."

In the case of State of New Mexico v. Seon Locke, 30 A. L. R. 407, there was a determination of the exact question at hand. In that case the New Mexico Reform School, which was a branch of the executive power of the state, purchased land against which there was a lien for taxes. Subsequently, the collector sold the land for taxes and made a tax deed. The state brought suit for cancelation of said tax deed and to restrain the collector from taking any further action. The court, in deciding that the purchase by the state freed the land from all tax liens, stated:

> "And we think these unanswerable reasons for exempting the property of the state from the levy of taxes thereon lead to the conclusion that when property is acquired by the state in its sovereign capacity, it thereupon becomes absolved, freed, and relieved from any further liability for taxes previously assessed against it, and which are unpaid at the time it becomes so acquired; that, from the moment of its acquisition, the power to enforce the lien is arrested

or abated. The claim of the state for such taxes becomes merged in its ownership of the fee. To consider it further burdened with such lien, and to permit it to be subsequently sold for the payment thereof, results in the state selling its own property to pay itself.

* *

All that is necessary to decide, and all that we do decide, is that all proceedings to assess the land for taxes, taken after it became public property, and all proceedings in attempting to enforce and collect the tax, were void. This decision is the only one that will prevent the disastrous result of property devoted to a public use being, through the carelessness of public officials lost to the public on tax judgments and sales, and is, we think, in entire accord with the settled policy of the state that public property shall not be subject to taxation, or to the laws in regard to proceedings to enforce the collection of taxes.'

* *

'In the case of a municipality, a governmental agency of the state, and itself maintained by taxation, and presumed by law to be exempt from taxation, it cannot be supposed that the legislature intended that any further steps should be taken looking to the enforcement of the state's lien for taxes against property acquired by one of its own governmental agents, after the property is purchased by such agent. Such proceedings would not aid the effectuation of any governmental purpose, but would impair it. After the municipality purchased this lot, the taxing officers could not take any further steps looking to the collection of the tax, and the subsequent sale of the land for the taxes was a nullity. The purchaser at the sale got no title, because it was beyond the power of the officers to sell.'

> The property in question was freed and absolved from further liability for the taxes previously assessed against it, the moment it was acquired by the state. Prior to that time, the state merely held a lien against such property to secure the unpaid taxes so previously assessed, and this lien was merged into the ownership of the title in fee. That a lien, whether it be created by mortgage or otherwise, is merged into the title of the holder thereof the moment he acquires the fee to the property covered by such lien, is a proposition of law too well settled to merit the citation of authority."

We find the same rule expressed in Laurel v. Weems, 100 Miss. 335, 56 So. 451, Flannagan v. Land Development Company, 145 La. 843, 83 So. 39, and other jurisdictions. The principle set out in the Locke case, supra, that there is a merger which extinguishes the debt when the owner of a mortgage acquires the equity of redemption, has been followed in Missouri. Wonderly v. Giessler, 93 S. W. 1130.

Article X, Section 6, of the Missouri Constitution exempts the real and personal property of the state, counties and other municipal corporations from taxation.

CONCLUSION.

In view of the foregoing authorities, it is our opinion that the State Conservation Commission is not chargeable with the taxes assessed against and which have become a lien on property acquired by such commission since the lien is extinguished when the property is acquired and no further taxes are assessable against this branch of the sovereign power.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
RLH:VC

TAXATION: LEVY:
UNCOLLECTED TAXES:

In fixing a levy, the county court should take into consideration amount to be realized from all uncollected taxes except those, that after a reasonable time and after reasonable efforts to collect, remain uncollected, county court has a wide discretion in fixing the levy and unless it abuses this discretion and acts arbitrarily and fraudulently, the levy will not be interfered with by the courts.

January 9, 1939

1-17

FILED
//

Mr. George B. Bridges
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion from this department which is as follows:

"The Mississippi County Court has requested that I receive an opinion from you on the following matter.

"The Air Line Special Road District was dissolved at an election on November 4, 1938. There is at present an outstanding indebtedness of $10,500.00 in bonds and accrued interest. Last spring the customary levy of fifty cents was made upon the property holders in this district. However, the railroad company now refuses to pay twenty-five cents of this levy on the grounds that there are sufficient delinquent taxes due and owing to retire this indebtedness.

"The fifty cent levy, mentioned above, consisted of a twenty-five cent special road and bridge tax (a blanket levy throughout the county) and the Air Line Special Road levy of twenty-five cents. However, this has been erroneously handled and the entire sum treated as an Air Line

> Special Road District levy. I don't know whether or not this pertinent to the point involved, but thought it might be wise to mention it to you."

Your request goes to the question of whether or not the county court has abused its discretionary power in fixing the levy by not taking into consideration uncollected taxes. In fixing the levy the county court should fix the amount that will raise the required amount of money. In State ex rel. and to Use of Johnson, County Treasurer, v. St. Louis & S. F. R. Company, 10 S. W. (2d) 918, 920, the court quotes Judge Ragland as follows:

> "'Exactions from the people, as taxes or otherwise, in advance of any needs of the government are not only condemned by sound public policy but are violative as well of fundamental rights guaranteed by our organic law. The County Court of Cass County was therefore without power to levy a tax clearly in excess of what could at the time have been reasonably anticipated as necessary to pay the interest and principal of the funding bonds. However, the authority to determine what amount would be necessary for that purpose was vested in it, and unless there was a clear abuse of this discretionary power, its action in the premises cannot be interfered with. In other words the amount levied must have been so grossly excessive as to constitute, constructively at least, a fraud upon the taxpayers. * * * Whether, however, the levy was so excessive as to be constructively fraudulent must be judged not from the fact that it subsequently developed that a larger amount was levied than was actually required, but from the entire situation which confronted the county court at the time the levy was made. The amount required for the redemption of the bonds,

> principal and interest, as well as the amount that would be realized from the levy, had to some extent to be estimated in advance. In doing so it would be necessary to consider, among other things, the amount and availability of funds, already on hand, and the probable loss and the cost of collection of the tax to be levied. When a court is called upon to determine whether a given levy was so excessive as to be fraudulent, or the result of a gross abuse of discretion, not only should proof of such matters as these be received, but every existing fact and condition which the county court might have properly taken into consideration in fixing the amount is relevant and admissible in evidence.'"

And at 1. c. 921, the court further said:

> "The power to levy a tax for county purposes is a power delegated to the county court, is legislative in character, and in the exercise of that power the county court has a large discretion. * * * * * "

And at 1. c. 922, the rule as stated by Cooley is quoted as follows:

> "'In fixing the amount or rate, the levying body has considerable discretion. The rate necessary to produce the amount required is largely within the discretion of the levying officers, since it is uncertain what the deficiencies in collection will amount to. But, while local authorities have a reasonable discretion in providing in advance for necessary taxes, the courts may interfere, if

> the discretion is abused by raising taxes faster than they are needed. A levy for future needs is invalid as excessive only when so excessive as to show a fraudulent purpose in making the levy.'"

In the same case, the court, in discussing the ruling of the Illinois Court in the case of Edwards v. People, 88 Ill. 340, quoted said court as follows:

> "'In the early case of Edwards v. People, supra, it was held that in the levy of a tax by the levy board it is proper that it take into consideration the past history of the state in the matter of losses and deductions which have occurred in the collection of the revenue and in the light of that experience exercise its best business judgment as to the rate necessary to produce the net amount required to be raised, and to fix such rate. Where the evidence clearly shows that public authorities have gone beyond the limits herein mentioned they will be held to have abused the discretion vested in them, and to the extent of such abuse the levy and rate fixed by them will be held invalid. In no sense is it to be considered that actual fraud has been committed or that the showing of actual fraud is necessary.'"

And the court further said at l. c. 923:

> "In that case there was considered the evidence as to what was shown by the experience of previous years as to the average percentage of loss and cost of collection of taxes, and also ruling that back taxes unpaid, but in process of collection, and distributable to the

> funds under consideration, were also to be borne in mind by the levying body.* * * "

We also find that the question of considering uncollected taxes when the levy is being fixed has been treated in 79 A. L. R., page 1156, wherein the rule is stated as follows:

> "It has been generally held under Constitutions requiring uniformity of taxation, that such provisions are not violated when, after the lapse of reasonable time and after reasonable efforts have been made to collect the first levy, an additional levy is made upon all the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy. Wayne County Savings Bank v. Supervisors, 97 Mich. 630, 56 N.W. 944; State v. Common Council, 15 Wis. 30; State v. Holt County Court, 135 Mo. 533, 37 S. W. 521; Francis v. Atchison, Topeka & Santa Fe Railway Co. 19 Kan. 303. These holdings are based on constitutional provisions similar to ours, requiring the levy and collection of the amount of money necessary to meet interest and principal bond payments. While, of course, the tax officials are required to use diligence to bring about the collection of the tax, and, as held in People v. Chicago & Northwestern Railroad Co., supra, they will not be allowed to supply such want of diligence by a further levy of taxes, there is in this bill no charge of want of diligence in attempts to recover the full levy for interest on and due installments of bonds. It is also generally held that such constitutional requirement is not

> satisfied merely by the levy of a rate sufficient to pay the debt if the taxes be collected, but it requires that there be a sufficient levy and collection of taxes to actually pay and discharge the debt. * * * * * * "

It will be noted by the rule as stated in A. L. R., supra, that the county court must not only make a levy sufficient to meet the demands on the funds for which the levy is being made but it must take into consideration that it will collect an amount sufficient to meet such demand when it falls due. Therefore, the court may make some allowance for uncollected taxes.

In the case of State ex rel. v. Holt, 135 Mo. 533, 546, the question of the authority of the county court to make an additional levy for drainage taxes caused by uncollected taxes, the court said:

> "* * * * Even if the assessment in the first instance was sufficient, if collected, to pay the cash in full, for said improvements, yet if after the allowance of a reasonable time for the collection from delinquents, a deficiency exists, and the legal remedies have been exhausted for the collection of taxes, or if the assessments made have been abandoned or remain uncollected, by the authorities having the matter of the collection in charge, the writ should be granted ordering an additional assessment."

The county court, in fixing the levy, should take into consideration the amount which will be realized from uncollected taxes and if it does do this and does not act arbitrarily in fixing such amounts, then the court will not interfere with the county court's action. All of the facts and circumstances and the manner in which the court arrived at the amount for the levy are to be considered, and as they are not before us we cannot say whether or not the county court acted arbitrarily and dis-

regarded the amount it will receive from uncollected taxes. However, the court, in fixing the levy, is required to keep in mind that it must not only make a levy sufficient to meet the demands, but also must collect an amount of money sufficient to meet such demands as they fall due. Therefore, it would seem that the past experience of the per cent of uncollected taxes should be taken into consideration when the levy is made and if the county court does not vary too far from that amount in considering the uncollected taxes when it fixes a levy, we do not think it could be said that the court has arbitrarily refused to consider uncollected taxes when it fixed the levy.

CONCLUSION.

From the foregoing, we are of the opinion that if the county court, when it fixed the levy to pay the indebtedness on the drainage district, failed to take into consideration uncollected taxes except those which, after a reasonable time and a reasonable effort to collect have not been collected, then the levy is void as to the amount that would be required to equal the amount of such uncollected taxes.

We are further of the opinion that if the county court, in considering the amount of uncollected taxes for the purpose of fixing the levy, takes into consideration the past experience of collecting delinquent taxes and uses that figure or some figure reasonably near to it as to the amount of taxes that will not be collected, then the county court cannot be held to have acted arbitrarily in fixing the levy and leaving out of consideration such uncollected taxes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

ROADS AND BRIDGES: No vote of the people needed to levy the tax authorized by Section 8067 R. S. Mo. 1929.

March 7, 1939.

2-2

FILE

Honorable F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

This will acknowledge receipt of your letter of February 25, 1939, which reads as follows:

> "I would like to have your opinion as to whether or not the Commissioners of a Special Road District, organized under the provisions of Article 10, Chapter 42, R. S. of Missouri 1929, have authority under Section 8067, R. S. 1929, to levy any taxes, for the purpose of constructing and maintaining roads in the district, without submitting the proposition to levy such taxes to a vote of the qualified voters of the district.
>
> "The Commissioners of a Special Road District have certified to the County Clerk of Benton County a levy of five cents on the One Hundred Dollars valuation of property in their district for construction and maintenance purposes, but such levy has not been approved by the voters of the district.
>
> "I would like to know if the levy is legal and should be run on tax books by the county clerk".

We have carefully examined all parts of Article 10 of Chapter 42, R. S. Mo. 1929 and find no provision or statement therein which in any way directs or indicates that the Commissioners of those Special Road Districts must have the assent of the voters before they can levy the tax authorized by Section 8067 R. S. Mo. 1929. The only reference made in this Article, to a vote on any taxing proposition, is that mentioned in Section 8068 with respect to voting bond issues. Neither do we find any case in the state where such a proposition has been urged or passed upon.

However, there is another question involved though not directly called for in your letter. You state that the levy made under Section 8067 was "for the purpose of constructing and maintaining roads in the district". In view of this statement, we desire to point out for what purposes the money raised by taxation, for this type of road district, can be expended.

The taxes mentioned in Section 8066 R. S. Mo. 1929, are to be expended as follows:

> " * * * All revenue so set aside and placed to the credit of any such incorporated district shall be used by the commissioners thereof for constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district and paying legitimate administrative expenses of the district, and for such other purposes as may be authorized by law. * * * "

The tax provided in Section 8067 R. S. Mo. 1929, is to be expended as follows:

> "The board of commissioners of any district so incorporated shall have power to levy, for the construction and maintenance of bridges and culverts in the

> district, and working, repairing and dragging roads in the district, general taxes on property taxable in the district, and shall also have power and authority and be its duty to levy special taxes for the purpose of paying the interest on bonds when it falls due and to create a sinking fund sufficient to pay the principal of such bonds at maturity; * * * "

The proceeds of bonds issued under Section 8068 R. S. Mo. 1929, are to be expended as follows:

> " * * * The proceeds of the sale of such bonds shall be used for the purpose only of paying the cost of holding such election, and constructing, repairing and maintaining bridges and culverts within the district, and working, repairing, maintaining and dragging public roads within the district."

In Harris vs. Bond Co., 244 Mo. l. c. 695, it is said:

> "These special road districts * * * * possess only such authority and rights as are expressly conferred upon them by the statutes of their creation."

Thus, we see that the levy made by these Commissioners, under Section 8067, would not be legal if it is for the construction of roads because the above statutes do not authorize the district to raise money by taxation, or any other means, for that purpose.

CONCLUSION

Therefore, it is the opinion of this department that the levy of taxes, authorized by Section 8067 R. S. Mo. 1929,

is not required to be approved by a vote of the residents of that road district. It is our further opinion no taxes can be levied, under Article 10 of Chapter 42 R. S. Mo. 1929, except for the purposes enumerated therein which do not include construction of roads.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

LLB:LB

FINANCIAL STATEMENT:
THE COST OF PUBLICATION
CHARGED TO WHAT FUNDS:

The cost of the publication of the financial statement shall be charged to the various funds which are published in such statement and not to the general revenue fund alone.

March 22, 1939 3/23

FILED
11

Mr. F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of how shall the cost of the publication of financial statement for the county be apportioned.

It appears from your request that you are under the impression that the cost of the publication of the financial statement shall be paid out of the ordinary revenue, and that this cost shall be divided and charged to the various classes of the ordinary revenue as is provided under the County Budget Act. We will refer you to Section 12165, Laws of Missouri, 1933, at page 353. You will note that this section requires the publication of the financial statement which is as follows:

> "* * * * Said statement shall show the bonded debt of the county, if any, kind of bonds, date of maturity, interest rate, rate of taxation levied for interest and sinking fund and authority for such levy, the total amount of interest and sinking fund that has been collected, interest and sinking fund on hand in cash, list of persons to whom interest and sinking fund has been loaned with the name of each borrower, amount of each loan, interest rate on loan, description of the security for the loan, and amount of interest, if any, delinquent

on each loan. Said statement shall also show separately the total amount of the county and township school funds on hand and loaned out, the amount of penalties, fines and forfeitures collected during the year and turned into the permanent school fund, the name of each person who has a loan from the permanent school fund, whether county or township, the amount of the loan, date loan was made and date of maturity, description of the security for the loan, amount if any, of delinquent interest on each loan. Said statement shall show the total valuation of the county for purposes of taxation, the highest rate of taxation the Constitution permits the county court to levy for purposes of county revenue, the rate levied by the county court for the year covered by the statement, division of the rate levied among the several funds, total amount of delinquent taxes for all years as of December 31 and a list of all delinquent personal taxpayers, delinquent more than one year and against whom suit has not been filed. The statement shall show receipts into each and every fund separately. First, from the general tax book; second, from railroad tax book; third, from billiard and other table licenses; fourth, ferry licenses; fifth, from land back tax books; sixth, from personal delinquent lists; seventh, fines and penalties; and eighth, from other sources. The total receipts for the year into all funds shall be shown in the recapitulation. Disbursements shall be shown in detail and each every warrant issued shall be shown separately except as herein expressly provided. Date of warrant, number, person to whom issued and purpose for which issued shall be shown. Under separate heading in each fund the statement shall show what war-

rants had been paid (or to pay which funds were in the hands of the county treasurer as of December 31) and under a separate heading what warrants were outstanding and unpaid for the lack of funds on that date with appropriate balance or overdraft in each fund as the case may be. Warrants for salaries of persons drawing yearly pay shall be brought into one call in the following form, Warrants No..., ..., etc., dated, ..., etc., salary of (name of person, title of office or employment, rate of pay, and total amount of warrants issued.) If part are paid and part unpaid such paid and unpaid warrants shall be listed separately under proper heading, as heretofore provided. Warrants issued to pay for the service of election judges and clerks of elections shall be in the following form, Warrants Nos..... to ..... inclusive, pay judges and clerks of elections at $.... per day, listing the names run in and not listing each name by lines, and at the end of the list of names giving the total of the amount of all the warrants issued for such election services. Disbursements by road districts shall show the warrants, if warrants have been issued. Where money has been disbursed by overseers the financial statement shall show the total paid by the overseer to each person for the year, and the purpose for each payment. If the payment was for labor it shall show the number of days each person worked during the year, the rate and the total amount paid to each person during the year. Each road district shall be shown separately and the status of receipts and disbursements for each district for the year shall be shown. Statements of special

> road districts shall be included in the county financial statement in the form in which said statements were submitted to and approved by the county court. Receipts into the county distributive school fund shall be listed in detail, disbursements shall be listed and the amount of each such disbursement. If any taxes have been levied by virtue of Section 22 of Article X of the Constitution of Missouri the financial statement shall contain the following: 'By virtue and authority of the discretionary power conferred upon the county courts of the several counties of this state to levy a tax of not to exceed 25 cents on the $100 assessed valuation the county court of ..... county did for the year covered by this report levy a tax rate of ..... cents on the $100 assessed valuation which said tax amounted to $..... and was disbursed as follows.' The statement shall show how said money was disbursed and if any part of said sum has not been accounted for in detail under some previous appropriate heading such portion not previously accounted for shall be shown in detail. * * * * * "

It will be noted from this section that there are various funds which are shown by this financial statement, such as the county revenue fund, the road and bridge fund, a special road and bridge fund, special road district fund and the school fund, or any other fund, the receipts and disbursements of which are required to be made by such section.

We think that the funds to which the lawmakers were referring when they provided in Section 12166, R. S. Missouri, 1929, that the person preparing the statement and the publisher itemize the amount as properly chargeable to the several funds and the county court to pay out of each fund in proportion it bears to the total cost of preparing and publishing such statement, were the various funds described in said Section 12165, the receipts

and disbursements of which were being published.

You will note that in said Section 12166 that if any part of the cost for the publication of the statement is not chargeable to any specific fund, then it shall be paid from the fund from which officers' salaries are paid. By referring to the County Budget Act, Laws of Missouri, 1933, page 344, section 5, we find that salaries of officers come within class 4 of the expenditures of the ordinary county revenue, therefore, that part of the cost of publishing the financial statement which is not payable out of any of the other funds described in said Section 12165 than the ordinary county revenue fund shall be paid out of class 4 of the County Budget.

CONCLUSION.

From the foregoing, this office is of the opinion that the county court would not be authorized to pay the whole or any part of the expense of publishing the financial statement out of class 6 of the county revenue funds but that such expense shall be paid as hereinbefore set out.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

THE PROSECUTING ATTORNEY: DUTIES:

Prosecuting attorney may not represent the opposite parties in cases in which the State Highway Department is interested

April 7, 1939

4-13

FILED
11

Mr. George B. Bridges
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

> "My father is one of the land owners being condemned. I am wondering whether there would be any objections, ethical or otherwise, to my handling the defense for land holders involved in this case. Of course, the county is not connected with this condemnation, however, I was wondering whether my position as prosecuting attorney would make it obligatory upon me to refrain from acting as defenseattorney in any of these cases."

There are various sections of the statutes which set out the duties of the prosecuting attorneys. We refer you to Section 11316, R. S. Missouri, 1929, which requires the prosecuting attorney to represent the state or county in all cases in which either are concerned.

You particularly refer to suits in which the State Highway Commission is the party plaintiff against certain land owners whose lands it is condemning for highway purposes. Under Section 8111, R. S. Missouri, 1929, the Highway Commission is empowered to purchase, lease or condemn lands in the name of the state. By this section, in case

the Commission purchases lands or has to pay for those lands which it has condemned, the purchase money is taken out of the public funds belonging to the State of Missouri. These funds are those which it is the duty of a prosecuting attorney to protect in performing his duties under Section 11316, supra.

Under Section 8098, R. S. Missouri, 1929, the Highway Commission is authorized to employ a chief counsel and the chief counsel may appoint such assistant as the Commission may deem necessary. Section 8099, R. S. Missouri, 1929, provides that the Attorney General shall advise the Commission and assist the legal advisor in any proceeding in any court of the state of which the commission is a party.

The last two sections cited do not seem to indicate that the lawmakers intended that the prosecuting attorney would be required to assist the Commission in matters in which it is interested in his county, but taking Section 11316, supra, into consideration we think that his duties to represent the state in matters in which it is concerned are sufficient to at least prohibit him from taking any issue against the interest of the state.

On the question of whether or not such act would be ethical and contrary to the Supreme Court Rules, we refer you to Supreme Court Rule 35 which is as follows:

> "The canons of ethics of the American Bar Association, as herein set forth, are hereby declared to be the measure of the conduct and responsibility of the members of the Bar of this court and of all courts over which this court has superintending control and the disciplinary power of the courts may be invoked for the intentional violation thereof. Nothing herein contained shall be construed as a limitation upon the power of the courts to reprimand and discipline any member of the Bar for conduct which, in the opinion of the court, is fraudulent, unlawful or unethical."

Paragraph 6 of subdivision two of the Canons of Ethics of the American Bar Association is as follows:

> "It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."

CONCLUSION.

From the foregoing it is the opinion of this department that the prosecuting attorney is not authorized to represent land owners whose lands are being condemned by the State Highway Commission for public purposes.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CORONERS' FEES: Coroner may hold an inquest and charge fees therefor where violent and casual deaths happen in his own County and the body is discovered therein.

May 1, 1939.

FILED
11

Doctor T. L. Bradley, Coroner
Warrensburg,
Missouri

Dear Doctor Bradley:

We desire to acknowledge receipt of your request for an opinion of February 20, 1939, which reads as follows:

> "About last May 1938 a boy 14 years old was drowned in this County in a big drainage ditch in this County. The creek was very high covered all the bottom lands. His boy companions saw him drown and start down the big ditch. Just lately his bones with clothing and a belt buckle to identify him were found 25 miles down the creek, just over the line in the next County. The report was that he was in my County the same one in which he was drowned (Johnson County) I went down with his father and identified the remains and took charge of them and I signed a burial certificate as Coroner.
>
> "The question is, am I entitled to my Coroner's fees."

Section 11608 R. S. Mo. 1929, is as follows:

> "A coroner shall be a conservator of the peace throughout his county, and shall take inquests of violent and casual deaths happening in the same,

> or where the body of any person coming to his death shall be discovered in his county, and shall be exempt from serving on juries and working on roads." (Underscoring ours)

A Coroner may hold an inquest:

1. When violent and casual deaths happen in his own County.

2. Where the body of such deceased person shall be discovered in his County.

Under the facts stated in the opinion request, the deceased was drowned in Johnson County although he was discovered in an adjacent County. The Coroner of Johnson County sought to exercise the powers of a Coroner upon viewing such body in such adjacent County. Therefore, if such Coroner may exercise any power and charge fees therefor, it is by virtue of the clause "when vblent and casual deaths happen in his own County".

Under the first subdivision the Coroner of Johnson County would apparently have the right to exercise the powers of his office. Under the second subdivision the Coroner of the adjacent County would apparently have the right to exercise the powers of his office.

Such a construction of Section 11608, supra, would create an irreconcilable conflict.

The rule of interpretation of such statute is stated in Blyson vs. Railroad, 152 Mo. App. l. c. 127, as follows:

> " * * * The law of interpretation of statutes is well established that all provisions of law relating to one subject should be considered in determining the meaning of any particular portion thereof, and such a construction should be given to the portion under consideration as will keep all the provisions of law on the same subject in harmony, and give effect to all, when such construction is possible. (Macke v. Byrd, 131 Mo. 682, 33 S. W. 448;

> City of Westport ex rel. v. Jackson, 69 Mo. App. 148; Litson v. Smith, 68 Mo. App. 397.) Where the provisions of law are seemingly contradictory of each other, or the literal construction of a single section would conflict with any other following or preceding it and with the entire scope of manifest intent of the act, it is the duty of courts, if it be possible, to harmonize the various provisions with each other, and to effect this, it may be necessary to depart from the literal construction of one or more sections. (State to the use of Rosenblatt v. Heman, 70 Mo. 441.)"

In view of the above rule of construction, the irreconcilable feature of said statute would be eliminated by construing said first subdivision to mean: Where violent and casual deaths happen in his own County and the body is discovered therein.

CONCLUSION

Therefore, it is the opinion of this department that where violent and casual deaths happen in a County, the Coroner thereof may exercise the powers of his office and charge statutory fees therefor whenever he discovers the body therein.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

SVM:LB

SCHOOLS: Transportation of High School Pupils.

May 11th, 1939.

5-13

FILED
11

Mr. F. M. Brady,
Prosecuting Attorney,
Benton County,
Warsaw, Missouri.

Dear Mr. Brady:

This will acknowledge receipt of your letter of April 17the, last, requesting an opinion from this office, and from which letter we quote as follows:

> "At a common school district in Benton County, Missouri, a proposition was submitted to the voters at the Annual School Meeting for the district 'to provide free transportation for all the high school pupils of the district to a high school outside of the district, at the expense of the district'; the proposition carried by a majority vote of the meeting, but not by a two-thirds majority. The annual meeting also voted a tax levy to provide the necessary funds to carry out the transportation of the high school pupils, but the board of directors of the district are opposed to the proposition of providing any transportation for the high school pupils.
>
> I would like to have you advise me if under the facts, as outlined and the law can the school board be required to provide for free transportation of the high school pupils

to a high school outside the district, there being no high school in this district."

Section 9197, R. S. Mo., 1929, which was first enacted at the 1911 session of the Legislature, constitutes the basis for free transportation of public school pupils. Such section provides in part as follows:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district:

* * * * * * * * * * * * * * * * * * * *

If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation."

It is reasonably apparent from the context itself that the foregoing statute relates to the transportation of pupils within the district in which they reside. An added reason, however, if necessary, would be the fact that in 1911 there was no provision whereby

rural students living in a district where there was no high school, could, when ready for high school, attend at the expense of their home district, a high school located in another district.

By reason of the revision of the school laws in 1931, provision was made whereby a pupil of a school district which did not maintain a high school could attend an approved high school in another district, at the expense in part of his or her home district. While transportation was provided for in the 1931 laws, yet the language used apparently limited transportation to that within a district.

This feature of the 1931 Laws relative to transportation may have brought about the rewriting of the Act in 1935, which is Section 16a, Laws of Mo., 1935, page 352, and reads as follows:

> "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state superintendent of schools, the amount paid for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more,

> shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits non-resident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state superintendent of schools before the transportation is begun, the amount spent for transporting such pupils, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils except money apportioned to such district to pay the cost of transporting such pupils."

We have underscored that part of the last mentioned section which we believe applies to the case you state, namely, the transportation of high school pupils to a high school outside of their district.

You will note that the first part of the section relates to transportation within the district and authorizes the district under such circumstances to make provisions therefor. This comports with Section 9197 wherein the taxpayers of the district are required to vote on the proposition. So far as the provision for transportation of pupils entirely within

a district is concerned, we find no repeal or amendment, express or implied, of Section 9197, save as to the cost of transportation which by the 1935 Act is indirectly paid by the state instead of by the district as called for in Section 9197.

You will further note that the part of the 1935 Act which applies to your case authorizes the board of directors, without qualification or limit as to such authority, to make provision for transportation to a high school outside the district in question, that is to say, such authority is not limited to submitting the proposition to the vote of the taxpayers; and the Act further provides in this instance that the cost of such transportation is paid by the state.

To the extent noted, the 1935 Act modified Section 9197 so far as a vote of the taxpayers is concerned.

Consequently, the vote in the case you recite was unnecessary and the only purpose it could serve would be to advise the board as to the sentiment of the patrons respecting the question of transportation.

While as we said there is no qualification of authority on the part of the board to make provision for transportation of pupils to a high school outside of the district, yet there does not appear to be any kindred provision in the act to compel the board to do so if it deems such action inadvisable. We note that the board in your case is opposed to the proposition, however, such opposition may be due to misapprehension relative to where the cost of transportation may come from.

We might add that on checking your question with the state department of schools, we find that it has been pursuing ever since the enactment of the 1935 Act, the views we herein express, that is, that no vote of the taxpayers is required for transportation of pupils to a high school outside the district in which the pupil resides.

Our conclusion is that the Board of Directors is authorized without vote of the taxpayers to provide transportation, where such district does not maintain a high school, for pupils who attend an approved high school in another district of the same or an adjoining county; and that such district so transporting its pupils will be paid or reimbursed by the state in the appropriation of state funds to such district not to exceed three dollars per month per pupil transported two miles or more.

Very truly yours,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

JWB RV

OFFICERS:
SALARIES AND FEES:

Mode of payment of additional compensation to circuit judge and prosecuting attorney on account of additional duties required by the 1939 laws.

September 11, 1939

9-12

FILED

11

Mr. George B. Bridges
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This is in reply to yours of the 5th wherein you request an official opinion from this department based on the following letter:

> "On August 23, 1939 I wrote to Mr. Franklin Reagan and requested an opinion as to the proper procedure to pay the additional salary granted to the Prosecuting Attorney by the 1939 legislature. In as much as this salary raise goes into effect this month, I should like to have your opinion at your earliest convenience.
>
> "I should also appreciate an opinion as to how the increased salary of the Circuit Court should be paid."

I.

The first part of your request pertains to the additional salary granted to the prosecuting attorney by the 1939 Legislature. The bill which authorizes additional compensation to the prosecuting attorney is House Bill No. 81, which provides as follows:

> "When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected

> or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. The prosecuting attorney shall receive as compensation for the additional services and duties required under this act, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to 25% of the annual salary of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose; Provided, however, that this section shall be applicable only to counties of less than 50,000 population.
>
> "Section 2. The General Assembly declares this act to be a Revision Act within the meaning of Section 41, Article IV, of the Constitution of the State of Missouri."

It will be noted that this bill provides for this additional compensation to the prosecuting attorney to be paid in

equal monthly installments out of the county treasury.

Referring to the prosecuting attorney's regular salary bill which was enacted in 1933, Laws of Missouri, 1933, page 178, it will be seen that the lawmakers provided that the salary of the prosecuting attorney, as provided under that act, should be paid out of the county treasury. Apparently, the lawmakers have intended that the additional salary, authorized by the 1939 Act, should be paid in the same manner as the prosecuting attorney's salary has been paid under the 1933 law.

We note in your request that you state this salary goes into effect this month. I see from the bill, Section 2 thereof, that the lawmakers have declared that this is a revision act. From our inquiry of the office of the Secretary of State, we find that said House Bill No. 81 was approved on July 5, 1939. On the question as to the date when the revision act goes into effect, I am enclosing an opinion written by Assistant Attorney General Arthur O'Keefe under date of August 18th, 1939, directed to the Secretary of State. I am enclosing herewith a copy of this opinion for your information, and which is the position that this department has taken on the date revision bills go into effect. On the question of the proper procedure to pay this additional salary, I find that this office has heretofore taken the position that the procedure depends on the provisions of the County Budget Act.

You will no doubt recall in 1937 the General Assembly provided for additional compensation for clerks of the circuit court for duties which they perform as clerks of the juvenile court. Referring to that act, Laws of Missouri, 1937, page 447, it will be seen that clerks of the circuit courts were allowed additional compensation for such services which were to be paid out of the county treasury in equal monthly installments. Since the additional compensation was not provided for in the 1937 Budget Act, the request was made upon this department as to how such additional compensation should be paid the clerks for that year. Pursuant to that request, this department, on August 24th, 1937, by an opinion written by Mr. Olliver W. Nolen, Assistant Attorney General, to Honorable G. Derk Green,

Prosecuting Attorney of Greene County, held that, "Therefore, if at the close of the fiscal year there remains any funds in any class, after the payment of all items which have been included in the budget, we are of the opinion that such excess may be used for the payment of the increase in the salary of the circuit clerks." And on November 22, 1935, in an opinion to Honorable H. J. Simmons, Prosecuting Attorney of Vernon County, written by Mr. Nolen, held along this same line as to payment of additional compensation to an officer after the budget has been set up. We are enclosing copies of these opinions for your benefit.

CONCLUSION.

Therefore, following the rule announced in the two opinions herewith enclosed, it is the opinion of this department that the additional compensation provided for by House Bill No. 81 of the Sixtieth General Assembly which allows the prosecuting attorney additional pay for his services in connection with the juvenile act can be paid only from the surplus remaining in the treasury after all of the obligations contemplated under the budget have been met.

II.

The second part of your request pertains to the manner of payment of the increased salary of a circuit judge. The bill which provides for this increased compensation of a circuit judge is House Bill No. 363 of the Sixtieth General Assembly, and provides as follows:

> "In all counties in this state which now constitute, or may hereafter constitute, a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in Sections 8754 and 8755, Revised Statutes

> 1929. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this State which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of $1300.00, per annum, to be paid in equal monthly installments out of the State Treasury.
>
> "Section 2. It is specifically declared and determined by the 60th General Assembly of Missouri that this bill shall be considered a revision bill, as provided for in Constitutional Amendment No. 2, Section 41, of Article IV, of the Constitution of the State of Missouri."

I note from the provisions of this bill that the additional compensation provided for therein is to be paid out of the state treasury in equal monthly installments. The first part of the act only applies to counties which now or may hereafter constitute a separate judicial circuit. I note that the circuit in which you are situated does not come within this class.

CONCLUSION.

It is, therefore, the opinion of this department that the salaries of circuit judges, as jury commissioners provided for by House Bill No. 363 in circuits which contain more than one county, should be paid out of the state treasury.

APPROVED:

Respectfully submitted

J. E. TAYLOR
(Acting) Attorney General

TYRE W. BURTON
Assistant Attorney General

TWB:DA

TAXATION AND REVENUE: Cities of the Fourth Class shall, in the published list of delinquent lands to be sold for delinquent taxes, provide that the same shall be sold at public auction at the court house door of the county in which such city may be located.

September 26, 1939.

FILED

Honorable C. D. Bray
City Attorney
Campbell, Missouri

Dear Mr. Bray:

We desire to acknowledge your request for an opinion on September 24, 1939, which is as follows:

> "In my letter of to-day which has already been despatched I overlooked one other matter which I intended to mention with reference to the sale of property for delinquent city taxes in cities of the fourth class.
>
> "You have held that city collectors are to advertise and sell city property for delinquent taxes, and execute deeds therefor, the same as county collectors for delinquent state and county taxes.
>
> "May I now enquire if the sale of city property for delinquent city taxes by the city collector should be held at the county courthouse though the city may be some other city than the county seat city or can such sales be held in the respective cities at such public place therein as may be designated by the city collector in his advertisement? I thank you."

Section 6995 R. S. Mo. 1929, is as follows:

> "Upon the first day of January of each year all unpaid city taxes shall become delinquent, and the taxes upon real property are hereby made a lien thereon. The enforcement of all taxes authorized by this article shall be made in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes, including the seizure and sale of goods and chattels, both before and after said taxes shall become delinquent: Provided, that all suits for the collection of city taxes shall be brought in the name of the state, at the relation and to the use of the city collector." (Underscoring ours)

Section 9952b, Laws of Missouri 1933, at page 430, is, in part, as follows:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty-acre tract or other

> legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered."

Section 9963c, thereof, is as follows:

> "In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such designation shall be construed to mean 'treasurer and ex-officio collector,' or in Section 9962 may be township collector. Where applicable it shall also refer to the collector, or other proper officer, collecting taxes in any city or town. Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk, or other proper officer.'"

CONCLUSION

Therefore, it is the conclusion of this department that it is the duty of the City Collector of a city of the Fourth Class to enforce the collection of taxes on

real estate due the city in the same manner and under the same rules and regulations as are or may be provided by law for the collection and enforcement of the payment of state and county taxes and that a publication of a list of delinquent lands shall state that such lands will be sold at public auction at the courthouse door of the county in which such city is located.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

TAXATION AND: County Court, by order, may have lands sold
REVENUE : under the provision of 9953b, Laws of Missouri 1939. If the sum realized from such sale is in excess of the costs incurred and advanced, the balance shall be distributed pro rata to the funds entitled to receive the taxes on the land.

December 19, 1939.

12-20

FILED
11

Honorable George B. Bridges
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Mr. Bridges:

We desire to acknowledge your inquiry of December 16, 1939, in regard to a construction of Section 9953b, Laws of Missouri 1939, at page 851, which is as follows:

> "Under the recent law, the Mississippi County Court appointed Oscar Wise as their Trustee to buy in all property at the last tax sale, for the county where the full amount of taxes were not paid by some other purchaser. Certain property was bought in this method by the Trustee who thereafter had a chance to sell the same property to a third party for a sum higher than that paid by the county for the property.
>
> "The Mississippi County Court has requested that I ask for your opinion as to whether or not the county is authorized to sell such property at a sum higher than that which they paid for it, and if so, into which fund should go the difference between the amount for which said property is sold and the sum paid therefor.
>
> "I shall appreciate very much if you will give me an opinion on this matter."

Section 9953b, Laws of Missouri 1939, at page 851, is, in part, as follows:

> "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * "
> (Underscoring ours)

In construing the powers of the legislature in passing a law and a legal presumption of its validity, the court, in the case of State ex inf. John T. Barker vs. Merchants Exchange, 269 Mo. 346, 356, the court held:

> " * * * It goes without the saying that there is a legal presumption of validity; that if there is doubt as to the constitutionality of the law the doubt shall be resolved in favor of the validity of the legislative act; that the expediency or inexpediency of the act is not for the courts; that in Missouri the power of the Legislature to enact laws has no limitation, except the express limitations in the State and Federal Constitutions; * * * "

In State ex rel. Barrett vs. Boeckler Lumber Company, 301 Mo. 445, 532, in speaking whether a statute means what it says when it is plain and unambiguous, the Supreme Court, en banc, said:

> "Nor is it within our province to give the statute any other meaning than its language imports. Our duty to apply the statute as it is written is as plain as the language of that statute and in that language there is no ambiguity. * * * "

CONCLUSION

Therefore, it is the opinion of this department that all lands so purchased, by the trustee, shall be sold and deeds ordered executed by such trustees upon the order of the county court and that the land may be sold for any sum, by such order of court, that the court may consider best for the protection of the interest of the funds without regard as to whether such sale price exceeds the taxes, penalties, interest and all costs or whether it may be for a sum less than the taxes, penalties, interest and all costs. It is, further, our opinion that the break down

of said sale price is not to pay the costs and then all taxes, penalties and interest and if there be a surplus after the payment of such sums, to divide such surplus pro rata. The break down provided by Section 9953b, supra, is to, first, pay the costs and then divide and distribute balance pro rata to the funds entitled to receive the taxes on the lands.

Respectfully submitted,

APPROVED:

S. V. MEDLING
Assistant Attorney General

W. J. BURKE
(Acting) Attorney-General
SVM:LB

PROBATE JUDGE:)
) Construction to be placed
WILLS:) on various clauses in a will as to what estate is vested - whether life estate or life estate with power to sell.

January 6, 1939

1-1

FILED
12

Hon. M. D. Brown
Probate Judge
Pulaski County
Waynesville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 31, 1938, enclosing a copy of the last will of L. N. Hufft, deceased. It appears that you have been, or will be, asked to make an order permitting the executrix to dispose of certain real estate. You ask, concerning this instrument, what estate is conveyed to the widow of deceased, and more particularly: May the widow (executrix) dispose of the real estate with which testator died seized because it perhaps is not a good investment?

Her right to do this, of course, depends upon the title and powers vested in her under the terms of the will. Our opinion assumes that the widow has elected to take under the will, and has not been discharged as executrix.

Exclusive of formal matters the will provides for the burial of testator and the marking of his grave, the cost of which "shall be considered as funeral expenses."

The controversial features are contained in the third paragraph of the will, which reads: "And I direct that my funeral charges, the expenses of administering on my estate, and all my just debts, be paid out of my personal estate, and if that be insufficient, I expressly authorize my executrix hereinafter mentioned to sell at public or private sale, the whole or such part of real estate, as may be sufficient for that purpose, first selling such property as she shall designate. And the remainder that is left, of whatever kind, to go to my beloved wife Emma J. Hufft during her

natural life time, she to have entire control of the same, it consisting of real estate, personal property, notes and accounts, so long as she lives, and after her death what is left to be equally divided between", the persons and class named by testator.

The fourth paragraph appoints the widow executrix and authorizes her to compromise and settle debts due testator's estate if she deems it advantageous to do so.

Before attempting to decide what powers and estate are vested in the widow (executrix), we must set forth some of the general principles, that have been formulated by our courts, applicable to the construction of wills.

The leading principle is that the intention of testator, if ascertainable, must be given effect, and this intention is to be ascertained from the instrument as a whole. Stevenson v. Stearn, 29 SW (2d) 116, (Mo. Sup.), and that rules of construction only come into play when there is doubt as to what testator intended. Burrier v. Jones, 92 SW (2d) 885 (Mo. Sup.).

The intent of the testator, as expressed in the first sentence of paragraph three of the will is clear and there can be no doubt but what he desired his debts to be paid out of his personal estate first, but if that estate be not ample to pay the same he expressly authorized executrix to sell such real estate as she might choose to pay the same.

The difficulty is contained in the second sentence of this paragraph. It is not so clear and unambiguous that no doubt can arise in a reasonable mind as to what testator meant. This doubt existing we must apply rules of construction to ascertain testator's intent.

As we see it, without resort to rules of

construction, this will may be susceptible to two meanings, these are: (1) That it vests a life estate in the widow with remainder over in fee to the persons and class named; and (2) that it vests a life estate in the widow, with an unconditional right of disposal and remainder over in fee to the persons and class named.

If our conclusion is in the first then the widow (executrix) may not dispose of this real estate. If the latter, of course, our conclusion will be the opposite.

We shall only deal with the real estate since that is all that is involved, or called for in your request.

Due to the ambiguities apparent in the second sentence of paragraph three of the will we must resort to rules of construction to ascertain testator's intent, and will set forth one of these rules which we think is applicable.

It is said that the terms of one provision of a will "cannot be cut down or their meaning modified by subsequent words not clear and decisive". Stevenson v. Stearns, 29 SW (2d) l.c. 118 (Mo. Sup.) (and cases cited). It will be noted the court used the term "cut down or modified". By this use we think it was the court's intention, though we find no case so holding, to say that the terms of one provision cannot be cut down or enlarged upon by subsequent words not clear and decisive. This to us seems to be the reasonable meaning to be applied because a modification is merely an alteration and an alteration may be one of reduction or enlargement.

In Chapman v. Chapman, 77 SW (2d) l.c. 90 (Mo. Sup.) the court had occasion to review a number of cases which we think are illustrative of the kind of estate this will vests in the widow. The court reviewed these cases as follows:

"In Freeman v. Maxwell, 262 Mo. 13; 170 SW 1150, the will read,'I bequeath to her sole and

separate use * * * the balance remaining after the death of my said daughter to go to her surviving children share and share alike'. The court held that the daughter took a life estate. In that case a life estate was created by implication, because the testator disposed of the remainder.

" In Cross v. Hoch, 149 Mo. 325, 50 SW 786, the will read, 'provided that the property here devised to Sarah Cross be subject to the trust, care, and control of my son Turner Maddox, for her use.' The will furtherprovided that if she died without children, then it should be divided among his other daughters. The court held that Sarah Cross took only a life estate by implication.

" In Mace v. Hollenbeck (Mo. Sup.) 175 SW 876, 877, the will stated, 'I hereby give and bequeath to my beloved wife * * * th be used for her benefit and assistance in whatever manner she chooses during her natural life * * * the remainder to be divided' equally between the testator's and her heirs. In that case the will specifically created a life estate in the wife and also by implication because it disposed of the remainder."

The court reviews a number of other cases in this same vein and to the same effect and then said:

"In the case of Tisdale v. Prather, 210 Mo. 402, loc. cit. 410, 109 SW 41,43, we said: 'It is now well settled that a conveyance which confers an absolute power of disposition creates a fee-simple estate in the grantee, if by deed, or in the devisee, if by will, in the absence of an expressed intention to devise a life estate only.'"

In the case of Presbyterian Orphanage of Mo. v. Fitterling, 114 SW (2d) 1004, 1007, a suit to set aside certain deeds, which necessitated construction of the will under which the grantor in said deeds obtained his title, the will provided: "I give, devise and bequeath to my beloved brother * * * all the rest, * * * of my estate, real, personal or mixed, to have,

hold and enjoy the rents, issues and profits thereof with full power to sell and dispose of the same * * * and whatever portion of my estate may remain after the death of my said brother * * * I give, devise and bequeath to the" plaintiff in that suit. The court held as to this will, "that a devise limited to enjoyment of the rents and profits of land, which is followed by a devise of the premises, as the testator's property, after the death of the devisee to whom he gave the right to enjoy the rents and profits thereof, must be construed to create a life estate in such first devisee."

It is clear, under the principles above announced that the widow (executrix) of testator Hufft has only a life estate in said real estate. The will provides "and the remainder that is left, (that is after the payment of just debts, funeral and administrative expenses) of whatever kind, to go to my beloved wife * * * during her natural life time, * * * and after her death what is left to be equally divided between" the persons and class named. Similar terms and language in the above cases have been held to specifically and also by implication to create only a life estate. In our opinion a life estate is all the widow has under this will. Also the terms of the will expressly creating a life estate by the use of the expression "during her natural life" cannot be enlarged upon by other subsequent vague and indecisive expressions such as appear in this will.

Whether or not an unconditional right of disposal is created under this will, if at all, must be gleaned from these expressions. The will after vesting a life estate in the widow provides, "she to have entire control of the" real and personal estate, then further provides "what is left" after the widow's death shall go to certain named persons.

In Owen v. Trial 258 SW 699 (Mo. Sup.), a case in which it was contended the use of the word "control" in a deed conveying certain land in which the grantors retained "control" of the lands until their death, affected the title conveyed, it is said: "Control means to 'exercise a restraining or directing influence over; to regulate' as applied to physical property. It does not apply to the title or estate granted."

In Rice v. Fields 232 SW 385 (Ky) the will read, "I desire to bequeath to my wife, * * * all my property both personal and real of whatsoever kind to be held and controlled by her and used by her for any purpose she may see fit, during her natural life time and after her death I desire that whatever may remain of my estate be distributed euqally among my heirs." The court in construing this will said: "The last part of this clause, 'whatsoever may remain of my estate', would seem to indicate that the testator intended the widow to consume or dispose of a part or all of the estate, but this no doubt had reference to the personal property which was susceptible of destruction by use * * *." The court then sets forth definitions of the words "hold, control and use" and says that from said definitions, "It will * * * readily be observed that the words employed by the testator did not invest the widow with the power of disposition of the property either by sale or otherwise * * *."

In Bramell v. Cole, 136 Mo. 201 the will reads, "I will that all my just debts be paid at as early a day as practicable, and the remainder that is left, to go to my beloved wife,* * * during her natural lifetime; she to have the entire control of the same, it consisting of the following * * *(real and personal property) * * *". After describing the property the testator added: "to go to her, for her to have full control of the same as long as she lives * * *."

It was contended in that case that a life estate was created in the widow with an unlimited right to dispose of the property, this because the will gave the widow entire control of the property during her life and that only what is left at her death went to the remainders.

The court in disposing of this contention said, l.c. 212, 213: "By the will in question the testator not only devised to his wife real estate, but he also bequeathed to her all money, cash, notes or bonds, and evidences of debt of every description whatsoever, and also all his personal property 'and effects of all kinds'. Personal property and effects being thus distinguished from money, notes, bonds, etc., must have included such perishable property as one would have in his residence and upon the land upon which he resided, and the words 'what is left,'

as used in the will, can apply to such personal property.

"But does the language used and repeated in the will, that the devisee should have 'full control' of the property during her life strengthen the contention that a power of disposition is to be implied? We are of the opinion that it does not, but that it has rather the contrary effect.

"The intention of the testator that his wife should have the control of all the property left by him is made prominent. In the most careful and judicious management of an estate like this, losses are liable to occur. By a devise over of 'what is left' the testator evidently had in mind such possible losses, and did not intend that the legatee for life should be chargeable with them.

"The ordinary meaning of the word 'control', when asserted of a person in charge of an estate, is that he has its management. It might imply a power to invest and reinvest, but does not imply a power to dispose of the estate itself so as to defeat the rights of those entitled to its future use."

A further exposition of the effect of words in a will of similar import to "what is left" on the right of a person with a life estate to dispose of the property, appears in Foote v. Sanders, 72 Mo. 616, 620, where it is held such an expression does "not confer a power of sale upon the widow."

Therefore it is our opinion that under this will the widow takes only a life estate in the property. That she is not authorized to sell or dispose of the real property vested in her for life, either as beneficiary or executrix except as directed and that is to pay all just debts, funeral and administration expenses if the personal estate be insufficient to pay the same.

Respectfully submitted,

APPROVED:

T. W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

LLB:rw

MOTOR VEHICLES: Parochial schools not entitled to free license plates.

FILED
1-18 12

January 16, 1939

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"Rev. C. J. Hornsey, pastor of Holy Cross School, Cuba, Missouri, has written me requesting that license plates be issued free of charge to the school bus, 'used only in the transportation of pupils to and from school.' He has enclosed newspaper clipping from CUBA NEWS, reading:

'HOLY CROSS SCHOOL
PUTS BUS IN SERVICE

'The Holy Cross School has a new bus that has been in operation for the past two weeks. The bus was formerly used at Cottelville, in St. Charles County, but being too small was given by Bishop Winkleman to the Cuba Holy Cross School.'

"May I be favored with your opinion whether the statutes provide for the issuance of free license plates to automotive vehicles which are used only in transporting pupils to and from parochial schools?"

Exemption from taxation is never presumed but on the contrary the presumption is in favor of the taxing power and the burden is on the claimant to establish clearly his right to exemption. Mullins v. Mt. St. Mary's Cemetery Association, 239 Mo. 681, 144 S. W. 108.

Section 7761, Laws of Missouri, 1933, Ex. Session, page 99, provides that every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall file an application for registration and pay a certain fee after which the commissioner shall assign a number to such motor vehicle and issue a set of plates bearing such number.

The reason that school buses are not required to pay such fees and are not required to have license plates is because of Section 7767, R. S. Missouri, 1929, which provides that:

> "* * * * * * * * * and all other motor vehicles owned by municipalities, counties and other political subdivisions of the state shall be exempt from the provisions of this article requiring registration, proof of ownership and display of number plates: * * * * * * * * * "

Therefore, school buses are exempt from display of number plates not because they are school buses but because they are owned by a political subdivision of the state.

CONCLUSION.

It is, therefore, the opinion of this department that school buses of parochial schools are not entitled to free license plates, nor are they exempt from the statutory requirements which provide that all motor vehicles must be registered and fees paid for such registration and license plates be obtained.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

MOTOR VEHICLES: Dealers in motors only not required to register as "dealer" Registration of reconstructed motor vehicle.

February 1st, 1939.

2-10

FILED
12

Honorable Dwight H. Brown,
Secretary of State,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 20th, 1939, which reads as follows:

"I have been asked for an opinion or ruling on the matter as to whether or not individuals, firms or corporations are required to have a dealer's license in order to sell, trade or barter engines or motors

In the event you rule that individuals, firms or corporation are not required to have a dealer's license, then what duty, if any, is placed upon this department with respect to issuing certificates of title and assigning numbers? That is to say, shall we require of the purchaser of a motor or an engine from an individual, firm or corporation a notarized bill of sale or an assigned title.

You will find attached hereto a copy of a part of a letter in which this request was made. I believe this is a question for your department and kindly request that you favor me with an opinion concerning the same."

We shall not set out the letter attached to your request, since your letter sufficiently embodies the questions.

Section 7759, R.S.Mo. 1929, defines a "dealer" to be:

> "Any person, firm, corporation, association, agent or subagent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers."

Section 7764, R.S. Mo., 1929, provides:

> "All * * * * dealers shall, instead of registering each motor vehicle * * * * dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such * * * * dealer, * * * *"

Section 7773 R.S.Mo. 1929, provides for dealers to make certain monthly reports covering each motor vehicle sold by said dealer during said month.

Thus, we see that all through the act the provisions are only conditioned to apply to dealers in motor vehicles.

A motor vehicle is defined in Section 7759, R.S. Mo., 1929, as, "any self-propelled vehicle not operated exclusively on tracks." A vehicle is defined by this section to be "any mechanical device on wheels, designed primarily for use on highways, except those propelled by human power, or those used exclusively on tracks." Drawing these definitions together we see that a motor vehicle is: a self-propelled mechanical device on wheels, designed primarily for use on highways, and not used exclusively on tracks.

Under no construction can a person who deals in motors only be said to be a dealer in motor vehicles. Consequently, the provisions of Section 7764 and 7773, supra, cannot be made applicable to said persons.

Reaching this conclusion necessitates an answer to your second question. This answer is found in the definition of a "reconstructed motor vehicle" in Section 7759, supra, and the terms of Section 7761 Laws 1933-34 p. 99.

A reconstructed motor vehicle is defined as:

> "A motor vehicle which shall have been assembled or constructed by means of new or used essential parts * * * * or which if originally otherwise constructed shall have been materially altered * * * * by the addition or substitution of new or used essential parts.

The placing of a new motor in a motor vehicle is reconstruction within the meaning of this definition.

Section 7761, supra, directs the commissioners to do certain things, with reference to registration of motor vehicles, and is as follows:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank to be furnished by the commissioner for that purpose, containing: (1) a brief description of the motor vehicle to be registered, including the name of the manufacturer, the motor number and character, and amount of motive power, stated in figures of horsepower; (2) the

> name, residence and business address of the owner of such motor vehicle; (3) if said motor vehicle be a commercial vehicle the weight of the vehicle and its rated capacity of live load, in pounds or seating capacity; (4) if such motor vehicle be a specially constructed or reconstructed motor vehicle, the application shall so state and the owner shall furnish the commissioner such additional information as he shall require."

Clause four (4) of this section authorizes the commissioner to obtain from the owner of a reconstructed motor vehicle any additional information he may require in order that said vehicle may be properly registered.

When the essential part used in a reconstructed motor vehicle is the motor, the Commissioner is directed by Section 7781a, Laws of 1935, p. 299, to obtain certain information before he registers said reconstructed vehicle. The terms of this section are clear and need no comment.

CONCLUSION

Therefore, it is our opinion that a person dealing in and selling motors only, even though capable of use in motor vehicles, is not required to be registered as a dealer under the Motor Vehicle Act. That when such a motor is purchased and placed in a vehicle such reconstructed motor vehicle is required to be registered by the owner

thereof, and that Section 778la, supra, sets forth what information the Commissioner is to obtain from the applicant for registering before he registers said reconstructed motor vehicle.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY,
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General.

LLB:RV

DOGS:
NOTICE OF ELECTION
CONCERNING DOGS:

1. Only one publication necessary for a notice of election. 2. Duties of assessors and county clerks.

March 7, 1939

3-7

FILED
12

Hon. Herbert S. Brown
Prosecuting Attorney
Grundy County
Trenton, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an opinion from this department on the following questions:

> 1st. As to the length of time, or, how many publications are necessary under Section 12881 to notify the citizens of the adoption of the election concerning taxing of dogs.
>
> 2nd. As to the duties of the assessor and county clerk in the enforcement of the dog tax law.
>
> 3rd. Form of legal notice of publication.

As to the first question we find that the last sentence in Section 12881 applies to that inquiry. It is as follows:

> "If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county

> court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made."

This section in plain language states that the law shall become effective from the time the publication is made. It does not provide for anymore than the publication.

CONCLUSION

As to this point, it is the opinion of this department that it is necessary to publish the result of the election to adopt the provision of the dog tax law only one time and that the law becomes operative from the date the publication is made.

The duties of the assessor and county clerk pertaining to the enforcement of the dog tax law are set out in Section 12881, which provides in part as follows:

> "The assessors for taxation purposes in each county and city of this commonwealth shall annually, at the time of assessing property as required by law, make diligent inquiry as to the number of dogs owned, harbored or kept by any person so assessed. The assessor shall annually, on or before the thirty-first day of December, make a complete report, on a blank form furnished by the county clerk or license collector, setting forth the name of every owner of any

> dog or dogs, how many of each sex are by him owned or harbored, and if a kennel is maintained by any person such fact shall also be stated. It shall be the duty of the assessor, at the time of making the assessment, to notify the owner of such dog or dogs that he must obtain a license for the same as provided for in this article; but the neglect or failure so to notify such owner shall not relieve the owner from his duty to obtain such license. * * * ".

This section prescribes certain duties of these officials in the enforcement of the act, yet, it will be seen by the last clause of the above quotation that if the assessor fails to notify the owner of the dog that it is his duty to obtain a license that does not excuse the owner from his criminal liability for failing to buy the license nor from his duty to buy the license for the dog.

The assessor begins his assessments as of June 1st of each year and it is his duty to have the assessment completed by the first of the year. In case the provisions of the dog tax law are not adopted until the assessment is about over then it would be impossible for the assessor to perform his duty, as prescribed in Section 12881, for that particular year and the county clerk, in such a case, would have to make an estimate of the number of dogs in the county for which he would want licenses and other supplies. The statute is silent as to such a contingency. By reading this entire section, since the lawmakers provided that if the owner of the dog is not notified by the assessor still it is his duty to pay the tax. Supplies are necessary if the taxes are to be paid. Therefore, the county clerk, under such circumstances, would be authorized to make an estimate of the amount of supplies that he would need for that year.

CONCLUSION

From the foregoing we are of the opinion that if the

assessor has not listed the dogs for assessment, as provided by Section 12881, still it is the duty of the county clerk to make an estimate of the number of supplies that he will need to carry out the provisions of the dog tax law in his county. We are further of the opinion that the duties set out in Section 12881 pretaining to the assessor are just as much incumbent upon his as are the duties of assessing real and personal property.

On your last question, as to the form of notice, I find that this department on November 18, 1938, in an opinion to Mr. Edward V. Long, Prosecuting Attorney of Pike County, set out a form of notice for publication of the adoption of the dog tax act. We are enclosing a copy of this opinion for your attention.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:JMW
Enc. 1

MOTOR VEHICLES: Person may attach insignia of profession to license plate.

April 21, 1939

4-7

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 31, 1939, submitting this question for our opinion:

> "May the insignia or emblem representing a person's chosen profession or avocation, be attached to the motor vehicle license plate and displayed with said license plate on that person's automobile?"

Section 7770 (a) Laws 1935, page 297, provides for the motor vehicle commissioner to furnish number plates to the owners of automobiles. Subsection (c) of this section provides:

> "(c) Every motor vehicle or trailer shall at all times have displayed the registration plates issued by the commissioner, entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing. On all motor vehicles one plate shall be displayed on the front and the other on the rear of such motor vehicle, not less than eight nor more than forty-eight inches above the ground, except that on trailers, motorcycles and motor-tricycles one plate shall be so displayed on the rear thereof."

Thus, it is plain that nothing may be attached to the license plate or automobile which will prevent in any manner said plate from being seen.

Subsection (c) of this section prohibits the display of plates, other than the official number plate, which bear any numbers. These sections are the only ones applicable which can be found which in any way attempt to prescribe what shall not be done with respect to the state license plates. They do not, as can be seen, prohibit such an emblem as is concerned here.

On the contrary, it seems that Section 7783 (1) expressly contemplates the use of emblems. This section provides:

> "(1) Improper use of emblem: No person shall display on a motor vehicle the emblem or insignia of any automobile or motor vehicle club, association or other organization unless he is a member thereof."

CONCLUSION.

Therefore, it is our opinion that persons may attach to their automobile number plates an emblem or insignia representing his profession or avocation, if he does not, in doing so, obscure the number plate.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:VAC

NOTARY PUBLIC: When bond becomes insufficient, county clerk or circuit clerk of St. Louis may order new bond and forfeit his office if order is not complied with.

May 26, 1939

5-27

FILED
12

Honorable Dwight Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We are in receipt of your opinion request under date of May 24th, 1939, which reads as follows:

"We desire an opinion from your office on the above caption, relative to the status of notary commission where the court has relieved the surety company of liability on the bond covering the George J. Schlueter notary public commission.

"Some days ago we received from the attorneys, Leahy, Walther, Hecker & Ely, a certified copy of the Court Order in the Circuit Court of the City of St. Louis, April term, 1939, in which the petitioner, the Fidelity & Deposit Company of Maryland, sought to be relieved of further liability on the notary bond of George J. Schlueter, because of non-payment of premium due on the bond.

"We immediately notified Mr. George J. Schlueter, 2117a S. 11th St., St. Louis, Missouri, that we were

in receipt of the copy of the Court Order and ask that he obtain a new bond or return the Commission to H. Sam Priest, Clerk of the Circuit Court, for cancellation. A copy of this letter was also mailed to Mr. Priest.

"Today we are in receipt of a reply from Mr. Priest, a part of which we quote:

"'I can only suggest that your office direct Mr. Schlueter to furnish a new bond, or that his commission be returned and cancelled.'

"This matter has been referred to the Governor's office without any official action.

"Will you kindly advise at your earliest convenience the proper procedure in this case."

Section 11738, R. S. Missouri 1939, reads as follows:

"The governor shall appoint and commission in each county and incorporated city in this state, as occasion may require, a notary public or notaries public, who may perform all the duties of such office in the county for which such notary is appointed and in adjoining counties. Each such notary shall hold office for four years, but no person shall be appointed who has not attained the age of twenty-one years, and who is not a citizen of the United States and of this state. It shall be the duty of every such notary when he performs an official act outside his or her own county to state in his or

> her certificate that the county in which such act is performed adjoins the county within and for which he was appointed and commissioned."

It will be noticed under this section that the power of appointment of a notary public is vested with the Governor and that the term of appointment is for four years.

Section 11742, R. S. Missouri 1929, reads as follows:

> "Every notary, before entering upon the discharge of the duties of his office, shall take the oath of office, which shall be indorsed on his commission, shall give bond to the state in the sum of two thousand dollars, except in counties of more than one hundred thousand inhabitants, in which they shall give bond in the sum of five thousand dollars, with at least two good and sufficient sureties, to be approved by the clerk of the county court (in the city of St. Louis such approval shall be by the clerk of the circuit court), which commission, oath and bond shall be filed and recorded in the office of said county clerk, and in the city of St. Louis in the office of the circuit clerk. Said bond, after having been so recorded, shall be filed in the office of the secretary of state, and may be sued on by any person injured; but no suit shall be instituted against any such notary or his sureties more than three years after such cause of action accrued. Sureties on the bond of any notary may be discharged from all future liability on such official bond,

> by petition in writing addressed to the county court (in the city of St. Louis to the circuit court), by conforming to the requirements, with the same rights and remedies as provided by sections 2944 to 2952, inclusive, of chapter 16, R. S. 1929, relating to sureties."

Under the above section the principal must have at least two good and sufficient sureties approved by the clerk of the Circuit Court of St. Louis, Missouri. After the approval has been made by the circuit clerk, it is recorded in his office and the original bond filed in the office of the Secretary of State.

According to your request the Fidelity and Deposit Company of Maryland has been relieved and discharged as surety for the principal, George J. Schlueter, and at this time the bond does not have sufficient sureties. The Fidelity and Deposit Company of Maryland has been relieved and discharged as surety under Sections 2943 to 2950, inclusive, of the Revised Statutes of Missouri 1929. These sections set out the procedure under which the petitioner, Fidelity and Deposit Company of Maryland, was discharged as surety on the notarial bond of George J. Schlueter of St. Louis, Missouri.

Section 11743, R. S. Missouri 1929, reads as follows:

> "On the written statement of <u>any citizen</u>, verified by oath, that the bond of any notary has become or is sufficient, said county clerk, and in the city of St. Louis the circuit clerk, shall cite such notary to appear before him, and to give a new and sufficient bond. If said clerk shall find his bond to be insufficient, he shall order a new

> bond to be given, and if such new and sufficient bond shall not be given within ten days after said order, such notary public shall forfeit his office, and thereafter cease to exercise the powers and duties thereof."

The above statute is not ambiguous and under the true meaning of the language in the section it specifically sets out the method of the forfeiture of office of a notary public. This section does not need any construction but is very plain and shows the intention of the Legislature as to the procedure to be used in the forfeiture of the office of a notary public.

59 C. J., at page 961, sets out the following:

> "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used." citing

Betz v. Columbia Telephone Co.,
(App.) 24 S. W. (2d) 224.

In Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224, the Court said:

> "To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

Although the above section sets out that any citizen may file an oath that the bond of a notary has become insufficient in that it does not contain the sufficient number of sureties, yet in view of Section 11738, supra, which provides the Governor make the appointment, he should be the most interested and delegate someone to file this oath in the office of the Circuit Clerk in the City of St. Louis. It then becomes the duty of the Circuit Clerk of the City of St. Louis to order a new bond to be given and upon non-compliance with that order his office should be forfeited.

Section 3953, R. S. Missouri 1929, reads as follows:

> "If any person shall take upon himself any office or public trust in this state, and exercise any power to do any act appertaining to such office or trust, without a lawful appointment or deputation, he shall, upon conviction, be adjudged guilty of a misdemeanor."

Under the above section after the office of notary public has been forfeited by the Circuit Clerk of St. Louis, if George J. Schlueter should continue to take acknowledgments he would be guilty of a misdemeanor.

CONCLUSION.

In view of the above authorities it is the opinion of this department that anyone interested in the forfeiture of the office of notary public of George J. Schlueter may file an affidavit in the office of the Circuit Clerk of the City of St. Louis setting out that his bond is insufficient for the reason that the surety has been relieved and discharged by the Circuit Court of the City of St. Louis, and after an order has been given by the Circuit Clerk of the City of St. Louis to the notary public to give a more sufficient bond, then after ten days the circuit clerk shall forfeit his office as a notary public.

It is further the opinion of this department that after the circuit clerk has forfeited the office of notary public, and he continues to take acknowledgments under the forfeited commission he would be guilty of a misdemeanor under Section 3953, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:DA

BALLOT TITLE: Providing that in 1949 and every ten years thereafter the general statute laws be revised in the manner directed by the General Assembly.

July 14, 1939

7-15 FILED 12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This acknowledges receipt of your letter of July 6th, 1939, asking that we provide for your office a title for House Joint and Concurrent Resolution No. 15, as provided by Section 10386, R. S. Mo. 1929. Accompanying the same is a copy of the said resolution.

Pursuant thereto, we submit the following as such title:

Constitutional Amendment No._____.

Providing that in 1949 and every ten years thereafter the general statute laws be revised in the manner directed by the General Assembly.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

STATUTES:
REVISION BILLS GO INTO EFFECT NOVEMBER 1:

Laws not revision measures and passed without an emergency clause go into effect ninety days after adjournment.

August 18, 1939

8-23

FILED
12

Honorable Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "The recent General Assembly was what is commonly called a revision session. Many bills were passed which were called revision bills. The statutes provide that a regular bill, approved by the Governor, becomes effective in ninety days following the close of the session. In the case of revising the statutes, such statutes do not go into effect until the first of November.
>
> "What we want to know, are these bills which are referred to as revision bills, effective in ninety days following the session, or as revision bills will they go into effect on November 1?"

Article IV, Section 41 of the Constitution of Missouri, adopted November 8, 1932, provides as follows:

> "In the year 1939 and every ten years thereafter all the statute laws of a general nature, both civil and criminal, shall be revised, digested and promulgated in such manner as the General Assembly shall direct.

> Provided, that after the expiration of 70 days of such revision sessions no measure other than appropriation bills and such bills as the General Assembly may determine by an express statement therein contained to be revision bills shall be considered by the General Assembly, except such as may be recommended by special message to its consideration by the Governor. Provided, further, that all revision bills shall take effect and be otherwise considered as are other bills."

Since the above amendment provides that all revision bills shall take effect and be otherwise considered as are other bills, we must ascertain what provisions have been enacted relating to the time that legislative bills shall take effect. Article IV, Section 36 of the Constitution of Missouri provides as follows:

> "No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

Section 659, R. S. Missouri, 1929, reads in part as follows:

> "A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, * * * * * * * * * * * * "

However, as pointed out in State ex rel. Brunjes v. Bockelman, 240 S. W. 209, 211:

> "The Missouri Constitution (1875, section 36 of article 4) places no inhibition upon the Legislature as to fixing a future date for a law to become effective. It prohibits them from becoming effective upon their passage and approval, except in excepted cases. * * * * * * * "

59 Corpus Juris, p. 1140, section 674, establishes the same rule when it states:

> "* * * * * A constitutional provision requiring that, with specified exceptions, all statutes shall go into effect a designated number of days after the adjournment of the session of the legislature passing such statutes is not violated by a statute which expressly provides that it shall go into effect at a date subsequent to the expiration of the designated number of days."

Therefore, the Legislature may provide that certain statutes may go into effect at a date more than ninety days after adjournment.

Senate Bill No. 331, Section 691, passed by the 1939 General Assembly provides as follows:

> "The Revised Statutes, as declared by this article shall take effect and go into operation on the first day of November, 1939, except such laws passed by the present assembly and incorporated therein as shall by their provision take effect at a different time."

This statute was enacted by the Legislature that

passed the revision bills and provides that all revision bills shall take effect on November first. It was passed with an emergency clause and went into effect July 8, 1939. Such a statute is proper. In State ex rel. Otto v. Kansas City, 276 S. W. 389, Judge Atwood, speaking for the Supreme Court, said:

> "The time a particular statute shall take effect may be fixed by another statute passed at the same session."

The reason for this postponement is given in Price v. Hopkin, 13 Mich. 318, l.c. 326, in which Judge Cooley, then a member of the Michigan Supreme Court, said:

> "* * * * And when the Legislature, for reasons satisfactory to them, decide to postpone the period for the statute to come into operation to a later period, it is to be presumed, nothing appearing to the contrary, that in the particular case it was deemed important that more time be allowed for citizens to ascertain the proposed changes, and to become acquainted with their bearings. The time thus allowed is the reasonable time fixed by the Legislature to bring knowledge of the law home to parties interested, before they are required to govern their actions by it."

The question of when a statute passed at a revising session takes effect has been a point of contention and discussion in many cases in Missouri. The leading case upon this question is that of State v. Schenk, 238 Mo. 429, 142 S. W. 263. The court said:

> "It appears from the foregoing that during the entire period from 1879 to the present, the statutes have contained both the section which provides that all laws, without an

> emergency clause, shall go into effect in ninety days after the adjournment of the session, and the provision of the declaratory act that the Revised Statutes shall go into effect on November 1, except acts passed by the revising session which provide otherwise by their terms.* * * * * *
>
> "* * * We think it apparent, however, considering the language of the Constitution, and all of the proceedings of the various revising sessions, that the theory adopted was that the revision of the statutes had reference to existing laws, and that no new bill passed at a revising session should be regarded as a revision bill; also, that it was understood and contemplated by the Legislature at these various revising sessions that such new bills, notwithstanding the language of the declaratory act, should go into effect, as provided by law and as contemplated by the Constitution, ninety days after adjournment.
> *
>
> "* * * * It has not been held, so far as we are advised, that acts which are not revision acts do not go into effect until November 1. On the contrary, it has been uniformly recognized that such acts go into operation ninety days after the adjournment of the Legislature."

The court then proceeds to cite the following cases in which new statutes passed at a revising session went into effect ninety days after adjournment. These cases are: State ex rel. v. Mason, 153 Mo. 223, 54 S.W. 524; State ex rel. v. Mason, 155 Mo. 493, 55 S. W. 636; State ex rel. Kenamore v. Wood, 155 Mo. 425, 56 S. W. 474; State ex rel. Fath v. Henderson, 160 Mo. 190, 60 S. W. 1093; State ex rel. v. Aloe, 152 Mo. 475, 54 S. W. 494; State ex rel. v. Withrow, 154 Mo. 402, 55 S. W. 460;

ex Parte Lucas, 160 Mo. 216, 60 S. W. 218; State ex inf. v. Washburn, 167 Mo. 680, 67 S. W. 592. To this list may be added Hollowell v. Schuyler Co., 185 S. W. (2d) 498, 322 Mo. 1230 and State ex rel. State Highway Commission v. Thompson, 19 S. W. (2d) 642, 323 Mo. 742.

On the other hand the court points out that the bills in the cases of Haskell v. Sells, 14 Mo. App. 91; State v. Edwards, 136 Mo. 360, 38 S. W. 73, and Hausen v. Insurance Co., 66 Mo. App. 29, were all revision bills and not new acts and, therefore, went into effect November the first.

The holding in the Schenk case, supra, was affirmed in State v. Bird, 286 Mo. 593, 228 S. W. 751, in which Judge Higbee, speaking for the Supreme Court said at l.c. 752:

> "The act of May 27, 1919, abolishing all the degrees of manslaughter and fixing the punishment (section 3245) is an original act, and not a revison. There is an apparent conflict between sections 7062 and 7095, R. S. 1919, as to the time when an act passed at a revising session takes effect. This identical question was thoroughly considered by this division in State v. Schenk, 238 Mo. 429, 142 S. W. 263. According to the ruling in that case, the act in question, being an original act having no emergency clause, became effective 90 days after the adjournment of the session--that is, on August 7, 1919. * * * "

Colligating the authorities quoted above, an original act having no emergency clause passed at a revising session goes into effect ninety days after the adjournment of the session while a revision bill goes into effect November the first.

CONCLUSION.

It is, therefore, the opinion of this department that revision bills shall take effect and go into operation from and after the first day of November, except such acts as passed by the General Assembly, and incorporated therein as by their provisions take effect at a different time.

It is further the opinion of this department that laws not revision measures and passed without emergency clauses go into effect ninety days after the adjournment of the session.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

TRADE MARKS: Under Sec. 12449, R. S. Missouri, 1939 a separate application must be filed for each name, mark or device used.

September 19, 1939

9-21

FILED
12

Hon. Dwight H. Brown
Secretary of State
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 18th, 1939, which reads as follows:

> "This department is today in receipt of an application from the Borden Company, a corporation duly organized and existing under the laws of the State of New Jersey but doing business in the State of Missouri. This company desires to register a number of receptacles under Section 12449 of the R. S. of Mo., 1929.
>
> "We find the above named company submitted a number of names to be fixed upon the receptacles used by them and we would appreciate your opinion as to whether one registration is sufficient to cover all names submitted or whether it will be necessary that a separate application be filed for each name or receptacle."

On December 5th, 1933, this office rendered you an opinion in regard to the construction of Section 14329 R. S. Mo. 1929, which section provides that anyone wishing to register a trade mark, trade name, or emblem,

> "may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take acknow-

> ledgment of deeds, and file same, together with a facsimile of the same, term, design, or device for registration, in the office of the secretary of state; said secretary shall deliver to said mechanic, manufacturer, association or union of workingmen, or other persons so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar;"

In that opinion it was held by this office that under Section 14329, no more than one trade name or design could be registered in one application. We refer you to the copy of that opinion which we are enclosing.

Section 12449 R. S. Missouri, 1929, reads in part as follows:

> "Any person engaged in manufacturing, bottling, or selling milk, buttermilk, cream or ice cream in any kind of receptacle, having the name of such person or other mark or device printed, stamped, engraved, etched, blown, painted or otherwise permanently fixed upon the same, may file in the office of the secretary of state for record a description of the name, mark or device so used; and cause such description to be printed once each week for three successive weeks in a newspaper published in the county in which the principal place of business of such person is located, or if the principal place of business of such person is located in another state, then in the county wherein the principal office or depot of such person within the state of Missouri is located. * * * "

Note the similarity and sameness of terms as used in Section 14329 and Section 12449, and that in both Section 12449 and Section 14329 the terms used are in the singular.

CONCLUSION

It is therefore the opinion of this office that under Section 12449 R. S. Missouri, 1929, a separate ap-

plication must be filed for each name, mark or device used.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

J. E. TAYLOR
(Acting) Attorney General

RPCW:RW

OATHS:
BOARD OF NURSE EXAMINERS: Section 13479, page 752, Laws of 1939.

September 21, 1939

9-27

Honorable Dwight H. Brown
Secretary of State
Jefferson City
Missouri

FILED
12

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of September 14, which reads as follows:

> "Please refer to Section 13479, page 752, 1939 Session Laws, regarding State Board of Nurse Examiners, the next to the last sentence of which reads as follows:
>
> 'Before entering upon their duties members shall take and file with the secretary of state, the constitutional oath of office required for state officers.'
>
> Will you please give me an opinion regarding whether this means the members of the State Board of Nurse Examiners shall take the oath before the Secretary of State and file the same with him, or whether they may take the oath elsewhere and then file it with the Secretary of State."

Section 13479, page 753, Laws of 1939, reads as follows:

"Upon taking effect of this chapter the Governor shall appoint a board of examiners and registrars of nurses to consist of five members. The majority of such appointees shall be chosen from those who have graduated from an accredited school of nursing and who are actively engaged in or who have had at least three to five years' experience in educational work among nurses. Upon the expiration of the term of office of any member in office the succeeding member or members to be appointed, in any year, shall be chosen by the Governor, with the advice and consent of the senate. The members of the board herein created shall be appointed as follows: One shall be appointed to hold office for one year; two for two years; and two for three years, beginning the first day of June of the present year and until their successors are appointed and qualified and thereafter the governor shall appoint on or before the first day of November of each year persons qualified who are residents and citizens of the State of Missouri as aforesaid, in each class to hold office for three years from the first day of December next ensuing. An unexpired term from whatever reason shall be filled in the same manner as an original appointment and shall be made for the unexpired portion of the term only. Before entering upon their duties members shall take and file with the secretary of state, the constitutional oath of office required for state officers. They may be removed by the governor for misconduct, incapacity or neglect of duties as required by this chapter."

Under date of April 24, 1935, this department rendered an opinion to Mr. R. B. Wilson, County Superintendent of Schools, Jefferson County, holding that a school director under Section 9288, R. S. Mo. 1929, may take an oath of office before a notary public. Section 9288, supra, provided each member may administer the oath of office to each other. This provision is very similar to the statute now to be construed.

Section 1721, R. S. Mo. 1929, provides, unless expressly prohibited, whenever an oath is required to be taken before a particular court or officer, the same may be done before any court or officer authorized to administer oaths:

> "Whenever any oath or affirmation is required by law to be taken before a particular court or officer, the same may be done before any other court or officer empowered to administer oaths, unless it is expressly prohibited; and when no court or officer is named by whom an oath may be administered or affidavit taken, the same may be done by any court or officer authorized to administer oaths."

Insofar as we are able to find, the courts in this state have never ruled on this particular question. However, in State vs. Jones 154 P. 378, l.c. 380-381, the court construed a statute which is analogous to the one in question. In this case there was a provision similar to the one in question and the court held that such a provision requiring that an oath be administered before certain officers in no way precludes any person authorized to administer oaths from administering same. Furthermore, the court stated that it is the taking of the oath before a properly constituted official that should entitle it to weight and consideration for any purpose rather than its administration by a particular designated official. In so holding, the court said:

> "The second assignment of error is based on the action of the trial court in refusing, on motion for a new trial being made by appellant, to strike from the record the affidavits of the ten jurors of the panel before which the defendant was tried, for the reason that the same were sworn to before the prosecuting attorney, deputy clerk of the district court, and chairman of the board of county commissioners--officers of Benewah county. It is contended

by counsel for appellant that the affidavits were null and void and should not have been considered by the trial court in resisting their motion for a new trial. The question, therefore, arises whether the county officers taking these oaths are authorized so to do, and, if so, can such affidavits be used before the trial court as counter affidavits in opposition to a motion for a new trial?

Section 6055, Rev. Codes, provides:

'An affidavit to be used before any court, judge or officer of this state, may be taken before any judge or clerk of any court, or any justice of the peace, or notary public in this state.'

Section 1983, Rev. Codes, provides:

'Every county officer and every justice of the peace may administer and certify oaths.'

It is insisted by counsel for appellant that section 6055 is a limitation on section 1983, and that no affidavit can be used before any court, judge, or officer of this state, unless it be taken by the officer designated in the former section. These two sections of our statutes have never been construed by this court, as the question is now before us for the first time, but we find that they were taken from the California Codes, and both have received a construction by the Supreme Court of that state.

In the case of Haile v. Smith, 128 Cal. 415, 60 Pac. 1032, it was insisted that section 4118 of the Political Code of California (which corresponds with section 1983, Rev. Codes), gave authority to

officers therein enumerated to administer and certify oaths only in proceedings peculiar to their own department or office. The court said:

'While it is not improbable that this is what the framers of the Code meant, still there is no such restriction in the language used, and there is no such room given for the play of construction as would warrant this court in overturning the judgment by taking that view. Neither do we think that section 2012 of the Code of Civil Procedure (which corresponds with section 6055, Rev. Codes) excludes all officers except those therein mentioned from taking affidavits to be used before a court. * * * It is not confined to affidavits to be used before a court or judge, but includes affidavits to be used before any other "officer of this state"; and we think that this section and all other sections of the same Code on the subject * * * are all cumulative, and that, where a general authority is given an officer to "administer and certify oaths," that authority cannot be limited by judicial construction to particular kinds of oaths.'

Section 1983, Rev. Codes, provides in express terms that every county officer and every justice of the peace may administer and certify oaths. An 'oath' being a solemn appeal to the Supreme Being in attestation of the truth of some statement, and an outward pledge that one's testimony is given under an immediate sense of responsibility to God, it would seem that one taken before any officer authorized under the law to administer it would have the same force and effect as if taken before an officer particularly designated. It is the taking of the oath before a properly constituted official that should entitle

> it to weight and consideration for any purpose, rather than its administration by a particularly designated officer."

The law is well settled in this state. The words "take" and "subscribe" are interchangeable when referring to someone taking an oath. In State ex rel Gott v. Fidelity & Deposit Co. of Baltimore, Maryland, 298 S. W. 83, l.c. 90, the court said:

> "The other assignment against the distribution order is that Judge Estill had no jurisdiction to make it. There are two points under this head; the first being that the record merely recites Judge Estill took the oath of office, when he qualified as judge pro tem., not that he took and subscribed the oath. There is nothing in this contention. The pertinent part of section 2564, R. S. Mo. 1919, is that the special judge 'take and subscribe the same oath that the judge of probate is required to take.' (Italics ours.) The regular probate judge is required by section 2543, R. S. Mo. 1919, to 'take' the oath prescribed by the Constitution for all officers. Section 6, art. 14, of the Missouri Constitution says 'take and subscribe.' The words are obviously used interchangeably by the statutes mentioned, with the same meaning, and the order should be similarly interpreted. At least it can be said, the use of the word 'take' in the order does not amount to an affirmative showing that Judge Estill did not subscribe the oath, and, with the record in this condition, the law presumes he complied with the statute and constitution. State v. Allen 267 Mo. 49, 57-8, 183 S. W. 329."

Apparently, the General Assembly in enacting this pro-

vision never contemplated that the words "take and file" should be so construed as to require a member of this Board to appear before the Secretary of State and no other officer authorized to administer oaths and take or subscribe to the oath of office, but that such members should take or subscribe to an oath as required in Section 13479, supra, before any officer authorized to administer oaths and then file same with the Secretary of State. Regardless of whether or not this construction is correct, it is immaterial in view of Section 1721, supra, and the holding in State v. Jones, supra.

CONCLUSION

Therefore, it is the opinion of this department that members of the Board of Nurse Examiners may take or subscribe to an oath of office as required in Section 13479, supra, before any person authorized to administer oaths in this state, and they are then required to file the same with the Secretary of State as provided in Section 13479, supra.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
ARH:RT

SCHOOLS: Children of employees of the Confederate Soldiers' Home are entitled to be sent by the local rural school district to a high school district, and local district must pay any deficit in tuition.

November 7, 1939

11-9

FILED
12

Honorable A. T. Broughton,
President, Board of Trustees
Confederate Soldiers' Home,
State Auditor's Office,
Jefferson City, Missouri.

Dear Sir:

This Department is in receipt of your letter of November 3d, wherein you make the following request:

> "In behalf of the Board of Trustees of the Confederate Soldiers' home of Missouri, near Higginsville, I submit the following statement of facts, with the request that you furnish me a written opinion in accordance therewith:
>
> "The Confederate Soldiers' Home of Missouri is located in Long Grove School District No. 28, of Lafayette County, Missouri. The Long Grove School District No. 28 does not maintain a high school. Certain children of employees of the Confederate Soldiers' Home of Missouri have completed the work in the highest grade offered by said Long Grove School District No. 28, and are eligible to attend high school in a district having an approved high school, where one or more higher grades is offered.
>
> "The Long Grove School District No. 28 adjoins the Higginsville School District which does maintain a high school. The per-pupil cost in maintaining the Higginsville High School for a school year is

$80.00, $50.00 of which said amount is paid by the State of Missouri as provided by law, the balance, or $30.00, of such per-pupil cost is to be paid by the district of which said pupils are residents.

"There are at present three pupils attending the Higginsville High School who, together with their parents, are and have been residents of the Long Grove School District No. 28 from four to six years. The Board of Directors of the Long Grove School District No. 28 refuse to pay the additional amount, over and above State aid, or $30.00 per-pupil for each school year, contending that they are not liable for such additional per-pupil cost by reason of the fact that the parents do not vote or pay taxes in said Long Grove School District No. 28.

"All the children of school age residing at the Confederate Soldiers' Home have been enumerated by the Long Grove School District No. 28 for State aid for many years. It is our contention that the parents and pupils above mentioned are residents of the Long Grove School District No. 28 regardless of the fact that the parents do not vote or pay tax in said district, and that said district is liable under the law for the payment of any amount, over and above State aid, to the Higginsville School District where such children are now attending high school."

The pertinent part of Section 16, Laws of Missouri, 1935, page 351, is as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school

> offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; * * * * * *"

Noting that the statute uses the expression, "every pupil resident therein," we shall consider your question from the standpoint as to what is meant by "resident therein."

In the decision of Clarence Special School District v. School District No. 67, 341 Mo. 178, on reversing a decision of the lower court, stated in effect that the sending district was obligated to pay any deficit in the tuition over and above $50.00 that Section 16a gives in the form of aid, providing that it did not cause the sending district to become indebted beyond the limits as contained in Section 12, Article X, of the Constitution of Missouri. In the decision of State ex rel. Burnett v. School District, 335 Mo. 803, the decision is to the effect that the district which sends the children to the high school is entitled to the state aid itself and not the receiving district.

The question as to whether or not the children of the employees of the Confederate Soldiers' Home are bona fide residents of the Long Grove School District No. 28 of Lafayette County, Missouri, is largely a question of fact. We herewith offer decisions of our courts which have had this question before them:

In the decision of School District v. Matherly, 84 Mo. App. 140, l. c. 142, the court said:

> "In our opinion, to entitle one to school privileges for his children in the public schools he must bona fide reside within the school district. Coming temporarily within the district to reside during the scholastic year, for the purpose of

sending children to the school of that district can not be allowed. If this defendant has such right, then all other citizens of Nodaway county, outside of Barnard, have, of course, the same right. The result would, therefore, be that that district could be called upon to support schools for the benefit of other distinct communities. This was not contemplated by the statute. State v. School Dist., 55 Neb. 317; Gardner v. Board of Education, 5 Dak. 259.

"If one living outside a school district desires the free school privileges of another district, he must abandon his old residence and go into the other district with the intention to become a resident therein and to subject himself to all the burdens and duties of other citizens residing there. 'A temporary removal of a person for the sole purpose of educating his children, without an intention of abandoning his usual residence, and with the intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as would, under the law, entitle him to vote at his temporary abode.' Hall v. Schoenecke, 128 Mo. 661. Nor would such removal entitle him to free tuition for his children.

"Defendant has cited us to the case of State ex rel. v. Smith, 64 Mo. App. 313. It is not applicable. The question there was as to the performance of the duty of the school clerk in taking the enumeration of school children to the end that it might be determined whether there was a sufficient number of negro children to authorize a school for them. The complainant in that case wanted a negro school maintained for the year 1894. By counting his children there was a sufficient number, by omitting them there was not. He had

> moved his family outside the district and to all appearances had abandoned his residence. He claimed he had an intention of returning, but of this the clerk was uninformed and he rightly omitted their names from the enumeration list. On the general subject of residence, on the point made that defendant was yet a citizen of the district in which his farm was, see State ex rel. v. Banta, 71 Mo. App. 32."

And again in the decision of Northern v. McCaw, 189 Mo. App. 362, l. c. 368, various cases are discussed which bear on the question as follows:

> "In the case of Chariton County v. Moberly, 59 Mo. 238 l. c. 242, 243, we find the law declared as follows: 'If a married man has two places of residence at different times of the year, that will be deemed his domicile which he himself selects or describes or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the right and duties of a citizen.'
>
> "The fact that the family lived for several months in the summer on the farm would make the city of Rolla none the less plaintiff's domicile or place of residence. (Hall v. Schoenecke, 128 Mo. 661, 31 S. W. 97.)
>
> "The only residence this record discloses that this plaintiff had prior to moving to Rolla was Springfield, Missouri, and he certainly offered sufficient evidence that he abandoned the Springfield home. And the fact that the wife and children stayed on her farm from July until September--when plaintiff established his home in Rolla--is not convincing that he established his family home on a farm--a place he did not own.

> The use and occupancy of the Rolla habitation clearly, under subdivision seventeen of section 8057, Revised Statutes 1909, fixed that as his permanent abode. The fact that the personal property on the farm was assessed in the Hirshe School District falls short of fixing plaintiff's domicile in that district. (State ex rel. Brown v. Hamilton, 202 Mo. l. c. 386, 100 S. W. 609.) It is established, we think, that he abandoned his Springfield home and began to be a bona-fide resident of Rolla in September, 1913, bringing himself within the rule declared in the case of Barnard School District v. Matherly, 84 Mo. App. 140 (which, it may be observed, has been before the appellate courts of this State three different times: 90 Mo. App. 403; 103 Mo. App. 337, 76 S. W. 1109). The evidence in that case as to residence was far less convincing than is the evidence here, and it was finally decided in defendant's favor, the defendant in that case occupying the same position as plaintiff in our case.

There are other decisions which might throw light on the question but we believe that the quotations from the above are sufficient to decide the question.

It is our opinion that even though the parents of the children in question do not pay taxes or vote in Long Grove School District, yet the same would not prevent them from the privilege of sending their children to the Higginsville School District in order that they may attend high school. You state in your letter that the employees have lived at the Confederate Soldiers' Home five or six years. The test appears to be as to whether or not parents of the children in question are temporarily residing in the district for the purpose of educating their children without becoming bona fide residents and with the intention of returning to their original districts or homes after the children have received their education.

Having lived in the district for five or more years, and evidently with no intention of leaving the district unless the parents lose their position or resign, we are of the opinion that they are bona fide residents of such district and are entitled to have the children sent to the Higginsville High School and the sending district pay any deficit in the tuition for such children.

We think your situation is analogous to persons who live in the State Capital and bring their children and place them in the public schools of Jefferson City. They are undoubtedly residing in Jefferson City the length of time they intend to reside and the mere fact that they may vote or pay taxes in some other county would not compel them to pay tuition if their children attend the Jefferson City High School.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

W. J. BURKE
(Acting) Attorney-General

November 9, 1939

Honorable A. T. Broughton,
President, Board of Trustees
Confederate Soldiers' Home,
State Auditor's Office,
Jefferson City, Missouri.

Dear Sir:

Since rendering you an opinion on November 7th, relative to the children of employees of the Confederate Soldiers' Home of Missouri being entitled to attend the Higginsville High School, another case supporting the conclusion and view which I expressed in that opinion, is that of State ex rel. v. Clymer, 164 Mo. App. 671, l. c. 680, which held as follows:

> "An instructive case is State v. Belleck, 107 N. W. 1022. In that case the Governor and the Superintendent of Schools of the state applied for writ of mandamus to compel the board of education of the school district of Lincoln, the capital of the state, to permit their children to attend school without the payment of tuition. As to the Governor, the Constitution of Nebraska, as ours, required him to reside at the seat of government during his term of office. There was no such provision as to the school superintendent. Both of the state officers maintained their legal residences at their former homes, which were not in the city of Lincoln. The court held that their children were entitled

> to attend the schools, and that the word 'reside,' contained in their statute, as it originally existed, would not necessarily be construed to mean a legal residence as distinguished from actual inhabitance, and that the true test was the motive or intention of the parents when they took up their abode in the school district. And if the family or the person or persons having legal custody and control of children of school age, removed to and lived in a school district, principally from other motives than obtaining the privilege of the schools for their children, even though their stay in the school district is not expected to be permanent, their children should not be deprived of school privileges while so living in the district. On the other hand, if the removal is to the school district for the purpose of obtaining the advantages of the school, without expense to the family, the school authorities may protect the district from such imposition. To the same effect is School District v. Matherly, 84 Mo. App. 140."

Please consider the above case as part of the opinion, as it appears to be directly in point.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

FUNDS: State Treasurer entitled to transfer only that part of Grain Inspection Fund under Sec. 13360, R. S. Mo. 1929, which is in excess of $30,000.

August 17, 1939

FILED
13

Honorable J. W. Buffington
State Warehouse Commissioner
Jefferson City, Missouri

Dear Mr. Buffington:

We wish to acknowledge your letter of August 14th wherein you state as follows:

> "Section 13360, Missouri Revised Statutes, 1929, provides that all fees and money receipts earned by the Grain Department and paid into the State Treasury monthly are and stand reappropriated as a special fund of the Grain Department, and at the end of each biennium all such funds remaining in the hands of the Treasurer in excess of $30,000 should be transferred to general revenue.
>
> "There is a Session Act, Laws 1933, Page 415, relative to the transfer of the funds of numerous departments of the State which receive receipts by way of fees, wherein such session act the balance remaining in such special funds at the end of each biennium is transferred to general revenue.
>
> "If the Session Act is held to apply to the Grain Department, then some confusion arises as to just what was intended by the Session Act with relation to the Grain Department's funds.
>
> "At the end of the 1937-1938 biennium the Grain Department had to its credit which by

> the statute had been reappropriated to it, the sum of $49,121.46 which the Treasurer proposes to transfer on or about August 20th next to general revenue. My contention is that the Treasurer is entitled to transfer only that part of such fund which is in excess of $30,000.
>
> "Will you kindly give me your opinion on this issue at your very earliest convenience?"

Under date of November 17, 1937, this department rendered an opinion to Honorable Robert W. Winn, State Treasurer, wherein it was held that the Grain Inspection Fund, together with fifty-two other State funds, would at the end of the biennium, assuming all warrants on same had been discharged, be required to transfer and place to the credit of the ordinary revenue fund of the State Treasury the unexpended balances remaining in said funds.

The conclusion above reached was bottomed upon our interpretation of Laws of Missouri, 1933, Section 1, page 415, which provides in part as follows:

> "All fees, funds and moneys from whatsoever source received by any department, board, bureau, commission, institution, official or agency of the state government by virtue of any law or rule or regulation made in accordance with any law, shall, by the official authorized to receive same, and at stated intervals, be placed in the state treasury to the credit of the particular purpose or fund for which collected, and shall be subject to appropriation by the General Assembly for the particular purpose or fund for which collected during the biennium in which collected and appropriated. The unexpended balance remaining in all such funds (except such unexpended balance as may remain in any fund authorized, collected and

> expended by virtue of the provisions of the Constitution of this State), shall at the end of the biennium and after all warrants on same have been discharged and the appropriation thereof has lapsed, be transferred and placed to the credit of the ordinary revenue fund of the state by the state treasurer."

You state that at the end of the 1937-1938 biennium the Grain Department had to its credit the sum of $49,121.46, which the Treasurer proposes to shortly transfer to the general revenue. Your contention is that the Treasurer is entitled to transfer only that part of such fund which is in excess of $30,000.00, in view of Section 13360, R. S. Mo. 1929, which provides in part that:

> "All fees collected shall be turned into the state treasury, and all fees so turned into the state treasury from the inspection and weighing of grain are hereby re-appropriated to the warehouse commissioner for the purpose of paying all salaries and expenses necessary for inspecting and weighing grain, and paying all other expenses incurred in the administration of the department. * * * Provided, however, that at the end of each biennial period all money remaining in said fund in excess of thirty thousand dollars shall be transferred by the state treasurer into and become a part of the general revenue fund."

It is a well established rule of statutory construction that the primary rule is to determine the intent of the Legislature in enacting a statute (State ex rel. American Asphalt Roof Corp. v. Trimble, 44 S. W. (2d) 1103, 329 Mo. 495), and to give effect to such legislative intent (State ex rel. Lentine v. Board of Health, 65 S. W. (2d) 943, 334 Mo. 220).

In order to arrive at the intent of the Legislature in the passage of the Session Act, we have undertaken an examina-

tion of the statutory provisions applicable to all boards, bureaus, departments, commissions, etc., with respect to the disposition of fees and receipts collected by each of them, and have found that all are required to turn over their respective receipts into the State Treasury, where such fees and receipts are set up as a particular fund to the agency paying in such receipts.

It is obvious, therefore, that the portion of the Session Act from its beginning down to the word "collected" in the eighth line, which provides for payment of fees into the treasury to the credit of each respective fund, is needless and unnecessary to the Act.

Examination further reveals that seven of such agencies are required to pay their respective receipts into the treasury and it is directly credited to the general revenue fund. Here, again, the provision in the Session Act as to transfer of funds to general revenue is needless as to those agencies having such provision prior to the passage of the Session Act.

The remaining agencies, however, save and except the Grain Department, had no provision of any kind for transfer of funds from each agency's special fund to general revenue at the end of the biennium. The Grain Department, under Section 13360, supra, it is to be noted, is required to turn over to the State Treasury all of its receipts which stand reappropriated for operating costs of the department, and at the end of each biennium there stands reappropriated to the department by legislative act any and all of the department's receipts for the biennium remaining in such fund up to and including the amount of $30,000.00, and transfer is provided for to general revenue for any amount remaining in the department's fund in excess of $30,000.00.

It is readily evident, therefore, that the purpose and intent of the lawmakers in enacting the Session Act was to provide for transfer of funds from the special fund to the general revenue fund with respect to those agencies which, up to the time of the enactment of the Session Act, didn't have any provision for such transfer of funds.

The courts have frequently held that statutes should receive a sensible construction, such as will effect the legislative intention, and if possible so as to avoid an unjust or absurd conclusion. State ex rel. Mosely v. Lee, 5 S. W. (2d) 83, 319 Mo. 976.

It is apparent that the Legislature having already made provision for the transfer of the funds of the Grain Department, and what was to be transferred, it certainly couldn't reasonably be said that the Session Act was intended to be applied to said department. The Grain Department is as much an exception to the Session Act as are those State agencies referred to where no provision for transfer of funds was needed at all.

Let us assume, however, for the basis of argument, that some confusion does exist as to the intention of the Legislature by adoption of the Session Act.

It is beyond contradiction that Section 13360 is a special statute applying specially to a particular department of the State with provision as to the disposition of its funds at the end of a biennium, special and pecculiar to itself, and totally unlike the provision of any other State agency. On the other hand, it goes without contradiction that the Session Act is a general law purporting to apply to all boards, bureaus, commissions, etc., of the State government.

In the case of State v. Imhoff, 238 S. W. 122, l. c. 125, the court in discussing when a special act will be held to be excepted from the provisions of a general act on the same subject, said:

> "We have said, not once, but a number of times, that where there are two acts, and the provisions of one have special application to a particular subject and the other is general in its terms, and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter."

Thus, even assuming that there was confusion between the general and special law, the latter would be construed as an exception, and hence the Grain Department not affected by the Session Act.

Laws of Missouri, 1933, Section 1, page 415, supra, further provides that an exception is made as to gifts, grants, etc., as follows:

> " * * * provided, that in the case of state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations, gifts or grants from the Federal Government, private organizations and individuals; funds for or from student activities, farm or housing activities, and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees; all of which excepted funds shall be reported in detail quarterly to the Governor and biennially to the General Assembly."

The argument might be presented that by reason of the above exceptions, the Session Act impliedly repeals the statute. However, it has long been a rule of statutory construction that:

> "Repeals by implication are not favored. It is our duty to harmonize and preserve the whole body of the law, when we can." Decker v. Deimer, 129 S. W. 936.

Furthermore, implied repeal, or repeal by necessary implication doesn't arise merely by reason of conflict between a special and general law. Such rule is illustrated in State v. Imhoff, supra, l. c. 125, as follows:

> "In the absence of any words in the enactment of section 4944 declaratory of a legislative purpose to repeal all former acts prescribing the manner in which propositions other than constitutional amendments are to be submitted to the people, the effect, if any,

> of the adoption of said section upon section 13165 must be by implication; it being necessary that there be present in the later act such declaratory words or some other equally cogent evidence of a purpose on the part of the Legislature to repeal the earlier section in the adoption of the later. Cases illustrative of the rule requiring such words or the presence of such an intention are found in the interpretation of acts prescribing a form of ballot in a particular case in an election for the organization of a village, the establishment of a high school district, or the issuance of bonds of a county, in each of which cases it was held that the acts especially applicable thereto were not repealed by subsequent general laws, which prescribed a form of ballot other than that required by the particular statute."

It is to be noted that the exceptions in the Session Act refer to the fees, funds, and moneys received by any department, board, etc., by virtue of:

> " * * * any law or rule or regulation made in accordance with any law * * *."

The first exception relates to funds controlled by the Constitution, since no legislative act can supersede the Constitution.

The second exception relates to gifts, grants and trust funds. Gifts and grants being voluntary contributions, and not arising by virtue of "any law or rule or regulation made in accordance with any law," it is obvious that this exception was included by the Legislature so that no false construction could be placed upon the Act by anyone who might desire to include gifts, etc., as coming within the terms "funds, and moneys" set forth in the Act. Thus, the Legislature guarded against any such contingency by expressly excluding funds that came to a department by voluntary action and not by law.

Another important rule of statutory construction is illustrated in the case of State v. Fulks, 296 Mo. l. c. 626, wherein the court declares that:

> "'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute."

It is, therefore, reasonable to conclude that the Legislative intent in the Session Act, if it was intended at all to cover the Grain Department therein, was to apply it to that part of the Grain Department's funds for which transfer had been provided, to-wit, the unexpended balance or remainder of funds in excess of $30,000.00.

To construe the Session Act accordingly is to harmonize it with the statute, which the law declares should be done, if possible. Manifestly, it is not only possible here, but logical, if the first principles in statutory construction are to be adhered to in giving the benefit of the doubt to harmonizing the law rather than repugnancy.

The strongest point that might be presented here as to possible conflict between the Session Act and the statute is that the one or earlier law expressly providing for transfer of the Grain Department's funds in excess of $30,000.00, might be assumed, by reason of the latter, or Session Act, to have been intended by the Legislature to be transferred along with the excess.

The case of State ex rel. Kellog v. Treasurer, 41 Mo. 16, is peculiarly applicable to the situation here. In that case the Legislature by an Act in 1863 created a special fund called the "Union Military Fund," consisting of all the money derived from the United States in connection with the State's

expense arising out of the Civil War. By the Act of 1865 it was provided that such fund be devoted to the above purposes. By the Act of 1867 the Legislature provided that the money received, or to be received from the United States Government should first be devoted to other purposes than the payment of war expenses.

The defendant treasurer elected to stand on the latter Act and declined to pay military bonds, which constituted war expense, on the assumption that the latter Act was in conflict with the former Act, and hence the latter Act prevailed.

In the instant case the Legislature by statute created a special fund called the "Grain Inspection and Weighing Fund" consisting of fees or receipts received from inspecting and weighing grain, and provided that all such fees should be devoted to the expenses of operation, save and except the excess over $30,000.00 remaining in said fund, which excess only was to be transferred to general revenue.

So far as the above outline of facts is concerned, the two cases are closely alike in principle as to facts, and presumably one could take a like position in the instant case as the defendant in the Kellog case, and urge "implied repeal" on the assumption that the Legislature intended by the Session Act to transfer the $30,000.00, whereas the statute reserved it in the Grain Fund.

In the Kellog case, the court considered the defendant's position that all of the fund should be devoted to the school purposes, and the balance left, if any, to military bonds in derogation of the provisions of the earlier act, held to the contrary by harmonizing the two acts and thereby removing the apparent conflict. The court in its holding construed the second Act to mean that the bonds should be first paid in accordance with the former law and that the latter Act dealt only with the excess of the funds remaining.

So in the instant case the two laws can and should be harmonized to the end that the Session Act wasn't intended to deal with the $30,000.00 already made a part of the Grain Fund by statute, or former law, but only with the excess of the funds over and above such amount.

The language of the court as to statutory construction in the Kellog case, supra, is particularly applicable, l. c. 25:

> "The rule of construction which has been laid down on unquestionable authority, as applicable to a case of this kind, is, that 'when the mind of the legislator has been turned to the details of the subject, and he has acted upon it, a subsequent statute in general terms, or touching the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provision, unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all' - Sedgw. on Stat. & Const. Law, 123. The law does not favor a repeal by implication unless the repugnance be quite plain; and two seemingly repugnant statutes should, if possible, have such construction, that the latter may not be a repeal of the former by implication - Dwar. on Stat. 533."

CONCLUSION

In view of the foregoing, we are of the opinion that the biennium of 1937-1938 having ended, the State Treasurer is entitled to transfer and place to the credit of the ordinary revenue fund only that part of the Grain Inspection Fund, under Section 13360, R. S. Mo. 1929, which is in excess of $30,000.00.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:HR

MOTOR VEHICLE: Any truck driven or operated on the highways must be registered.

February 16, 1939

2-20

FILED
15

Col. B. M. Casteel, Supt.
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of February 14th, 1939, in which you request an opinion on the following:

> "1. Sgt. James S. Poage, St. Joseph, has requested information as to whether or not a truck with a hammer mill (feed grinder) attached wherein the motor of the truck is used also as a power plant for the feed grinder, need be registered under the present motor vehicle laws.
>
> "2. Several of these are operating in Sgt. Poage's territory, some of them having an additional power plant attached. It is the opinion of Sgt. Poage and the Prosecuting Attorney's office that these vehicles should be registered, but there is some doubt in their opinion as to registration of the first described vehicles."

Section 7761 Laws of Missouri, Extra Session, 1933-34, page 99, par. (a), partially reads as follows:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, by mail or otherwise, in the office of the commissioner, an application for registration on a blank

to be furnished by the commissioner for that purpose * * * * * * * * * "

Paragraph (b) thereof reads as follows:

"Upon the filing of such application, exhibition of certificate of ownership and the payment of the fees hereinafter provided, the commissioner shall assign a number to such motor vehicle, and without other expense to the applicant shall issue and deliver to the owner a certificate of registration in such form as the commissioner shall prescribe, and a plate, or set of plates, bearing such number."

Paragraph (c) thereof partially reads as follows:

* * "For commercial motor vehicles having a capacity of:

Less than 2 tons	$10.50
2 tons and less than 5 tons	18.00
5 tons and less than 6 tons	27.00
6 tons and less than 7 tons	30.00
7 tons and less than 8 tons	36.00

and for every ton or major fraction thereof in excess of 8 tons, $15.00 per ton.* * "

This statute is not ambiguous and provides that motor vehicles operated or driven upon the highways of the state must be registered.

In 59 C. J., page 952, it is said:

"The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of con-

struction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning," citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 453, 314 Mo. 390; Crier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

59 C. J., at page 961, sets out the following:

"In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224.

CONCLUSION

In view of the above authorities it is the opinion of this department that motor trucks with a hammer mill, or feed grinder, attached, wherein the motor of the truck is used also as a power plant for the feed grinder, and motor trucks equipped with additional power plant attached, must be registered under section 7761 Extra Session Laws of Missouri, 1933-34, page 99 if the motor truck is driven or operated on the highways.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RW

COUNTY BUDGET: How to pay debts of past years and method to determine validity thereof.

February 21, 1939

FILED 15

Honorable Marvin S. Carmichael
Associate Judge, Nodaway County Court
Maryville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 11, 1939 asking our opinion on the following:

> "(1) What authority, if any, and how is the present county court to pay unpaid bills for the years 1937 and 1938?
> (a) Bills that were contracted after the years estimated revenue was exhausted?
> (b) Bills that were allowed by the old court but no warrants written?
> (2) Would it be fitting and proper for the court to approve all such bills even though they are not paid at the present time?"

(1) These unpaid bills for the years 1937 and 1938 are to be paid out of the revenue provided for those years, or the surplus revenue of another year. This is the holding in Kansas City, Fort Scott and Memphis Ry. Co. v. Thornton 152 Mo. 570, 575 where it is said:

> "* * * Under these provisions of the Constitution, (Sections 11 & 12 in Article 10) warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not

> equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year.

This case furnishes authority and mode for the payment of these county debts.

The mechanics for making said payments out of subsequent surplus funds is discussed in State ex rel v. Johnson 162 Mo. 621. The court there had three questions before it. The first concerned the application of the surplus of one year to the deficit of another year. This does not concern us since the case heretofore cited adequately answers that question.

The second question was as follows, l.c. 628:

> "If so, what is the lawful method of applying such payment? Must the warrants be paid in the order of their presentation and registration, or are they payable pro rata to all the outstanding indebtedness?"

The court in answer to this said l.c. 631:

> "* * * We conclude that this surplus, after the current expenses for the years * * * * had all been paid, at once became subject to this general statute, section 3166, Revised Statutes 1889, (now section 12139, Revised Statutes 1929) which provides a just and equitable rule for the payment of the debts of the counties. The preferred right of payment according to registration is not taken away

> further than the changed condition wrought by the Constitution requires, and when the Constitution is read into and with this section, it merely changes the order of payment so that the funds provided for each year's expenses is primarily the fund out of which warrants drawn for those expenses are to be paid according to their presentation and registration in that year, and when they are all paid and a surplus, as in this case, remains, then it is applicable to unpaid warrants of former years and section 6771, Revised Statutes 1899, (Section 12139 R. S. 1929) provides the rule of priority just as it did before its modification by the Constitution of 1875, and the surplus is not to be distributed pro rata."

The third question was as follows l.c. 628:

> "If such surplus is so applicable and if payable in the order of their registration, is it the duty of the treasurer to so pay them or must the county court first distribute the fund for the payment of such warrants before the treasurer can pay any of such warrants for past years' indebtedness?"

The court in answer to this said l.c. 633:

> "It was not at all necessary for the county court to make any further appropriation of the fund before the treasurer could pay relator's warrant out of this surplus. The court is required to distribute the current tax into the different funds each year, and may, in proper cases, transfer moneys from one fund, when not needed, to another that is insufficient, but after all the warrants for any year have been paid there is no provision of law for distributing this surplus into different funds, but it is in the hands of the treasurer, as an executive officer, charged by the statute with the duty of disbursing the funds on warrants drawn by the county court, and as the warrants have been drawn, all he has to do is to pay them in the order of their registration whenever he has money enough to take up a warrant * * * *"

(1-a) Any debt incurred after the years estimated revenue was exhausted, is void and the county cannot pay the same.

Article 10 Section 12 of the Missouri Constitution provides, "No county * * * * of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year," except, of course, the indebtedness on bond issues assented to by a two-thirds majority to the voters.

In Clarence Sp. School Dist. v. School Dist. No. 67, 107 S. W. (2d) 5, 7 (Mo. Sup.) it is said:

> "Under this section (section 12, art. 10) * * * (defendant) might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding * * * to the extent of the revenue provided for that year, but not in excess of it." (Our italics.) Failure to collect during any year all taxes levied therefor does not invalidate debts which were within the amount levied when contracted. * * * *"

There is now a limitation of ninety per cent on the amount of anticipated revenue which may be spent. (Section 4, Laws 1933, page 343).

Applying the above it is evident that any debt contracted by a county which makes the counties whole indebtedness incurred in that year exceed ninety per cent of the anticipated revenue for said year, is void and illegal and not a binding obligation on the county and is not to be paid by the county. In ascertaining the validity of such a debt, it should be borne in mind that the indebtedness is incurred at the time the contract is entered into, and not when the warrant is issued therefor. Trask vs. Livingston County 210 Mo. 518; Clarence School Dist. case, supra.

(1-b) - (2) The items covered by these questions may be approved by the court and paid by a warrant drawn upon the revenue provided for the year the debt was incurred, even though there is no funds to pay said warrants on hand. Of course there is a limitation on this, in that, if any of said debts are void, under the

law heretofore set out they may not be paid.

These debts must be paid by warrant drawn on the funds provided for the year in which the debt was incurred, because in Kansas City, Fort Scott and Memphis Ry. Co. v. Thornton, supra, it is said that the constitution makes "each year's revenue * * * * * * applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year." Thus if there are any funds on hand, collected from delinquent taxes, for the year in which the debts were incurred they must be applied to these debts, and it necessarily follows that in order to do this the warrant must be drawn on that years revenue.

Another way which the county may pay the valid debts of 1937 and 1938, if there is no likelihood of the same being retired out of surplus funds from other years is, after said debts have been reduced to judgment, vote bonds to pay said judgment indebtedness. (Article 7, Chapter 15 R. S. Mo. 1929).

CONCLUSION

Therefore, it is our opinion that unpaid county debts for years prior to 1939 may be paid out of surplus revenues of other years, if any (or by bond issue after reduction to judgment), if said debts are valid and binding obligations on the county. That any claim on the county for such a valid debt should be allowed by the court and a warrant drawn, in payment thereof, on the funds provided for the year in which said debt was incurred, even though there are no funds on hand for the payment of said warrants.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

LLB:ww

753

MOTOR VEHICLE LAWS: Illinois Trucks temporarily in Missouri need not procure Missouri license.

April 12th, 1939.

5-1

FILED
15

Hon. B. M. Casteel,
Superintendent and Colonel,
Missouri State Highway Patrol,
Jefferson City, Missouri.

Dear Sir:

We have received your request for an opinion on a letter from Mr. Thomas L. Leigh, Captain, Commanding Troop "C", which reads as follows:

> "1. Mr. R. J. Moore of the Blackwell Corporation, 2000 St. Clair Avenue, East St. Louis, Illinois, was in this office today and presented the following question:
>
> 2. His company has a contract for a road repair job in St. Louis County. The trucks which he proposed to use are Illinois trucks and licensed in Illinois only. He wants to know if it will be necessary to buy Missouri licenses for these trucks.
>
> 3. Request that a ruling on this question be secured."

Replying thereto, Section 7761, R. S. Mo. 1929, was repealed by the Extra Session, 1933-34, and a new section enacted in lieu thereof. See Laws of Missouri, Extra Session, 1933-34, p. 99. Said section provides:

> "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise expressly provided, cause to be filed,"

an application for registration containing a brief description of the motor vehicle sought to be registered, the name of the manufacturer, the motor number, amount of motive power, the name, residence and business address of the owner, etc. It further provides that the schedule of registration fees shall be as therein set out.

Section 7768, R. S. Mo. 1929, provides that "a non-resident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered" at the place where the owner is a resident, and which has displayed upon it the number plates, etc., of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle,

> "provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

The Revised Motor Vehicle Laws of Illinois, compiled in 1935 by Edward J. Hughes, Secretary of State, at page 13 and Section 20 thereof is as follows:

> "Except as is herein provided for foreign corporations, the provisions of sections 8,9,9b, 9c,9d,9e,9f,9g,9h,9i,9j,9k,10, 14,17 and 27 of this Act shall not apply to any motor vehicle or motor bicycle owned by non-residents of this State if the owner thereof has complied with the law requiring the registration of motor vehicles or motor bicycles or the names of the owners thereof in force in the city, state, foreign country or province, territory or Federal district of his residence; and the registration number showing the initial or abbreviation of the name of such city, state, foreign country or province, territory or Federal district, is displayed on such vehicle substantially as is provided in section 14 of this Act; Provided, that the provisions of this section shall be operative as to a motor vehicle or motor bicycle owned by a non-resident of this State only to the extent that under the laws of the city, state, foreign country or province, territory or Federal district of his residence, like exemptions and privileges are granted to motor vehicles or motor bicycles duly registered under the laws of and owned by residents of this State. If, under the laws of such city, state, foreign country

> or province, territory or Federal district, motor vehicles or motor bicycles owned by residents of this Sta e, operating upon the highways of such city, state, foreign country or province, territory or Federal district, are required to pay the registration fee and carry the license plates or pay any other fee or tax to such city, state, foreign country or province, territory or Federal district, the motor vehicles or motor bicycles owned by residents of such city, state, foreign country or province, territory or Federal district, and operating upon the highways of this State shall comply with the provisions of sections 8,9,9b,9c,9d,9e, 9f,9g,9h,9i,9j,9k,10,14,17 and 27 of this Act. Foreign corporations, partnerships and individuals owning, maintaining or operating places of business in this State and using motor vehicles or motor bicycles in connection with such places of business, shall comply with the provisions of sections 8,9,9b,9c,9d,9e, 9f,9g,9h,9i,9j,9k,10,14,17 and 27 of this Act insofar as the motor vehicles and motor bicycles used in connection with such places of business are concerned."

From the above provisions of the Laws of Illinois it would appear that a truck being temporarily used in Illinois and which was properly licensed under the Laws of Missouri, and owned by a resident of Missouri, would not be required by the Laws of Illinois to have a license issued from the State of Illinois, and under the provisions of the Laws of Missouri, Section 7768, supra, the truck owners about which you make inquiry would not be

required to procure a license from the State of Missouri for their trucks which are temporarily within Missouri.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

DW:RV

SCHOOLS: Property of school districts exempt from taxation, said districts being municipal corporations.

May 22nd, 1939.

FILED
15

Carter & Jones,
416 Olive Street,
St. Louis, Missouri.

Hon. Edgar H. Wayman,
City Counselor,
St. Louis, Missouri.

Gentlemen:

As suggested in your respective letters dated February 21, 1939 and March 9, 1939, we have gone over the opinions submitted by you on the question of the liability for taxation of certain property owned by the school district of the City of St. Louis. We have examined the authorities cited in both opinions. We are of the opinion that the brief submitted on behalf of the Board of Education is the better reasoned brief, and we adopt the opinion as arrived at in said brief as our opinion upon the question.

In doing this, we might make some observations.

One of the principal cases relied upon by the City is the case of State ex rel. v. Gordon, 231 Mo. 547. It is true in this case the court did say in the course of the opinion that a school district was not a municipal corporation with diversified powers. We think the language in that particular was obiter for the reason that it was not necessary to a decision of the case to determine whether a school district was or was not a municipal corporation. That part of the opinion was trying

to point out why there would be less likelihood of voters at a bond election for school purposes being confused by a doubleness in propositions to be voted upon than there would be in elections in cities and towns, for the reason that cities and towns had many diversified powers, such as the power to build electric light plants for city use and for the manufacture and sale of electricity, light and power to consumers, the power to buy and ornament parks, to exercise the right of eminent domain and many other powers which could be exercised when authorized by a vote of the people. The opinion was trying to point out that with school districts there was only one single broad purpose which could be voted upon by the voters of the district and that was the purpose of furnishing education and increasing the facilities therefor.

After making the contrast between elections of cities and towns and elections in school districts, the court said, l. c. 575:

> "In a field so circumscribed, doubleness in propositions is not so likely to arise as in the larger and more diversified field of municipal activity."

For these reasons, we do not think the foregoing case is authority for the proposition that school districts are not municipal corporations in the sense that the words "municipal corporations" are used in the Constitutional provision regarding exemptions of the property from taxation.

Another case relied upon by the City is the case of State ex rel. v. Board of Directors of St. Louis Public Schools, 112 Mo. App. 213. The question being discussed in that case was whether or not the election of a school director in the City of St. Louis was an election by the people. In the course of the opinion the court commented that the school district was not a municipal corporation proper but was a quasi municipal corporation. We do not believe that the foregoing comment by the court was necessary to a determination of the question being considered. Certainly an election of a director would be an election by the people whether the school district was a municipal corporation in the s trict sense of the word, or whether it was a municipal corporation in the broader sense of the word, which is pointed out and adopted by the Supreme Court in the case of Caldwell v. Little River Drainage District, 291 Mo. 72.

Another case mentioned in the brief submitted on behalf of the City of St. Louis is the case of Burton Machinery Co. v. Ruth, 194 Mo. 194. In that case the court said that a city school district was a body corporate, but in the course of the opinion, l. c. 196, the court said:

> "It is clear that since materialmen and laborers have no lien for their material furnished or work done for one contracting with a school district, or other similar corporation, the section of the statute which we have just quoted

> was intended to be a protection to the classes which would otherwise be protected by our mechanics Lien law."

It will be seen from the foregoing expressions that a school district was classed along with corporate bodies mentioned in the statutes being considered. Such other corporate bodies were counties, cities, towns, townships and road districts. If the obiter statement has any weight, we think it might well be authority for classification of a school district in the same category as a county, city or town.

We think that in addition to authority cited in the brief submitted on behalf of the Board of Education, reference to the Constitution of Missouri will show that the words "municipal corporation" as used in Section 6 of Article 10, should be given the broader meaning as suggested in the case of Caldwell v. Little River Drainage District, supra. It will be noted that in said section of the Constitution "the property, real and personal, of the state, counties and other municipal corporations * * * * *, shall be exempted from taxation." A county is not a municipal corporation in the strict sense of the word as pointed out in the case of Heller v. Stremmel, 52 Mo. 309. We think, therefore, that it is significant that the word "other" is used in the foregoing section of the Constitution.

We call attention also to various other sections of the Constitution wherein counties, townships and cities are referred to as municipalities, towit:

"No county, township, city or other municipality * * * * *." (Sec. 6, Art. 9).

"The corporate authorities of any county, city, or other municipal subdivision of this State * * *" (Sec.19,Art.9).

"The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes." (Sec. 1, Art. 10).

"The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." (Sec. 10, Art. 10).

"The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to

this State, or to any county or other municipal corporation therein." (Sec. 51, Art. 4).

There are other provisions of the Constitution in which the language places counties in the same category as municipal corporations. We think, therefore, that the language of the Constitution clearly shows that when the words "municipal corporations" are used they do not mean municipal corporations in the strict sense of the word, and apparently this was the theory of the court in the case of Caldwell v. Little River Drainage District, supra. If a drainage district can be classified as a municipal corporation without doing violence to the Constitution, then we think that a school district can be so classified without any fear that the meaning of the Constitution is being subverted.

A good portion of the revenue which supports public schools comes from the state, and if a part of that revenue must be taken to pay taxes, the state would in effect be subjecting itself to taxes. We do not want to be understood as saying that school districts can acquire property and hold it indefinitely free from taxation unless the property is actually put to use for educational purposes. From the facts as outlined in the date submitted to us, we understand that the property in question has been acquired by the school district for the purose of use in the educational program of the district. The mere fact that it is not put to immediate use does not, in our opinion, subject it to taxation, but this is not saying that a school district could acquire property without an honest intention of using it for

educational purposes and still claim exemption of the property from taxation.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

HHK/rv

MOTOR VEHICLES: Non-resident owner must display plates. Receipt of registration not sufficient.

August 21, 1939

8-27

FILED
15

Colonel B. M. Casteel, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "A resident of the state of Illinois purchases a car and, not being able to obtain his registration plates for such car immediately, makes a proper application for such registration and is given a notarized receipt indicating that he has made such application. Finding it necessary to travel in the state of Missouri before the plates are mailed from the Springfield registration office, he is faced with a doubt as to whether or not operation without registration plates and carrying only the receipt for registration is sufficient for valid operation in the state of Missouri.
>
> "We will appreciate your opinion, covering such a typical case as that mentioned, as to whether or not the operator or owner is subject to arrest and prosecution and if such a vehicle as that described may be detained or removed from operation on the highways until the proper registration plates are secured and displayed on the vehicle."

Section 7768, R. S. Missouri, 1929, provides as follows:

> "A nonresident owner, except as otherwise herein provided, owning any motor vehicle which has been duly registered for the current year in the state, county or other place of which the owner is a resident and which at all times when operated in the state has displayed upon it the number plate or plates issued for such vehicle in the place of residence of such owner may operate or permit the operation of such vehicle within this state without registering such vehicle or paying any fee to this state, provided that the provisions of this section shall be operative as to a vehicle owned by a nonresident of this state only to the extent that under the laws of the state, country or other place of residence of such nonresident owner like exemptions are granted to vehicles registered under the laws of and owned by residents of this state."

There is no doubt that "the power of the state to regulate the use of motor vehicles on its highways extends to non-residents as well as to residents." Storaasli v. Minn., 51 S. Ct. 354, 283 U. S. 57, 75 L. Ed. 839.

We believe the statute is plain and unambiguous in its requirement that non-resident motorists, in order to be exempt from registration in the state of Missouri, must display "the number plate or plates issued for such vehicle in place of residence of such owner."

Moreover, as said in 17 R. C. L., 522:

> "Those who seek shelter under an exemption law must present a clear

> case, free from all doubt, as such laws, being in derogation of the general rule, must be strictly construed against the person claiming the exemption and in favor of the public. * * * * "

Therefore, a non-resident owner of a motor vehicle must display number plates of the state of which he is a resident in order to bring himself within the statute exempting non-residents from the Missouri Motor Vehicle Laws.

CONCLUSION.

It is, therefore, the opinion of this department that a non-resident owner of a motor vehicle must display number plates of the place of which he is a resident upon his vehicle in order to be exempt from registering such vehicle in Missouri.

A receipt for registration alone from the state in which the car is registered is not sufficient for valid operation in the state of Missouri.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

COUNTY WARRANTS: Limitations are governed by the provisions of Section 12173, R. S. Mo. 1929.

September 28, 1939

FILED
15

Mr. Omer Casey
County Treasurer
Stockton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 15, asking our opinion on the following questions:

(1) Do limitations run on county warrants and, if so, when?

(2) May county road district warrants be registered and protested so as to thereafter draw interest until paid?

(3) Who is liable for warrants issued in excess of the anticipated revenue?

Section 12173, R. S. Mo. 1929 provides:

"Whenever any warrant drawn on any county treasurer shall have remained in the possession of the county clerk for five years, unclaimed or not called for by the person in whose favor it shall have been drawn, or his or her legal representatives, the county court shall, by proper order, entered of record, annul and cancel the same; and whenever any such warrant, being delivered, shall not be presented to the county

> treasurer for payment within five years after the date thereof, or, being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment thereof, such warrant shall be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues."

The court in the case of Wilson vs. Knox County 132 Mo. l.c. 394, in speaking of the application of the above quoted section said:

> "Counsel for respondent contend that section 3195 does not provide a limitation to actions upon county warrants, but insist that the provisions thereof, last quoted, were intended merely for the guidance of the county officers, and to place limitations upon these agents of the county as to the payment of such warrants. That the section does contain such directions and limitations in the provision 'that any such warrant * * * shall not be paid, nor shall it be received in payment of any taxes or other dues' is beyond question; and excellent reasons are given why these restrictions upon county officers were and ought to have been embodied in the statute. But in the forefront of these limitations there stands another, of which this contention takes no account, i.e., 'that such warrant shall be barred.' What is to be done with this limitation? It can not apply to the county officers upon whom the intended restrictions are made full and complete by the prohibition that the warrant shall not be paid or received in payment for any taxes or other dues. It can not be ignored or dropped from the

> statute, and must apply according to its terms to every county warrant, of the class in question. How can the application of those terms to such warrants be made, except by barring an action thereon?
>
> The word 'bar' 'has a peculiar and appropriate meaning in law.' 'In a legal sense it is a plea or peremptory exception of a defendant sufficient to destroy the plaintiff's action.' 1 Jacob's Law Dict., 289; 1 Abbott's Law Dict., 125. 'A special plea constituting a sufficient answer to an action at law and so-called because it barred, i.e., prevented, the plaintiff from further prosecuting it with effect, and if established by proof defeated and destroyed the action altogether.' 1 Burrill's Law Dict., 185.
>
> The word 'barred' must be held to have been used in this section in its well defined technical sense. R. S. 1889, sec. 6570. It necessarily implies an action to be 'barred,' defeated, or destroyed, and the meaning of the phrase 'such warrant shall be barred' is just as plain and unmistakable as if the phrase had been written 'action on such warrant shall be barred.'"

It is clear, upon reading the above statute and quoted excerpt from the Wilson case, that any action to collect a county warrant is barred that is commenced more than five years after the date of said warrant, unless said warrant has been presented to the treasurer for payment within five years of the date; and also that an action to force collection of a protested warrant is barred, if said warrant is not presented for payment to the county treasurer within five years after funds have been set aside for its payment.

In answer to your second question, we enclose copies of opinions rendered to Honorable Randolph H. Weber, Prosecu-

ting Attorney of Butler County, on November 10, 1937, and January 11, 1938, holding that county road district warrants may be issued and registered up to the amount of the anticipated revenue and that said warrants, upon being properly protested, draw interest at 6% per annum.

We take your third question to ask who is liable to the holder of a warrant issued in excess of the anticipated revenue for that year. It is well settled in this state that a warrant so issued is void and the county is not liable therefor. State ex rel vs. Hackman 280 Mo. 686, Trask vs. Livingston County, 210 Mo. 582, Watson vs. Kerr 279 S. W. 692.

Concerning the liability of the body that issued said warrant in excess of the anticipated revenue as private individuals, we will say that our research has disclosed no decided case by the courts of this state that would seem to conclusively settle the question. It appears from the knowledge we have of the facts that any controversy on this point would concern only the holder of such a warrant, and the members of the body that ordered it issued as private individuals. This being the situation, it is not our duty to attempt to prejudge these private individuals private liability. However, we refer you to some authority which is indicative of the attitude of the courts on this question. See: Jacquemin vs. Andrews 40 Mo. App. 507; 87 A.L.R. 273 notes.

As to your own responsibility on this subject, we enclose an opinion rendered to Maurice Dwyer dated January 13, 1936.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
LLB:RT
Enc.

CIRCUIT CLERKS: If Circuit Judge approves the appointment of a deputy to Circuit Clerk under Section 11812, Laws of Mo. 1937, p. 446, the county must pay the same; the amount of the salary must be taken into consideration even though the anticipated revenue may not be sufficient to pay the same under the Budget Act.

January 18, 1939

1-19 FILED 16

Hon. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This Department is in receipt of your letter of January 13th, wherein you make the following inquiry:

> "By Section 11786, Laws of 1937, page 445, the salary of Circuit Clerks in counties containing a population of ten thousand or less, was increased to $1700 annually. Under this law our Circuit Clerk and ex-officio Recorder will receive an increase of $600 although his duties have not been increased at all.
>
> "Sections 11812-3 provide * * * * 'The Clerk and his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury.'
>
> "It appears that our Circuit Clerk wants a deputy to assist him, although it does not appear that his duties have been increased, or that he could not perform all the duties of both offices except during the May and November terms of the Circuit Court each year, if he

> would give same his time and personal attention. As yet our County Court has not made up the Budget for 1939; but judging from the 1938 budget (when the expenditures exceeded the income) it is very doubtful if there will be any anticipated revenue to take care of the Circuit Clerk's deputy, as the Court has had trouble in meeting the actual running expense of the County each year.
>
> "My opinion is that, even though the Circuit Judge should have made an appointment of a deputy circuit clerk as provided by the above mentioned law, that such appointment and the salary of the deputy would not be binding upon the court, or an encumbrance on any funds of the County, since there will be nothing with which to pay same.
>
> "Please let me have your opinion in the matter so that I may properly advise the Court when they make up their budget."

The first phase of the main question which you present relates to the inference in your letter that the need of a deputy circuit clerk should be taken into consideration. Noting your statements to the effect that the duties of the circuit clerk have not increased, this does not appear to be a question which you or the county court have the power to pass upon.

Under Section 11812, Laws of Missouri, 1937, page 446, the circuit clerk is entitled to appoint his deputy or deputies, with the approval of the judge of the circuit court; said section being as follows:

> "Every Clerk of a Circuit Court shall be entitled to such number

> of deputies and assistants, to be appointed by such official, with the approval of the Judge or Judges of the Circuit Courts, as such Judge or Judges shall deem necessary for the prompt and proper discharge of the duties of his office. The Judge or Judges of the Circuit Court, in its order permitting the Clerk to appoint deputies or assistants, shall fix the compensation of such deputies or assistants which said order shall designate the period of time such deputies or assistants may be employed. Every such order shall be entered of record, and a certified copy thereof shall be filed in the office of the County Clerk. The Clerk of the Circuit Court may at any time, discharge any deputy or assistant, and may regulate the time of his or her employment, and the Circuit Court may, at any time, modify or rescind its order permitting an appointment to be made."

It therefore becomes a matter for the Circuit Judge to determine the deputy or deputies which he "shall deem necessary for the prompt and proper discharge of the duties of his office," and if the Circuit Judge determines that he is in need of a deputy it would appear that the county is bound, the same as it is for any county officer, for the payment of same under Section 11813, Laws of Missouri, 1937, p. 447, which is as follows:

> "The salary of the Clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The Clerk and

> his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury."

We know of no additional duties which have been added to the office of circuit clerk. Under Section 11814a, Laws of Missouri, 1937, p. 447, the clerk is compensated for services as Clerk of the Juvenile Court, and we assume that you arrive at the compensation of the Clerk by adding $200.00, as for counties of the population of Reynolds, to the amount allowed by Section 11786, Laws of Missouri, 1937, page 445.

Relative to the question as to whether or not the county is liable for the salary of the deputy circuit clerk, in the event one is appointed, we shall discuss the same independent of the ability of the county to pay the same, or as determined by the Budget Act.

In the decision of Bates v. St. Louis, 153 Mo. 18, l. c. 20, the court said:

> "It is well settled law that 'a public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creature of law, and as an incident to the office. . . . "The salary belongs to him as an incident to his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office."' (Givens v. Daviess Co., 107 Mo. loc. cit. 608, 610; Fitzsimmons v. Brooklyn, 102 N. Y. 536; State ex rel. Chapman v. Walbridge, 153 Mo. 194.)

"As is well said in Throop on Public Officers, sec. 500, quoting from Robinson, J., in People v. Green, 5 Daly (N. Y.), pp. 268, 269:

"'The right of an officer to his fees, emoluments, or salary, is such only as is prescribed by statute; and while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment, provided by law. The compensations for official services are not fixed upon any mere principle of quantum meruit, but upon the judgment and consideration of the legislature, as a just medium for the services which the officer may be called upon to perform. This may in many cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office "for better or worse"; and whether oppressed with constant and overburdening cares, or enabled from absence of claim upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service, or neglects his duties. . . . . The fees or salary of office are "quicquid honorarium," and accrued from mere possession of the office.'"

And again in the decision of State ex rel. Ake v. Kansas City, 221 Mo. App. 784, the court states that a county officer's right to a salary is a property right. Hence, we dispose of the question with the statement that it would appear that the county is liable for the salary of the deputy clerk.

Assuming that the county is liable and that the court approves the appointment of a deputy clerk and fixes his salary, can the county court refuse to include the same in the estimate of 1939?

Class 4 of the County Budget Act, Laws of Missouri, 1933, p. 341, provides as follows:

> "The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together, with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

Under Section 11813, quoted supra, the deputy is entitled to receive his salary paid out of the county treasury in monthly installments at the end of each month the same as the clerk. He, therefore, has the same status, insofar as salary is concerned, as the clerk, and any salary allowed to him should be included in the estimate in Class 4. It is

unfortunate that the anticipated revenue of the county cannot be estimated to such amount that it would include the salary of the deputy; yet, nevertheless, in the situation which you present, this salary must be taken into consideration.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

COUNTY BUDGET: County Clerk cannot be compelled to draw warrant on 1939 funds for 1938 debt, where there is no surplus.

February 16th, 1939.

2-18

FILED 16

Hon. Paul N. Chitwood,
Prosecuting Attorney,
Reynolds County,
Centerville, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of February 7th, 1939, which is as follows:

> "The following copy of a county court order made at the February term, (February 7th, 1938) is as follows:
>
> > "Now at this time the court takes up the matter of appointment of a Deputy State Health Commissioner for Reynolds County as authorized by section 9025, Laws of Missouri, 1933, page 271, and after due consideration of said matter and the court being fully advised appoints Dr. J. R. Pyrtle to said office for a period of one year at a fixed salary of $400 per year * * * *"
>
> An opinion from your office several months ago among other matters, provides that the County Physician is a County Officer, and that his salary warrant is to be written upon the funds in class number 4, of the County Budget Laws.

> In the instant case, it appears from the County Court records that nothing was appropriated in this class with which to pay the County Physician, or rather Deputy State Health Commissioner, as the statute terms him. It further appears that at the present term of the County Court (the preparing of the budget for 1939, being the most important business) nothing is being appropriated in this funds for the payment of Dr. Pyrtle's account which has been filed and approved.
>
> Mr. Lloyd Hill, the new County Clerk of this County has refused to take any part whatever in the writing of a county warrant on Class NO. 4, of the 1939 budget, (when completed) for the reason that he contends that the county is in anticipation of law on a cash cash basis and that warrants should not be written with which to pay indebtedness for past years unless there is a surplus left over, which is not the fact in this case.
>
> Kindly let me know your opinion at your earliest convenience as to what remedy may be had, if any, compelling the County Clerk to write a warrant to the Dr. for his services."

The question is as we see it; May a warrant be drawn on the 1939 budget and funds to pay an obligation incurred in 1938, when there is no surplus in 1939 funds? This opinion will be confined strictly to that question and is in no way to be construed as ruling whether or not an officer's

salary can be paid at all if he fails to file his estimate (Sec. 6, Laws of 1933, p. 344), or the court fails or refuses to appropriate an amount in Class Four to pay him (Sec. 5, Laws of 1933, p. 344).

In Kansas City, Fort Scott and Memphis Railroad Company v. Thornton, 152 Mo. 570, 575, the court on a similar question, said:

> "Under these provisions of the Constitution warrants may be issued to the extent of the revenue provided for the year in which such warrants were issued, and the warrants so issued each year must be paid out of the revenue provided and collected for that year. If the revenue collected for any year for any reason does not equal the revenue provided for that year and hence is not sufficient to meet the warrants issued for that year, the deficit thus caused can not be made good out of the revenue provided and collected for any other year until all the warrants drawn and debts contracted for such other year have been paid, or in other words, only the surplus of revenue collected for any one year can be applied to the deficit of any other year. Thus each year's revenue is made applicable, first, to the payment of the debts of that year, and secondly, if there is a surplus any year it may be applied on the debts of a previous year."

The constitutional provisions referred to by the court in the Thornton case are Sections 11 and 12 of Article 10. Of course, now there is a limitation

of ninety percent on the amount of the anticipated revenue which the court may spend. (Sec. 4, Laws of 1933, p. 343).

Under this case it is clear that funds raised to pay the obligations for the year 1939 cannot be applied to the payment of the debts of a prior year, unless there is a surplus in the 1939 funds. You state in your letter that no such surplus exists.

Any debt contracted in the year 1938 must be paid by a warrant drawn on that year's revenue (or the surplus of another year). This is to be seen by what is said in the Thornton case l. c. 575, where the court held that the constitution made "each year's revenue **** applicable **** to the payment of the debts of that year."

With respect to compelling the county clerk to draw and attest the warrant in question we direct your attention to the last paragraph of Section 8, Laws of 1933, p. 345, 346, providing that:

> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

This would also be true of any such order violative of the constitution.

It needs no citation of authority to establish that no proceeding could be instituted against the county clerk to compel him to do that which the constitution and laws say shall not be done.

CONCLUSION

Therefore, it is our opinion that a county clerk cannot be compelled to draw and attest a warrant on 1939 funds to pay a debt incurred for the year 1938, when there is no surplus in said 1939 funds.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY,
Assistant Attorney General.

_____

(Acting) Attorney General.

LLB:RV

MOTOR VEHICLE FUEL TAX: Agents and employees of federal government exempt when -

GASOLINE: Sales at Jefferson Barracks taxable when -

March 8, 1939

3-9

FILED

16

Honorable Roy H. Cherry
State Oil Inspector
Jefferson City, Missouri

Dear Mr. Cherry:

This will acknowledge receipt of your letter of March 3, 1939, in which you request our opinion on the following:

"It has been the policy of this department since the enactment of the Missouri Motor Vehicle Fuel Tax Act to allow distributors upon whom the motor vehicle fuel tax is levied to deduct from their reports each month the number of gallons of motor vehicle fuels sold to agents and employees of the United States government. These deductions must be substantiated by an exemption certificate, form No. 1094, which is supplied by the federal government to its agents and employees entitled to exemption. This certificate No. 1094 is executed by the person in the employ of the government and delivered to the service station attendant at the time of the purchase.

On numerous occasions, service station attendants have refused to accept this exemption certificate in lieu of the tax and the federal government has at various times filed with this department claims for refund of the tax paid on such purchases. This department has heretofore included the government claims in the list of relief claims recommended to the appropriations committee of the House of Representatives and in the past an appropriation has been made for the

payment of the claims. We have on file at the present time two claims by the federal government for a total of $186.14. These claims are supported by several hundred of the above mentioned certificates. Some of these certificates are dated as far back as 1932.

During the 1936 session of Congress, there was passed what is known as the Haden-Cartwright Bill. (H.R. 11687)

In the state of Missouri, we have only one military reservation on which a post exchange is operated and since the enactment of the above mentioned resolution, the Jefferson Barracks Post Exchange has made no reports and paid no tax to the State of Missouri on gasoline sold for private use on the highways of this state. It seems that the War Department regulations hold that the Missouri motor vehicle fuel tax is not a sales tax and that for this reason the provisions of the Haden-Cartwright Act do not apply.

Assuming that the War Department is correct in that the Missouri motor vehicle fuel tax is not a sales tax, then it must be a tax for the privilege of doing business in the state of Missouri and the tax applies to the distributors of motor vehicle fuels. If the tax is a tax on the distributor for the privilege of operating a business in the state of Missouri, then it would seem that the federal government has paid no tax to the state of Missouri and would be entitled neither to exemption or refund."

I.

First, we will consider your question relative to the agents and employees referred to in your letter, who claim

exemptions, or apply for refunds on form certificate No. 1094. In order to have a legal proposition, we assume that those involved are engaged in an essential function of government and not a business on which the federal government has embarked, which normally would be taxable. Allen v. Regents of University of Georgia 58 S. Ct. 980.

With that question behind us, we find that in Central Transfer Company vs. Commercial Oil Co. 45 Fed 2nd 400, it is held that the gasoline tax levied by Sections 7795 and 7796 R. S. Missouri 1929, is an excise tax levied on the right to engage in the business of selling the gasoline. It is further held that the fact said tax is, as a matter of business, passed on to the buyer does not make it a tax levied against him, even though the seller is required to post notice to the effect that a tax is included in the purchase price. Section 7821 R. S. 1929.

With this holding we agree in that the statutes above mentioned levy the tax on the seller, not the buyer and as such is an excise tax. Under this construction, these federal agents and employees pay no tax levied against them, but only purchase gasoline and pay a stipulated price per gallon, to be fixed solely by the seller, which price happens to include the tax because the seller has elected to pass the same on to the purchaser.

If we could adhere to the strict rule that the tax must be levied against the buyer before these federal agents and employees are exempt, this question would be settled now, but that does not seem to be the case.

In Panhandle Oil Company vs. Mississippi 277 U. S. 218, 72 L. Ed. 857, it appears that the State of Mississippi by its laws imposes an excise tax of one cent per gallon on the privilege of engaging in the business of selling gasoline. The Panhandle Oil Company was engaged in said business in that state and in the course of said business sold large quantities of gasoline to the Coast Guard Fleet and Veterans Hospital at Gulfport. In denying the right of the state to collect the tax from the Panhandle Oil Company, on that gasoline sold those agents, the Supreme Court of the United States said (citations omitted):

"The United States is empowered by the

Constitution to maintain and operate the fleet and hospital. Art. 1, Sec. 8. That authorization and laws enacted pursuant thereto are supreme (art. 6); and, in case of conflict, they control state enactments. The states may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of Federal functions. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the state and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the state, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales of the government. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons.

> The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the Unit d States, of its constitutional powers to operate the fleet and hospital. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. And that is to tax the United States--to exact tribute on its transactions and apply the same to the support of the state.
>
> The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled."

The above case was followed in Graves vs. Texas Company 298 U. S. 393, 80 L. Ed. 1236. It is interesting to note the dissenting opinions in these cases to the effect that if the majority opinions be the law, then the United States government is a privileged customer, who must receive a special reduction in price for commodities it purchases if anywhere in the processing of said commodity a tax has been imposed on one of the processors and that processor has increased the price of the product in order to compensate himself for the tax levied against him and which he paid.

We would have thought the rule as above announced, to be reciprocal, that is, the federal government could not collect the one cent tax on gasoline levied by 48 Statutes 764 on the producer who, in turn, passes the same on to the seller and thence to the buyer, when the buyer is an agency of the State of Missouri. At least, this immunity due to the dual sovereignty was recognized in Allen vs. Regents of the University of Georgia, supra, and Indian Motorcycle Co. vs. U. S. 283 U. S. 570, 75 L. Ed. 1277. It seems, however, that this rule has been seriously questioned in Helvering vs. Gerhardt 58 S. Ct. 969, 304 U. S. 405, if not overturned. At any rate, Congress, perhaps foreseeing the rule laid down the Gerhardt case, expressly provided that this federal tax on gasoline was not to apply on sales made to a state or political subdivision thereof for use in the exercise of an essential governmental function. 49 Statutes 1025, 26 U.S.C.A. 1420.

On this question, it is our opinion that these agents and

employees of the federal government, when so engaged, are not liable to pay the state tax on gasoline. Where, however, the tax has been paid by one of these agents or employees, there is no authorization in our law by which it can be returned.

The Missouri Constitution, Article IV, Section 43, provides that "all revenue collected and money received by the State from any source whatsoever shall go into the treasury, and the General Assembly shall have no power to divert the same, or to permit money to be drawn from the treasury, except in pursuance of regular appropriations made by law." (See also Art. X, Sec. 19). The Legislature, in Laws of 1937, page 108, appropriated funds "To pay the claims for refunds of taxes paid on motor vehicle fuels as provided by law." The refunds contemplated by this Appropriation Act are those authorized by Section 7805 R. S. Mo. 1929. A casual reference to this statute is sufficient to show that the only time a refund may be paid is when the gasoline on which it is claimed was not used to propel a motor vehicle over the highways of this state. We think it will be conceded that these agents and employees of the federal government did not so use the gasoline on which they claim refunds.

II.

Your next question concerns Jefferson Barracks, an area which the State of Missouri ceded to the federal government, and the liability for tax of those within its confines selling gasoline.

This territory was ceded by the State of Missouri to the United States in 1892 (Extra Session Acts 1892, page 16). This Act reserved to the state, among other things, "the right to tax and regulate railroad, bridge and other corporations, their franchises and property on said reservation." (This has been a military post since 1826, City of St. Louis vs. U. S. 92 U. S. 462).

In Standard Oil Company vs. California 291 U. S. 242, 78 L. Ed. 775, it is said on this:

"In three recent cases--Arlington Hotel

> Co. v. Fant, 278 U. S. 439, 73 L. ed. 447, 49 S. Ct. 227; United States v. Unzeuta, 281 U. S. 138, 74 L. ed. 1091, 50 S. Ct. 455--we have pointed out the consequences of cession by a State to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the Act of 1897 California surrendered every possible claim of right to exercise legislative authority within the Presidio--put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein."

An exception to this rule, however, is when the state makes certain reservations in the ceding act which do not interfere with essential governmental functions on the reservation. Fort Leavenworth R. R. Co. v. Lowe 114 U. S. 525, 29 L. Ed. 264.

We see by the Missouri ceding act that no reservation was made as to the right of the State to tax sales of gasoline made on the reservation.

The Bill mentioned in your opinion request appears in 23 U.S.C.A. 55a, and provides as follows:

> "(a) All taxes levied by any State, Territory or the District of Co umbia upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Terri-

> tory or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel not sold for the exclusive use of the United States during the preceding month."

Prior to 1892, the State of Missouri had the right to legislate concerning this reservation on any subject so long as it did not interfere with essential governmental functions in doing so. Thus, at that time, it could have imposed any tax it saw fit on property or transactions taking place on said reservation, if within the above limitation. By the Act of 1892, the state released this area from its control, except for the reservations designated in the Act. Under the Haden-Cartwright Bill 23 U.S.C.A. 55a Congress returned a certain portion of that which the state released by the Act of 1892, that is, the right to collect the tax upon "sales of gasoline" made on the reservation.

You state that it is contended that Congress used the phrase, "tax upon the sales of gasoline", in a technical sense, meaning that before the State of Missouri can collect the tax upon gasoline sold on the reservation, said tax must be a sales tax. Circular No. 58 issued by the War Department over the signature of the Honorable Malin Craig on September 8, 1936, in para. 5, seems to indicate that that is the War Department's contention.

We can not agree to this construction. Congress, when it passed the Haden-Cartwright Bill, presumably knew that military and other reservations were located throughout the United States and that all states do not levy their gasoline tax in the same manner. Due to this, Congress must have intended the Act to apply to all states alike, irrespective of any particular mode in which a state might levy its gasoline tax. Neither does the Honorable Homer Cummings, in his

opinions (38 Atty. Gen. Op. 519-522) apply any such strict construction. That officer also remarked at page 521:

> "It lies with the territorial government and its appropriate officers to construe its laws and to determine whether or not under them taxes are to be levied upon sales by or through such agencies located on such reservations of motor vehicle fuels which are not for the exclusive use of the United States."

Notwithstanding the contention of the War Department, we are now advising you, as the taxing authority of gasoline in this state, that as construed by the Supreme Court of the United States, the tax on gasoline as levied by the State of Missouri is a "tax upon the sales of gasoline". As pointed out in Part I of this opinion, the gasoline tax in Missouri is strictly speaking an excise tax, but this rule does not obtain when applied to agencies and instrumentalities of the federal government.

In Panhandle Oil Company vs. Mississippi, supra, the court in construing the law of Mississippi, which levied that state's gasoline tax in almost the identical language as does Missouri said:

> "To use the number of gallons sold * * * * as a measure of the privilege tax is in substance and legal effect to tax the sale".

As was said in Gregg Dyeing Co. vs. Query 286 U. S. 472, 76 L. Ed. 1232 the Supreme Court regards substance and effect rather than form in determining what kind of tax has been levied.

It is, therefore, our opinion that all gasoline sold within the confines of Jefferson Barracks, when not sold for the exclusive use of the United States, is subject to the

tax levied on gasoline by this state to be paid as Congress directed in the Haden-Cartwright Bill.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

LLB:RT

LIMITATIONS: Limitation does not begin to run against the County Treasurer

COUNTY TREASURERS: and his bondsmen until the end of his term and breach of duty then to pay over funds.

March 24th, 1939

FILED
16

Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

We have your inquiry which is as follows:

"On June 8th, 1938, a report of an audit made by County Examiners J. E. Sanders and L. L. Patterson, of the State Auditor's office, was made of all the county offices of Reynolds County, and filed with the County Clerk of said county.

"The audit covered the period during the years 1935 and 1936. It reported a shortage of $4,469.45 of Mr. O. C. Lane, Treasurer, and consisted of a shortage of $3,862.76 of Mr. Lane's accounts, plus $606.69, representing an excess of one half of one percent of fees illegally retained by him for disbursing the school moneys of the county for the year 1936.

"I have sued Mr. Lane and his bondsmen, the American Surety Co. Inc. of New York in a civil action here in the Circuit Court, to recover this amount on the bond. I have been informed by the defendant Surety Company, that the principal defense would be the three year statute of limitations, i.e., that the present suit on the bond was not brought

until after the three years limitation, as they claim barred at least half of the alleged shortage. To sustain their point, they cite me Section 863, R. S. Mo., 1929, which reads as follows:

> "Within three years: First, an action against a Sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

"They further cite numerous cases, the principal ones of which are Shelby County vs. Bragg, 135 Mo. 276, Putnam County vs. Johnson, 259 Mo., 73, State ex rel Bell vs. Yates, 231 Mo., 276, and City of St. Joseph vs. Wyatt, 274 Mo., 566. Also a number of other cases are cited to sustain the position, that a suit against an official on his bond, must be instituted within three years from the date of the breach of the bond, shortage or other defalcation complained of.

"Now according to the audit report, the shortages of Mr. Lane did not all happen at any particular date, but continuously over a long period of time. Apparently the defense does not believe their position to be good, or

at least logical. They have filed a motion to make the various accounts, the amounts taken and the dates of the shortages, along with their defense of the three year statute of limitations plea.

"It would be impossible to definitely give the exact dates of the shortages, since the balances in each fund were raised or lowered from day to day, apparently at the will of the treasurer. For the same varied almost daily. For the same reason any such shortages would be next to impossible to detect, since the treasurer carried all funds in his various book balances, in one bank account in Reynolds County Savings Bank, the county depository at that time. In my opinion the embezzlement, and shortages of Mr. Lane were not really complete as to set in operation of the statute of limitation until the last wrongful act was finally completed, and the total amount of shortage was capable of being ascertained. The total shortage of $4,469.45, did not occur until February 5th, 1937, when the treasurer made his final settlement when the exact amount of the shortage was ascertained, and he failed to account for, and turn this amount over to his successor of this date. Section 860, R. S. Mo., 1929, provides:

> "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued:

> Provided, that for the purposes of this article, the cause of action shall not be deemed to accrue when the wrong is done or the technical breach of contract or duty occurs, but when the damage resulting therefrom is sustained and is capable of ascertainment, and, if more than one item of damage, then the last item, so that all resulting damage may be recovered, and full and complete relief obtained."

"Also the following cases are in point with this section: Fitchner vs. Mohr, 16 S. W. (2d), 739, and Lewis vs. Thompson, 96 S. W. 939.

"I do not care to burden you with a lengthy discussion of the points of law involved in this case, but in view of the importance of this case to Reynolds County, I would appreciate your opinion and advice as to which of the two sections of law relating to the statute of limitations will govern in the instant case."

Replying thereto, it occurs to us that your question boiled down is this:

> When does the Statute of Limitation begin to run against the liability of the County Treasurer and his bondsmen, on account of the failure of the County Treasurer to properly account for and pay over the funds officially in his hands?

Section 12152, R. S. Mo., 1929, states with reference to the duties of the County Treasurer:

> "He shall settle his accounts with the count semi-annually, at its first and third regular terms in each year; and at the end of his term * * * * * * shall immediately make such settlement, and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

In the case of Fitchner against Mohr, 16 S. W. (2d), 739, the St. Louis Court of Appeals, speaking of when the statute of limitations begins to run, said l. c. 741:

> "It seems to us therefore, that the time when thestatute begins to operate against a claim under the constitutional and statutory provisions aforesaid, is that date when it has been discovered or made known to the public that the officials or agents have violated the provisions denouncing the reception of deposit when the bank is in a failing condition or insolvent."

The court there seems to hold that the petition there under attack which stated that on August 31, 1922, the bank became insolvent and was thereupon taken over by the Finance Department and by showing that at that time the information became available to the depositors which charged him with the duty of account, and the statute of limitation began to run at that time. In other words, the statute of limitation did not begin to run at the date of making of the deposit which, in that case, was on April 25, 1922, but did begin to run at the date the depositor became acquainted with the fact that the bank was insolvent.

In Lewis against Thompson, 96 S. W. (2d), 938, speaking of when the statute of limitation begins to run, the Kansas City Court of Appeals speaking of Section 860, R. S. Mo., 1929, page 944, said:

> "Under this section it has been held that a cause of action has accrued when a right exists to institute a suit and for its enforcement * * * * * * * * * * *
>
> "A fundamental rule applies to the construction of all limitation statutes, is that the same may be deemed to begin to run only when the cause of action ascertained accrued to the person asserting it and that does not accrue in the legal sense it comes into being and such party has the right to assert the same in court."

In that case the question considered was when the statute of limitation began to operate as to a broker's commissions for the sale of a business establishment, the value of which was to be determined by an inventory to be made after the entering into of the contract of sale. The court held the statute to begin to run, not from the date the contract was

entered into, but from the date the inventory was made, because at the latter time the amount of broker's commissions was thereupon capable of ascertainment, saying at page 945:

> "Until such time plaintiff could not know the amount of the compensation to which he was entitled, and had no cause of action therefore he might assert in court."

It will be noted that Section 12152, supra, uses the term "settle" speaking of the duty of the county treasurer with reference to his semi-annual settlements. That statute requires him to pay over the money officially in his hands "at the end of his term * * * ". The county treasurer acts as a reservoir or receptacle officially of the county funds. There is no other person to whom the county treasurer can pay the county funds belonging to the county as long as he himself is in office. It did not become the duty of the county treasurer to pay over the county funds to any other person (except of course, funds called for by county warrant properly issued against the funds) until the end of his term.

Your inquiry does not disclose that the County Treasurer declined nor neglected to render semi-annual settlements. Under Section 12153, R. S. Mo., 1929, certain other officers are required to make settlement at each term of the county court, and "pay into county treasury any balance which may be due the county * * *" Section 12154, R. S. Mo., 1929, states that:

> "If any person thus chargeable shall neglect or refuse to render true accounts, or settle, as aforesaid, the court shall adjust the accounts of such delinquent, according to the best information they can obtain, and ascertain the balance due to the county."

Section 12153, supra, apparently does not apply to the county treasurer because the parties required by that section to make such settlements and balances of accounts and by it required to pay such moneys to the county treasurer. Subsequent sections there following relate to the penalties and liens applicable in summary proceedings of the county court in adjusting defaulting office accounts, but seems to refer to proceedings directly against the official and not to liability on his official bond.

If the cause of action accrues to the court at the semi-annual settlement called for by Section 12136, then the statute of limitations begins to run from that date. If by the term "settlement" is meant merely the stating of the account and it would not become the duty of the county treasurer to pay over any money to anyone until the end of his term. It might be argued that he has not violated his official duty in not paying over the proper amount until the end of his term.

If A owes a promissory note which is due the first day of January, 1941, A has not vidated his legal duty to the payee by declining to pay said note prior to January 1, 1941. It might be A's duty to render account to the payee by writing him letters at each term when the county court convenes and setting out all of the circumstances surrounding the note and the payment thereof, by the fact that A failed to do these latter things, would not of itself accelerate the due-date of the note, nor would that fact start the statute of limitations.

It occurs to us the last above is somewhat of a parallel to the statutory duties and responsibilities of the county treasurer while it is his statutory duty to make settlements with the county court semi-annually, yet does not become his duty to pay over the balance of official funds until the end of his term when the statute of limitation does not begin to run until he has violated that duty, which violation must occur at the end of his term by failing to pay the same over to his successor.

The cases in your letter mentioned as cited by the bondsmen do hold that the statute of limitation begins to run against the county officials when they make settlements required by law to be made by them with the county court, and the settlements as made by them show on the face to be incorrect and also when the other public records available for the county court to use in checking up the accuracy of the report and show the report as made to be incorrect, and seem further to hold that the only instances where the statute does not begin to run against an official making a settlement with the county court are those where he has made a false settlement and there is no available record by which the falsity thereof could be reasonably discovered but on the contrary, there has been by the defaulting officer a concealment of the true facts, but those cases apply the above rule to officers after the liability to make the payment there under consideration has accrued. If it was the duty of the county treasurer in the instant case, to pay this money over to someone at each semi-annual period when the statute requires him to "settle" his accounts, then the statute would begin to run from those periods, but if, as we have stated here above, his duty to pay over the money does not come into existence until the end of his term of office, then the statute of limitations should not begin to run until he has reached that date.

The cases cited by the bondsmen and above mentioned, and the three year statute of limitations preclude a successful prosecution if such were instituted more than three years after the time at which the final settlement of the county treasurer was due, if there was no fraud in the making of the settlement, and if the records were available for the county court as the auditing body, to determine that the settlement as made was fraudulent or incorrect. If the county treasurer in making such settlement had made an incorrect settlement and had so manipulated his records by falsification or kept a dual set of records, and there was no available public records by which the county court could ascertain that the settlement as made was false, the statute of limitations would not begin to run until after the county court had had a reasonable opportunity, all the facts and circumstances considered, to discover the falsity of the settlement. See St. Joseph against Wyatt, 274 Mo. 567, for a summary of the law as to the last above expression herein.

We do not by this opinion desire to be understood as in any way excusing the failure of the county court to require a strict and proper accounting of public funds of the county. It is their duty to protect the county funds. They are by law created the fiscal agents of the county. They are the guardians of the proper handling of the county funds. It is their duty to faithfully and assiduously watch over the settlements made by county officials with the county as is said in the last case above mentioned, page 575:

> "The County Court is given the power to audit the accounts of these officers and it is made their duty to examine settlements made by them and, if necessary, to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct."

CONCLUSION.

It is our opinion that the statute of limitation does not begin to run against the county treasurer and his bondsmen until he has violated his duty to pay over county funds, and that his duty to pay over county funds does not spring into existence until the end of his term of office, absent the other statutory provisions for the termination of his office.

Respectfully submitted,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW/RV

CRIMINAL LAW:
INFORMATION:
NUMBER OF COUNTS: Where one offense is committed the state may file an information containing several counts where different sections of the statute are violated.

April 26, 1939

5-7

FILED
16

Mr. Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the question: May a person, who has possession of a fur-bearing animal out of season, be prosecuted under an information containing two counts, one for the possession of such animal, and the other for failing to procure a dealer and shipper's license?

The sections of the statute which have been violated to which you refer are Sections 8238, 8239 and 8261, R. S. Missouri, 1929. Section 8238, supra, makes it unlawful for any person to kill any fur-bearing wild animal, to take, have in his possession, offer for sale, etc., in certain periods of the year. Section 8239, supra, pertains to a dealer and shipper's license to purchase and sell, transport, possess and commercialize in pelts of fur-bearing animals.

It appears from the case which you have submitted that a party has been charged with possession of the pelt of a fur-bearing animal out of season contrary to the provisions of Section 8238, supra, and you are asking whether or not another count under Section 8239, supra, can be included in that information.

It will be noted that the punishment for the violation of the two foregoing sections is set out in Section 8261, supra, which makes it a misdemeanor to violate said sections.

In Kelley's Criminal Law and Practice, Third Edition, page 160, section 206, the rule as to the number of counts which may be included in an information charging misdemeanors is stated as follows:

> "An indictment may contain counts for several distinct offenses--misdemeanors only, provided the judgment and punishment for each be the same. * * * * * * * "

Section 3552, R. S. Missouri, 1929, provides as follows:

> "When, by law, an offense comprises different degrees, an indictment may contain counts for the different degrees of the same offense, or for any of such degrees."

In State v. Davis, 29 Mo. 391, l.c. 397, the rule is stated as follows:

> "The defendant had no right to compel the State to elect on which count in the indictment she would try him. As but one offence was committed, and the two counts related to the same transaction, it was entirely competent to the State to vary her charges by means of several counts, although under different sections of the statute, so as to meet the proof which might be produced."

So in the case which you have submitted, if the party, by his act, has violated Sections 8238 and 8239, then under the foregoing ruling it would not seem improper to charge him in two counts, however, the court might require you to elect at the close of the case on which count you would go to the jury.

CONCLUSION.

From the foregoing it is the opinion of this department that an information charging a person with misdemeanors may contain several counts where one offense has been committed and different sections of the statute have been violated.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

HARRY H. KAY
(Acting) Attorney General

TWB:DA

SCHOOLS: Children from orphans' home residing in families in common school districts may attend without paying tuition.

October 6, 1939

10-7

FILED
16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This Department is in receipt of your letter of September 15th, wherein you request an opinion relating to payment of tuition by the children of Spofford Home in Kansas City, Jackson County. Your letter is as follows:

> "I am writing your office at the request of Miss May Bowlin, our County School Superintendent, on account of the following condition and insistent contention having come up in one of the districts in this County.
>
> "The main facts are based upon children sent from the Spofford Home in Kansas City, Jackson County, as it appears they send out the children who are residents of the home or under the home's care, to people in the country and pay a minimum amount for their board and these children have been of course enrolled in the schools.
>
> "In one of the districts in the Northern part of this County the School Board appealed last year to the County Superintendent and raised objection to these children being sent to their schools, feeling no doubt that it was an unjust and unnecessary burden upon the District.

"There were some compromises made in this particular district last year, but this year the question has again come up, however it appears over only one child. It is asserted by the people who have the child that they expect to adopt him, however, for the purpose of the present contention we are treating the matter as the original complaint came up, to-wit, that the child is a proper charge of the Spofford Home. It is asserted that it is a further fact that this particular child is an orphan, both parents being dead.

"Under Section 9207, Revised Statutes of Missouri 1929, the Statutes set out four classes of children who are entitled to attend school wherever they may be: First, Orphan Children; second, Children bound out to apprentices; third, Children with only one parent; fourth, Where the parents do not contribute to the child's support and where the child is unable to pay tuition.

"The only question that seems to be debatable in this matter is whether or not the fact that the Spofford Home has charge of the child. That fact by itself would annul the provision of Section 9207 and that is the point particularly that the County Superintendent would be glad to have your valued opinion and of course any further information that might be of aid to us."

Section 9207, R. S. Mo. 1929, relating to orphan children is as follows:

"The board shall have power to make all needful rules and regulations for the organization, grading and government in their school district--said rules to

take effect when a copy of the same, duly signed by order of the board, is deposited with the district clerk, whose duty it shall be to transmit forthwith a copy of the same to the teachers employed in the schools; said rules may be amended or repealed in like manner. They shall also have the power to suspend or expel a pupil for conduct tending to the demoralization of the school, after notice and a hearing upon charges preferred, and may admit pupils not residents within the district, and prescribe the tuition fee to be paid by the same: Provided, that the following children, if they be unable to pay tuition, shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support: Provided further, that any person paying a school tax in any other district than that in which he resides shall be entitled to send his or her children to school in the district in which such tax is paid and receive credit on the amount charged for tuition to the extent of such school tax."

It appears that the family who have the child in their home, which is now in your county, intend to adopt the child, but at the present time it may be considered that they have control of the child, supporting it, and have it as a member of their household.

There are a number of decisions which bear on this question. The one which particularly treats exhaustively of the question is that of State ex rel. v. Clymer, 164 Mo.

App. 671, l. c. 676, wherein is said the following:

> "While the statute must be liberally construed, we also recognize the fact that it would not be right to permit children living in districts whose taxpayers have neglected or refused to maintain schools to have the benefits free of charge of schools in districts wherein the taxpayers have burdened themselves to erect school houses, employ competent teachers and maintain schools. (Binde v. Klinge, 30 Mo. App. 285.)
>
> "Prior to 1885 the statute contained none of its present provisos, but simply authorized the board to admit non-resident pupils within the district, and to prescribe the tuition fee to be paid. In 1885 it was amended by adding the proviso: 'That orphan children, or any children bound as apprentices, shall have the privilege of attending school in any district in the state of Missouri in which they may find a permanent or temporary home, without paying a tuition fee.'
>
> "While the statute was in this language, the case of Binde v. Klings, supra, was decided by the St. Louis Court of Appeals. In that case Mrs. Binde, a widow, who had resided in the Hermann school district for more than forty years, applied to the court for an injunction to restrain the directors of that district from refusing the privileges of the school to her granddaughter, Paula Muehl. Paula's father resided in Montgomery county, but she was living with her grandmother at Hermann, under an arrangement made with

the child's father, to the effect that she was to live with the grandmother until the latter died or the child married. In fact, the arrangement in that case was substantially the same as the one we are now considering. In passing on the case, Judge Thompson held the word 'resident' used in the statute, was to be distinguished from the word 'domicile,' and without the proviso in the statute, if the child had gone to live with the grandmother without any expectation of returning to its parental residence while the grandmother lived, or while the child remained unmarried, and not merely for the purpose of acquiring the privilege of a better school than existed at the domicile of the parent, she might be a resident of the grandmother's school district, although the father resided elsewhere. The court held, however, that the proviso limited the general language, and only permitted orphan children, or children bound as apprentices, to attend schools in districts where they had a permanent or temporary home without paying tuition fees, and said that by admitting certain non-residents the Legislature necessarily excluded the idea that other non-residents were entitled to the privilege.

"A careful reading of the Binde case will lead to the conclusion that had the statute then been in its present form, a different judgment would have been rendered.

"The statute is not ambiguous, and plainly provides that children who are unable to pay tuition, and whose parents are not contributing to their support, shall have the privilege of

attending school in any district in which they may have a permanent or temporary home. It will be noticed that the privilege is granted, regardless of the residence or domicile of the parent.

"It seems to us that the evidence clearly brings the case within the fourth subdivision of the statute. The boy, to all intents and purposes, was a resident of the school district, although his domicile may have been at Springfield. He was living in the district as a member of the relator's family, and under an agreement made with his father by which the relator had agreed to take, care for, and educate him. It was not a contract made for the sole purpose of permitting him to attend the Steelville school. The grandparent was aged, and the boy had lived with him a part of the time for more than five years, and undoubtedly there existed between them a degree of affection perhaps equally as strong as that between father and son. The common experience of mankind proves the truth of this statement, and therefore, it needed the testimony of no witness to establish it. But the grandfather did testify that he liked the boy and wanted him to live with him, and it was satisfactory with the father and the son also. There is no claim that the contract was not made in good faith, or that it was not being strictly performed by all parties thereto. The fact that it was not in writing was a matter that the parties alone were concerned about, and no stranger could set it aside or take advantage of the failure to observe formality in its execution."

Another decision discussing the question of residence is that of Northern v. McCaw et al., 189 Mo. App. 362.

Conclusion

We think Section 9207, supra, independent of the decision which we have quoted herein, is plain and comprehensive enough in its terms to apply to the situation which you present, because the statute states,

> "shall have the privilege of attending school in any district in this state in which they may have a permanent or temporary home: First, orphan children; second, children bound as apprentices; third, children with only one parent living, and fourth, children whose parents do not contribute to their support:"

We are of the opinion from the facts surrounding the child or children of the Spofford Home, if they be in a district in which families are maintaining them, even though the home has not relinquished its authority over the children, that such children are entitled to attend school in such districts without the payment of tuition.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

OWN:EG

LAW PRACTICE: Agent may appear in justice court in representative capacity, but not for valuable consideration.

November 14, 1939

11-14

Honorable Paul N. Chitwood
Prosecuting Attorney
Reynolds County
Centerville, Missouri

FILED
16

Dear Sir:

We acknowledge your request for an opinion under date of September 2nd, as follows:

> "What appears to me to be the illegal practice of law in this county, is quite prevalent. There is hardly a case filed in justice court but what there is from one to two or more laymen appearing for parties, and attempting to act as lawyers in the cases.
>
> Now I know that there are a new set of Supreme Court Rules, regulating the bar, and I do know that it is a criminal offense to practice law without a license, but not having access to the latest opinions of the courts, on just how far a layman may go and not be violating this law, I do not know. Under 1929 revised statutes, it did not appear to be an offense for a layman to appear in a Justice of the Peace Court, and without pay.
>
> It is sincerely hoped that appearing in a justice court is what has been defined as 'law business', and a violation of the law. This practice has gotten too common in this county and should be stopped; and will be stopped if the parties are actually violating the law. Your opinion in this matter is earnestly requested."

Section 2207, R. S. Mo. 1929, provides who may appear and conduct suits before justices' courts:

> "Any plaintiff, except infants, may appear and conduct his suit either in person or by agent or attorney."

Section 2210 R. S. Mo. 1929, provides who may appear and defend suits before justices' courts:

> "Every defendant in any suit, except infants, may appear and defend the same, in person or by agent or attorney."

In the case of Crescent Furniture Company, 28 Mo. App. 210, l. c. 213, the court said:

> "A person can prosecute or defend in our courts either in person or by attorney, and in justices' courts he can do it by an agent who is not an attorney. * * * * * The statute merely enables an agent, who is not an attorney, to conduct for his principal a proceeding just as he would do it if he were an attorney."

Section 11692, R. S. Mo. 1929, defines the terms "practice of law" and "law business" as follows:

> "The 'practice of the law' is hereby defined to be and is the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court of record, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies.

> The 'law business' is hereby defined to be and is the advising or counseling for a valuable consideration of any person, firm, association, or corporation as to any secular law or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to obtain or securing or tending to secure for any person, firm, association or corporation any property or property rights whatsoever."

It is to be noted that in order to constitute the "practice of the law", the appearance must be before a "court of record".

Section 1826, R. S. Mo. 1929, sets out the courts of record in this state.

> "The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the county courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Justices' courts, not being courts of record, the appearance of an agent who is not an attorney, to conduct or defend a suit for his principal, would not constitute the "practice of the law".

When, however, an agent who is not an attorney appears in a justice court to conduct or defend a suit for his principal, and he acts "in a representative capacity" and "for a valuable consideration" he is clearly engaged in the "law business" which is forbidden by Section 11693, R. S. Mo. 1929, and punishable as a misdemeanor.

Section 11693 provides:

> "No person shall engage in the 'practice of law' or do 'law business,' as defined in section 11692, or both, unless he shall have been duly licensed therefor, and while his license therefor is in full force and effect, nor shall any association or corporation engage in the 'practice of the law' or do 'law business' as defined in section 11692, or both. Any person, association or corporation who shall violate the foregoing prohibition of this section shall be guilty of a misdemeanor and upon his conviction therefor shall be punished by a fine not exceeding one hundred dollars and costs of prosecution and shall be subject to be sued for treble the amount which shall have been paid him or it for any service rendered in violation hereof by the person, firm, association or corporation paying the same within two years from the date the same shall have been paid and if within said time such person, firm, association or corporation shall neglect and fail to sue for or recover such treble amount, then the state of Missouri shall have the right to and shall sue for such treble amount and recover the same and upon the recovery thereof such treble amount shall be paid into the treasury of the state of Missouri. It is hereby made the duty of the attorney-general of the state of Missouri or the prosecuting attorney of any county or city in which service of process may be had upon the person, firm, association or corporation liable hereunder, to institute all suits necessary for the recovery by the state of Missouri of such amounts in the name and on behalf of the state."

For a discussion as to what constitutes "valuable consideration" under Section 11692, supra, see State v. St. Louis Union Trust Company, 335 Mo. 845, 74 S. W. (2d) 348, l. c. 355.

From the foregoing, we are of the opinion that an agent who is not an attorney may appear in a representative capacity in a justice court to conduct or defend suits for a principal, but if said appearance is for a "valuable consideration" same constitutes "law business" and is punishable as a misdemeanor under Section 11693, R. S. Mo. 1929.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

TAXATION: Erroneous publication invalidates sale
PUBLICATION: of land for delinquent taxes.

November 30, 1939

12-✓

FILED
16

Hon. G. L. Chambers
Presiding Judge
County Court of Maries County
Vienna, Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 7th, requesting an official opinion from this Department, which reads as follows:

"On yesterday, our County Collector sold several tracts of land for delinquent taxes, but the advertisement in the newspaper was in error, in this, it stated 'on Monday, November 6, 1938, at 10 o'clock and continuing from day to day as indicated by the following publication, by the undersigned according to the provisions of Senate Bill No. 94 of the 1933 Session Acts.'

"What we want to know is this: First, Would sales under this notice be good or should the whole matter be considered invalid and no certificates of purchase be issued or deeds made.

"Second. Does the County have to pay the printer for the publication under such a notice.

> "Please advise in the premises as soon as possible and oblige, the undersigned."

We will take your questions in the order as they appear in your request.

Your first inquiry is would a sale of land for delinquent taxes be valid when the publication stated the sale would be made on November 6, 1938, when, in fact, said publication should have read November 6, 1939.

It is fundamental that in construing a statutory provision relating to the sale of land for delinquent taxes, it must be strictly construed in favor of the owner of said land. Section 1519, p. 1117 of 61 C. J. reads as follows:

> "Sales of land for delinquent taxes being in derogation of private rights of property, the power has been said to be strictis-simi juris and statutes authorizing such sales must be strictly construed in favor of the owner of such land, or in so far as they are intended for the benefit, or the protection, of the citizen, and the scope of such statutes is never enlarged beyond their actual terms."

It is also stated in 61 C. J. Section 1603, p. 1190, that after a publication of notice the sale must be held on the very day shown in the notice. The pertinent part of this provision reads as follows:

> "* * * * Where the law is such that the sale is to take place after a prescribed publication of notice, it must be held on the very day appointed in the notice or advertisement."

In Meriwether v. Overly, 228 Mo. 218, l. c. 240, 241, a notice of publication was required before any sale of property for delinquent taxes could be made. The provision requiring notice to be given requires said publication to be given in **numerical order.** The court held that since said property for sale was not placed in consecutive numerical order, the notice amounted to no notice at all. In so holding, the court said:

> "Nor is the notice or advertisement any the less invalid. The property in suit appears therein after lot 122. Lot 67 is not, therefore, described 'consecutively' 'in numerical order' in either the land tax book or advertisement notice. The assessment was in radical disregard of the positive requirements of the charter and was void; and, as the notice, which is an essential prerequisite to a valid sale, was nugatory, both it and the sale were void.
>
> "It is proper to remember in this connection that the city treasurer did not sell this property for taxes pursuant to a judgment of court. The charter of Kansas City authorizes him to sell real estate against which taxes are due and delinquent without bringing suit and without any personal notice to the owner. The only notice he is required to give is by a publication 'once in the daily edition of some

> newspaper of general circulation published in Kansas City,' and then the newspaper 'for a period of ten days immediately following such publication' shall cause a notice in large type to be inserted on its local page, 'stating the day and date on which said publication was made.' No other notice is required. The charter provisions requiring lots to be listed in the tax book and in the notice of publication 'consecutively,' 'in numerical order,' at once become of the highest value to the property-owner, for if the notice is misleading, as any notice would be that lists lot 67 after lot 122, then his property is taken from him without notice, which every here means without due process of law. The notice in this case amounted to no notice. The charter method for selling real estate for delinquent taxes is a harsh one, and the courts should not permit an owner's property to be taken from him in pursuance thereof unless the requirement as to notice is strictly complied with."

Also in Schlafly v. Baumann, 108 S. W. (2d) 363, l. c. 366, the court held that because a sale was not commenced on the first Monday in November as provided by law, and also as shown in the publication, the power to sell becomes functus officio. We quote from this decision the following:

> "The general rule and its limitations, likewise recognized in the cited cases, are stated in 59 C. J. 1078, Sec. 634: 'A statute specifying a time within which a public

officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it at such time, is such that the designation of time must be considered a limitation on the power of the officer.'

"Exercise of the official action here involved is in derogation of private rights of property, disturbs vested rights therein, and deprives persons of their ownership of property; and this, under the Jones-Munger Act, by ex parte proceedings of a rather drastic and summary nature, based upon constructive notice. The provision for sale on the 'first Monday in November' is for the benefit, protection, and security of landowners, and not for the convenience of officials or the dispatch of their official duties. Due diligence on such date should avail landowners of information concerning any proceedings against their real estate for the collection of delinquent taxes. Statutory provisions prescribing the time and place of tax sales have been strictly construed in favor of the taxpayer and strict compliance therewith rigorously exacted. The maxim, 'Expressio unius est exclusio alterius,' is especially apropos. Keane v. Strodtman, 323 Mo. 161, 167 (II), 18 S.W. (2d) 896, 898 (2). In the instant case we need only rule that the notice and proposed sale are null and void because not in substantial com-

> pliance with the Jones-Munger Act - a ruling well within the foregoing observations and the cases relied upon by respondents: Meriwether v. Overly, 228 Mo. 218, 239, 129 S.W. 1, 8; Lagroue v. Rains, 48 Mo. 536, 538; Large v. Fisher, 49 Mo. 307, 308, 309. See also, Sullivan v. Donnell, 90 Mo. 278, 283, 2 S.W. 264, 266 (stating, considering certain Kansas City charter provisions: 'While the sale may be continued from day to day, he must at least begin on that day, the day for which the notice of sale is given; and, if not begun then, the power to sell becomes functus officio'); 61 C. J. p. 1190, Section 1603; p. 1117, Section 1519."

In Spurlock v. Dougherty, 81 Mo. 171, l. c. 181 and 182, the court held that the notice of publication was made to the August Adjourned Term instead of notice to the special term or to some subsequent regular term, and therefore, was not in compliance with the law, and concluded by holding that the Circuit Court did not err in excluding the deed. The court in so holding, said:

> "The notice given by the collector for judgment and for sale, was notice of an application to the August adjourned term. This was not a compliance with the statute which required notice of application to the special term, as provided by section 182, supra, or to some subsequent regular term. There was no authority of law for an application to an adjourned term of court, and the notice was

worthless for the purposes intended. The notice is the indispensable prerequisite, and without it the court had no jurisdiction. In Large v. Fisher, 49 Mo. 307, Judge Adams says: 'A regular notice published as the law requires, is the very foundation of the collector's authority to sell. In selling lands for taxes, he is executing a mere naked statutory power, and the rights of the citizen to his property cannot be divested by this kind of sale, unless it appears affirmatively from the form of the collector's deed that all the prerequisites of the statute have been strictly pursued. This is the settled law of this State.' Spurlock v. Allen, 49 Mo. 178; Lagroue v. Rains, 48 Mo. 536; State ex rel. v. Mantz, 62 Mo. 258."

* *

"But the notice of application for judgment, in this case, ran to neither of these times, but to the 'August adjourned term.' 76 Mo. 129. This is not such compliance with the requirements of the statute as the authorities above quoted hold to be necessary. We think, therefore, that the circuit court did not err in excluding the deed. This proceeding is for a purpose. The notice is given so that the owners of the land may have their day in court. It stands in the place of summons in the circuit court."

Also in State v. Magedanz, 250 N.W. 337, l. c. 338, the court had to deal with a statutory provision requiring that a notice of sale for delinquent taxes be published. The statute provided that the sale shall be held on the second Tuesday in December of each year. This provision is very similar to our

statutory provision on notice.

In 1932, the second Tuesday come on the 13th day of December. The notice stated the sale would be held on Tuesday, the 8th day of December, 1932, instead of the 13th day of December. The court, in holding that no legal notice was given, said:

> "A sale of real estate for the nonpayment of taxes can only be held after proper and legal notice, as required by the statute, and since there was no notice for a tax sale to be held on the 13th day of December no legal sale could be made on that date.
>
> "The judgment of the district court, holding that the tax sale notice was a legal notice, was erroneous and is reversed."

Also, in Numitor Gold Mining Co. v. Katzer, 256 Pa. 464, l. c. 465 and 466, we have a situation including facts very similar to the instant case. The above case was appealed from a judgment quieting plaintiff's title to real property and declaring defendant's tax deed void on account of a defective notice of sale. The following publication appeared in the newspaper:

> "Addenda Notice.
>
> "Property to be Sold at Public Auction on June 27, 1923, for Delinquent Taxes of 1918.
>
> "Public notice is hereby given that the five-year period allowed by law for the redemption of property sold

> to the state for delinquent taxes will have expired on the 25th day of June, 1923, on all of the property sold to the state for delinquent taxes in the year 1918, as herein listed (unless redeemed or canceled on or before the date of sale), and that pursuant to the provisions of section 3771a of the Political Code, I, Wm. T. Garland, as county tax collector of the county of Nevada, will be on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, in the tax collector's office in the courthouse in the county of Nevada, state of California, the undersigned tax collector will sell at public auction to the highest bidder, for cash in lawful money of the United States, the several parcels and lots of property hereinafter described. * * *"

On June 27, 1923, said land was sold to the defendants. The court, in holding that this notice was fatally defective and that the tax deed was void by reason of inserting the year 1922 in the notice instead of the year 1923, said:

> "The caption to the addenda which reads 'Property to be sold at public auction on June 27, 1923, for delinquent taxes of 1918,' is not a definite statement that the property would, in fact, be sold on that date. Moreover, if it can be said to be an affirmative statement that the property would be sold on June 27, 1923, it is in direct conflict with the following language employed in the body of the notice:

> 'I, Wm. T. Garland, as county tax collector of the county of Nevada, will be on the 27th day of June, 1922, at 10 o'clock a. m. of said day, and continuing each day thereafter, if additional time is required to complete the sale, in the tax collector's office. * * *'

"Evidently a clerical error occurred in inserting in this notice the year 1922 instead of 1923. Of course, the figures 1922 indicated an impossible date of sale, since at the time of the publication that date had already elapsed. Nor can it be held that reference to the caption of a notice can be resorted to to correct and actually change an erroneous date contained in the body of the instrument. The notice of the time of sale is statutory and jurisdictional, and the court may not speculate as to the actual date intended to have been inserted. Lewis v. Tulare Rec. Dist., 56 Cal. App. 52, 204 P. 421; Simmons v. McCarthy, 118 Cal. 622, 50 P. 761. In Black on Tax Titles, Section 207, it is said:

> 'It (the notice) must designate the time and place of the sale with such certainty that there can be no reasonable misconception in regard to it.' 3 Cooley on Taxation (4th Ed.) p. 2804, Sec. 1415; Knowlton v. Moore, 136 Mass. 32.

"A strict construction of the language employed in this notice impels the conclusion that there was an omission to

state that the property would actually be sold, even upon that inaccurate date of 1922, for the language is:

> 'I, Wm. T. Garland, as county tax collector * * will be * * in the tax collector's office,' on 'June 27, 1922, * * * and continuing each day thereafter,' etc., and 'will sell at public auction * * * the several parcels and lots of property hereinafter described. * * *'

"This language, construed strictly according to the rule invoked, means that Wm. T. Garland, county tax collector, gave notice that he would be in his office June 27, 1922, and continuing thereafter, and would sell the property in question, without stating when or where he would dispose of it."

Therefore, in view of the foregoing authorities, it is the opinion of this Department that any sale made under the notice attached to your letter would not constitute a valid sale. We are assuming that the sale was made, but that no certificates were issued. In such case the purchase money and interest thereon should be refunded out of the county treasury as provided in Section 9958a, p. 441, Laws of Missouri, 1933, which reads as follows:

> "Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his

representatives or assigns, on the order of the county court. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry upon his sale record."

Your second inquiry - Does the County have to pay for the publication of such a notice. In view of the limited facts as to who is responsible for the error in the publication, it is hard to answer your request. However, we will say that depends to a great extent upon who is responsible for the error in the first instance.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

ARH:RV

TOWNSHIP ORGANIZATION: Township board should retain moneys
PAYMENT OF BONDS: collected from levies for paying bonds of the township.

December 20, 1939

12-21

FILED
16

Honorable G. R. Chamberlin
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the question of whether or not township officials in counties operating under township organization have a right to retain the amount of taxes realized from levies for paying off bonds in order that the township retire the bonds and pay the interest as it becomes due. These are road bonds to which you refer in your letter we assume.

After bonds for road purposes have been voted in townships under township organization, a plan of collection of taxes for the payment of these bonds is set out in Section 7961, R. S. Missouri 1929, which provides in part as follows:

> "* * * * If it shall appear that two-thirds of the voters voting at such election on said question shall have voted in favor of the issuance of said bonds, the board of commissioners of the special road district, or the county court, as the case may be, shall order and direct the execution of the bonds for and on behalf of such special road district or township, and shall provide for the levy and collection of a direct annual tax upon all the taxable property in said district or township suf-

ficient to provide for the payment of the principal and interest of the bonds so authorized as they respectively become due. It shall be the duty of the clerk of the board of commissioners on or before the first day of May in each year, or the state auditor immediately thereafter, in case the clerk of the board of commissioners should fail or neglect, on or before the first day of May of each year, so to do, to certify to the county court of the county, or counties, wherein such road district is situated, the amount of money that will be required during the next succeeding year to pay interest falling due on bonds issued and the principal of bonds maturing during such year. On receipt of such certificate it shall be the duty of the county court, or courts, at the time it makes the levy for state, county, school and other taxes, to, by order made, levy such a rate of taxation upon the taxable property in the road district, in such county or counties, as will raise the sum of money required for the purposes aforesaid. On such order being made it shall be the duty of the clerk of the county court, or courts, to extend such rate of taxation upon the tax books, against all of the taxable property in the district in such county or counties, and the same shall be collected by the collector of the revenue at the time and in the manner, and by the same means as state, county, school and other taxes are collected. * * * "

Since this section provides that taxes for the

payment of bonds shall be collected as other taxes are collected, we will look to the laws applicable to collection of taxes in counties under township organization to determine in what manner such collections shall be made.

Section 12318, R. S. Missouri 1929, provides as follows:

> "It shall be the duty of the county clerk of each county in this state, that has or hereafter may adopt township organization, to make out annually, for the use of the township collector of each township, correct lists of the property assessed, which lists shall be in alphabetical order, the names of the persons owing tax on personal property in each collector's district, the aggregate value of such property assessed to each person, and the amount of taxes due thereon. He shall also make out for the use of the township collector an abstract of all real property which is assessed, in numerical order, which shall show the name or names, if known, of the person or persons to whom each tract or lot is assessed, and the value of each tract or lot, and the amount of taxes due thereon, which list shall be made out in strict conformity with the forms and instructions furnished by the state auditor."

Section 12319, R. S. Missouri 1929, provides as follows:

> "The county clerk shall cause to be estimated and set down in separate columns, to be prepared for that purpose, in the copied assessment roll, opposite the several sums set down as the valuation of real and personal estate,

> the respective sums, in dollars and cents, to be paid as taxes thereon, stating separately the amount of state, county, township, school, bridge and other tax."

Section 12320, R. S. Missouri 1929, provides as follows:

> "The county clerk shall cause a copy of the assessment roll of each township in their respective counties, with the taxes extended thereon, to be delivered to the collector of such township, on or before the day in each year, as fixed by law, when taxes become due."

Section 12321, R. S. Missouri 1929, provides as follows:

> "To each assessment roll a warrant under the hand of the county clerk and seal of the court shall be annexed, commanding such collector to collect from the several persons named in the assessment roll the several sums mentioned in the last columns of such roll, opposite their respective names; the warrant shall direct the collector, out of the moneys collected, after deducting the compensation to which he may be lawfully entitled, to pay over to the county treasurer the state and county tax collected by him. He shall pay over to the township treasurer all school moneys collected by him, and all moneys collected for township expenses, and all moneys collected for road and bridge purposes."

The foregoing sections set out the plan provided for the collection of taxes and the disposition to be made of them by the collector. Said Section 12321 provides that all such taxes be turned over to the township treasurer.

Section 12268, R. S. Missouri 1929, provides that the township treasurer shall be ex-officio treasurer of the township. It provides in part as follows:

> "There shall be chosen at the biennial election in each township one trustee, who shall be ex officio treasurer of the township, one township collector, and one township clerk, who shall be ex officio township assessor, one constable, two members of the board, and two justices of the peace: * * * * * "

In speaking of the duties of the treasurer and ex-officio treasurer in counties under township organization, Section 12290, R. S. Missouri 1929, provides as follows:

> "He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; * * * * * and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, * * * * * * * * * * "

Said Section 12321 requires the county collector to pay over to the township treasurer all moneys collected for township expenses and all moneys collected for road and bridge purposes. Since the bonds were sold for road and bridge purposes, the taxes collected to pay these bonds would be tax collected for road and bridge purposes and, therefore, should be turned over to the township treasurer to be distributed as is pro-

vided by Section 12291, R. S. Missouri 1929, which provides in part as follows:

> "The township trustee and ex officio treasurer shall not pay out any moneys belonging to the township for any purpose whatever, except upon the order of the township board of directors, signed by the chairman of said board and attested by the township clerk: * * * * * * * * * * "

By the foregoing sections it will be seen that the lawmakers have provided a system for the levy and collection of taxes for road purposes and special road districts in townships under township organization. This includes taxes raised for the payment of bonds issued by such special road district. The collectors collect these taxes and turn them over to the township trustee who is ex-officio treasurer of the township and then it is his duty to pay out these moneys only on the order of the township board.

In the case of Sherlock v. Duck Creek Township, 92 S. W. (2d) 675, the court, in arriving at its opinion in that case, adopted the rule that under the statutes, township boards should retain these bond moneys and retire the bonds and interest out of the moneys which are turned over to the trustee and ex-officio treasurer by the collector of revenue.

CONCLUSION.

From the foregoing it is the opinion of this department that the township board in counties under township organization should retain the moneys which are collected for the purpose of paying the bonds of the township, and that said board should pay out said moneys for the purpose of retiring the bonds and interest as they become due.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

WARRANTS: COUNTY: Manner of reducing rate of interest.

January 25, 1939

FILED
17

Mr. Paul J. Clay
Clerk of the County Court
St. Francois County
Farmington, Missouri

Dear Mr. Clay:

We wish to acknowledge your letter of January 19th, as follows:

> "For a number of years it has been customary for this county to pay 6% interest on all protested warrants. Inasmuch as all warrants are paid promptly, and at this time there are no outstanding registered warrants, the County Court is of the opinion, that this interest rate could be reduced, thereby affecting a savings of considerable proportion to this County. They have made inquiry and do not believe that the demand for warrants would be lessened if the interest rate was reduced to 4%.
>
> "Can this court legally reduce the rate of interest on protested warrants?"

You state that for a number of years your county has been paying 6% on all protested warrants and would like to know if this rate of interest could be reduced.

In the case of Isenhouer vs. Barton County 88 S. W.

759, 190 Mo. 163, l.c. 170 the court in holding that when no rate of inte est is prescribed on the face of the warrant they bear six per cent interest, said:

> "County warrants are creatures of the statute, and can only be issued in accordance therewith, but when no rate of interest is prescribed upon their face, they bear interest at the rate of six per cent per annum, as provided by section 3705, Revised Statutes 1899, after presentation to the treasurer of the county by which issued, and failure to pay because of there being no money in the treasury for their payment. (Robbins v. Lincoln County Court, 3 Mo. 57; Skinner v. Platte County, 22 Mo. 438, State ex rel v. Trustees, 61 Mo. 155)."

There is no statute which requires the county court to pay any specified sum of interest on protested warrants other than the above general statute, now Section 2839 R. S. Mo. 1929 which states that the legal rate of interest for creditors is six per cent when no other rate of interest is agreed upon.

We are, therefore, of the opinion that the county court can legally reduce the rate of interest on protested warrants provided they prescribe on the face of the warrant the amount of interest that will be paid.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
MW:RT

STATE HOSPITAL: Employees personally liable for negligent acts.

June 8, 1939

6-10

FILED
17

Senator George D. Clayton, Jr.
State Senate
Jefferson City, Missouri

Dear Senator Clayton:

We wish to acknowledge receipt of your request for an opinion under date of May 31st, as follows:

> "Will you please advise me if an operator of an X-ray machine in a State Hospital would be held personally liable in the event of any malpractice claims being brought against the operator by any of the patients treated at the State Hospital."

7 C. J. Sec. makes the following statement with reference to the liability of the employees of asylums for their negligent acts (Section 9, p. 151):

> "However, such an institution being a mere instrumentality of the state government, brought into being to aid in the performance of governmental duty, the rule of respondeat superior does not apply to it; and, therefore, it cannot be made to respond in damages for a personal injury inflicted on another by one of its inmates or employees, although such injury results from negligence or malicious acts on the part of such inmate or employee, and although the statute creating it provides that it may sue and be sued. The liability for such acts is on the individual personally guilty of the negligence or misconduct causing the injury."

The above declaration finds support in the case of Ketterer's Adm'r. v. State Board of Control, 115 S. W. 200, l. c. 201; 131 Ky. 287; 20 A. L. R. (N. S.) 274. The court, in its opinion, said:

> "All the authorities relieve the state and such officials from responsibility in such cases and place the responsibility upon those persons who commit the acts which are the direct cause of the injury."

And in the case of Dunn v. Central State Hospital, 248 S. W. (Ky.) 216, l. c. 217, the court said:

> "Clearly the appellant could not maintain an action for personal injury against the Central State Hospital, a state institution, for the injury occasioned to her through the negligence of its employees, if any, in operating an electric motor truck in the regular line of their employment. She might, however, have had and maintained an action against the employees of the asylum operating the electric motor if their negligence was the proximate cause of her injury."

And again in the case of Johnson v. Hamilton County, 156 Tenn. 528; 1 S. W. (2d) 528, l. c. 529, the court in holding that a declaration against the superintendent of a county insane hospital, alleging that the defendant knowingly and wilfully placed a patient in a locked cell where razor blades were present, with resulting injury, stated a cause of action, said:

> "Certainly, no less can be required of the superintendent of a hospital receiving insane patients that such insane patients should not be knowingly and

> willingly placed in contact with means and instrumentalities for doing injury to themselves; and when it is charged that the defendant was guilty of such neglect of duty, and, in addition, 'well knew or by the exercise of reasonable care and prudence might, could, would, and should have known that the patient would inflict injury upon himself,' we think a cause of action is stated."

We have been unable to find any Missouri authorities construing the liability of employees of state hospitals for their negligent acts, but we are of the view that same would be in line with the authorities hereinabove set out.

We are, therefore, of the opinion that an operator of an X-ray machine in a state hospital would be held personally liable in the event of any malpractice claim being brought against the operator by any of the patients treated at the state hospital.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

COUNTY BUDGET ACT: Payment of claims out of class other than that to which they belong prohibited except same may be paid out of Class 6 under certain conditions.

August 21, 1939

8-21

FILED
17

Mr. Edgar S. Clatterbuck
Treasurer of Callaway County
Fulton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following question:

> "If the amount is spent that was set aside for class 3-three that is the Road class, and the Presiding Judge and Co. Clk. signs warrant is it lawful for the Treasurer to write chk. for same?
>
> "Not for class three only but any other class, can the Amt. set up for one class be transferred to another? I want to know just how far the Treasurer has power to go in this matter to keep within his rights."

Your question involves the County Budget Act which is found in Laws of Missouri, 1933, at page 340 and as amended in Laws of Missouri, 1937, page 422, by the Act of 1937, Sections 2 and 5 of the original act were amended. Comparing the old act with the new it appears that class 5 of each of these sections was amended under the new act. Section 1 of the Act of 1933 provides in part as follows:

> "* * * The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term

> of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. It is hereby made the duty of the clerks of the county courts of the several counties of this state to prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this act but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

The last sentence of the above paragraph indicates that the lawmakers had in mind and stressed the point that the expenditures of the county should be classified and that priority of payment according to the classification should be provided for and that such priority should be sacredly preserved by the county officials. By this statement in this section we think that the lawmakers meant by the term "priority of payment shall be sacredly preserved" that they intended that all of the claims of one class should be met and paid, or the court should be assured that funds were available for payment of such claims before they paid claims of the next class or classes below that class.

The Budget Act requires the court to classify the proposed expenditures of the county into six classes. Section 2 at page 422, Laws of Missouri, 1937. Class 6 of this section is as follows:

> "Class 6: After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided, however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

You state in your letter that all of the funds in class 3 have been spent. Class 3 of the Budget Act is as follows:

> "Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

Under estimated expenditures required to be made by Section 5 of the Act, Laws of Missouri, 1937, page 423, it is provided in class 6 thereof as follows:

> "Class 6: Amount available for all other expenses after all prior classes have been provided for. No expense may be incurred in this class until

> all the prior classes have been provided for. No warrant may be issued for any expense in class 6 unless there is an actual cash balance in the county treasury to pay all prior classes for the entire current year and also any warrant issued on class six. No expense shall be allowed under class six if any warrant drawn will go to protest. Provided, however, if necessary to pay claims arising in prior classes warrants may be drawn on anticipated funds in class six and such warrants to pay prior class claims shall be treated as part of such prior funds. Nor may any warrant be drawn or any obligation be incurred in class six until all outstanding lawful warrants for prior years shall have been paid. The court shall show on the budget estimate the purpose for which any funds anticipated as available in this class shall be used."

Class 6 of Section 2 for estimated expenditures clearly indicates that the funds in that class may be used to pay claims of prior classes where the funds of such classes have been exhausted. Class 5 of Section 5 of the Act of 1937, page 423, provides as follows:

> "Class 5: Contingent and emergency expense.--The County court may transfer any surplus funds from class 1, 2, 3, and 4 to class 5 to be used as contingent and emergency expenses. Purposes, for which the Court proposes the funds in this class shall be used, shall be shown."

It would appear that this section would authorize any surplus funds in classes 1, 2, 3, and 4, to be transferred to class 5 to be used as contingent and emergency expenses. This transfer can occur only when there is a surplus of funds in either of those classes. When the

court places public funds in the classes required by the Budget Act such funds may then be taken from those classes only for obligations belonging to that class, unless there is a surplus therein, in which case such surplus may be transferred as is provided by class 5 of Section 5, supra. Otherwise, by said Section 1 of the act the priority of payment of such funds must be sacredly preserved.

The only way in which warrants now issued on demands against class 3 could be paid in case that fund is depleted would be out of class 6, and then only when all demands on classes 1 and 2 and all legal outstanding warrants of prior years have been met.

In your request you state that you want to know just how far a treasurer may go in performing his duties in connection with the payment of such warrants and keep within his rights. I think we have explained the provisions of the Budget Act clearly in regard to the transfer of funds from one class to another and the payment of claims out of class 6.

As to the obligations which an official incurs when he does not follow the provisions of the Budget Act, we refer you to Section 8 of the Act, Laws of Missouri, 1933, page 345, which provides in part as follows:

> "* * * If any county treasurer shall pay or enter for protest any warrant before the budget estimate shall have been filed, as by this act provided, he shall be liable on his official bond for such act. * * * * * * * * *
>
> "Any order of the county court of any county authorizing and/or directing the issuance of any warrant contrary to any provision of this act shall be void and of no binding force or effect; and any county clerk, county treasurer, or other officer, participating in the issuance or payment of any such warrant shall be liable therefor upon his official bond."

In our research on this question we do not find where the courts of this state have had before them such a question. This is because of the fact that the Budget Act is new and not sufficient time has elapsed for such questions to get before the courts.

CONCLUSION.

From the foregoing it is the opinion of this department that if the moneys which were set aside for class 3 under the Budget Act have all been spent and there are other lawful claims payable out of this class, then such claims may be paid out of class 6 of the Act provided that there is enough appropriated for and in classes 1 and 2 to pay all lawful demands against those classes, and provided further that there is enough money in class 6 to pay all legal outstanding warrants against said class 6.

We are further of the opinion that if the treasurer or any other officer participates in the issuance of the payment of any warrant in violation of the provisions of the Budget Act, then he would be liable on his bond for such act.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION AND REVENUE : County Courts may only compromise back taxes under the provisions of Section 9950. When lands are sold and the description is imperfect the sale is not valid but the tax lien is transferred to the grantee. Right of such lienholder.

October 18, 1939.

10-28

FILED
17

Mr. Paul J. Clay
Clerk of the County Court
St. Francois County
Farmington, Missouri

Dear Mr. Clay:

We desire to acknowledge your request for an opinion on October 17, 1939, which is as follows:

"The following problem concerning the abatement of taxes has arisen in our County. The property is described as follows; 49 acres, SW Pt. SE Frl. ¼, 7-36-6. The property has been advertised for tax sale for a total amount of $71.19. This is the first sale. The owners of the property have called upon the Court and ask them to reduce the taxes. The Owners have offered to compromise the taxes with the Court for 50% of the charge against the property. By their representative, they state that the property is inadequately and insufficiently described.

"The assessment is $600.00. It is the opinion of the Collector that this is a very reasonable assessment. Others who are acquainted with the value of the land say that it is worth much more than the assessed valuation. We have searched the map of the County and find that the land can be designated or

> located from the description given on the tax records.
>
> "Under 'Laws of Missouri 1933', Section 9958b, captioned 'When Sale Shall Not Be Valid', we reads as follows: 'or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty', We determine, therefore, that it is not necessary for the description set out on the tax records to be exactly as is set out in the deed.
>
> "The Court wishes to treat the persons concerned in this matter fairly, however they do not feel that they have a complete and just cause for asking for an abatement. They will with hold the tax abatement order pending an opinion from your office, covering the above."

I.

A county court, in compromising back taxes, obtains its authority under and by virtue of Section 9950, Laws of Missouri 1933, at page 427, which provides, in part, as follows:

> "Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the same would not sell for the amount of such taxes, interest and cost,

> it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' * * * " (Underscoring ours)

Under the provisions of Section 9950, supra, a county court may only compromise back taxes:

> "when it shall appear to the county court * * * that any tract of land * * * contained in said 'back tax book' * * * is not worth the amount of the taxes * * * or that the same would not sell for the amount of such taxes * * * "

In an opinion rendered by this department to Honorable D. M. Githens, Presiding Judge of County Court, Poplar Bluff, Missouri on September 8, 1939, a copy of which is enclosed herein, this department held that a county court may compromise taxes on lands, under the provisions of said Section 9950, at any time before they are sold at a third sale. However, the question was not passed on as to said Section 9950 being the only statutory provision for such court to compromise delinquent taxes.

CONCLUSION

Therefore, it is the opinion of this department that the county court may only compromise back taxes when it shall appear to such court that the lands and lots are not worth the amount of taxes, interest and costs due thereon, as charged in the back tax book or recorded list

of delinquent land in the collector's office or that the same would not sell for the amount of such taxes, interest and costs.

II.

Section 9952a, Laws of Missouri 1933, at page 430, is, in part, as follows:

> " * * * The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Section 9958b thereof, at page 441, is as follows:

> "No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court." (Underscoring ours)

Section 9958c, is as follows:

> "If any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the

> first two enumerated in the preceding section, the lien which the state has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to a lien on such land for the amount of taxes, interest and penalty, legally due thereon at the time of such sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof." (Underscoring ours)

Section 9958d is, in part, as follows:

> "Every person holding a lien upon any real estate in this state by virtue of any illegal or invalid tax deed, shall, upon the payment or tender to him by the owner or any person having an interest in such real estate, of the full amount of said lien, together with the sum of one dollar and twenty-five cents, and together with any sum that may be due him as an occupying claimant, make, execute and acknowledge before some officer authorized to take acknowledgment of deeds, and deliver to the person making such payment or tender a deed of release, releasing to the owner of such real estate all claims the holder of such invalid tax deed has on such real estate on account of such tax deed; * * * "

Section 9960 thereof, is as follows:

> "The sale of lands for taxes shall not be invalid on account of such lands having been listed or charged on the tax book in any other name than that of the rightful owner."

Section 9962c is, in part, as follows:

> "Any person holding any deed of lands or lots executed by the county collector for the non-payment of taxes, may commence a suit in the circuit court of the county where such lands lie, to quiet his title thereto, without taking possession of such lands, * * * . The court shall examine into the facts, and if upon the hearing of such cause it shall appear that the complainant's title was or is invalid for any cause, such suit shall not be dismissed by the court, but the court, in cases where the tax was due and unpaid, or where the complainant's title was invalid for defect or uncertainty of description shall ascertain the amount due the complainant, for principal and interest, to be computed at not to exceed ten per cent per annum, and from whom due, and shall decree the payment thereof within a reasonable time by the owner of such land, the owner of any life estate therein, or any other person in possession as lessee thereof and owing such sum ascertained, and in default thereof shall direct that such leasehold, life estate and land or lot be sold therefor, and that the equity and right of redemption of all defendants in such suit, and all persons claiming under them shall be forever foreclosed. * * * "

Section 9962d is, in part, as follows:

> "If any conveyance made by the county collector, pursuant to a sale for non-payment of taxes, under this or any former tax law, shall prove to be invalid and ineffectual to convey title

> for any other cause than such as are enumerated in section 9960b the lien which the state had on such land for state, county, township, school and all lawful purposes, together with all lawful charges, shall remain in full force, and shall be transferred by such deed to the grantee and vested in him, his heirs and assigns, who shall be entitled to a lien upon such lands, and the same shall be bound for the final payment thereof; and in case judgment be rendered against the person holding the title from the collector, as aforesaid, for the recovery of such land, in an action of ejectment or other action, either at law or in equity, brought by the owners of such lands, heirs or assigns, the court shall ascertain the amount due to the party holding such tax deed and from whom due for principal and interest and for all improvements made by him on such lands including subsequent taxes paid with interest, and shall decree the payment thereof within such reasonable time by the owner of such land; * * * "

Under the provisions of Section 9952a, supra, "the entry of record by the County Collector" listing delinquent lands becomes a levy for the purpose of enforcing the states lien for taxes.

Section 9958b, supra, providing when a sale shall not be valid states three conditions under which such invalidity exists. The third ground is that of imperfect description of the land.

Section 9958c, supra, provides that an invalid sale for taxes - the invalidity resulting from imperfect description - transfers the states lien for taxes, which is provided in Section 9952a, supra, to the grantee.

Section 9958d, supra, provides that when the owner or interested party in real estate pays to the holder of the transferred lien, referred to in the preceding paragraph, the full amount of such lien and other items men-

tioned therein, the lienholder must release his interest in and to such lien to such party.

Section 9962c, supra, provides that the holder of a tax deed to land may bring a suit to quiet title and if the court finds that plaintiff's deed is invalid for any cause

> "such suit shall not be dismissed by the court, but the court, in cases where * * * the complainant's title was invalid for defect or uncertainty of description shall ascertain the amount due the complainant * * * "

unless the same is paid the court shall order a sale to pay the same.

Section 9962d, supra, provides that when the conveyance made by the collector is invalid and ineffectual to convey title "for any other cause than such as are enumerated in Section 9960b" the lien of the state for taxes shall be transferred, by the conveyance of the collector, to the grantee and in case of an action in ejectment or other legal or equitable remedy in behalf of the owner and judgment is obtained thereunder the court shall ascertain the amount due to the party holding the tax deed, for all improvements and payments on subsequent taxes and provide for the payment thereof.

CONCLUSION

Therefore, it is the opinion of this department that in event lands levied on for delinquent taxes as provided in Section 9952a, supra, are imperfectly described it is the duty of the collector to seal such lands.

When lands are sold for delinquent taxes and the description is imperfect, the sale is not valid but the tax lien is transferred to the grantee and he may enforce his rights under the above statutes.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

COUNTY COURTS: County judges and counties of over twenty thousand (20,000) population are entitled to mileage for each necessary trip made.

October 30, 1939

11-3

FILED

Hon. Paul J. Clay
Clerk of the County Court
St. Francois County
Farmington, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated October 28, 1939, which is as follows:

> "We note, that in 'Laws of Missouri, 1939', Section 2092 that, 'in addition to the salaries herein authorized to be paid Judges of the County Court in Counties having less than 75,000 inhabitants said Judges shall receive five cents per mile for each mile necessary traveled in going to and returning from the place of holding county court'. As you know, St. Francois County has an estimated population of 40,000. Our Court is one of the counties in the state in which county court is in session every day. We would like your interpretation of this law, stating whether or not judges are entitled to mileage each day from their residence to the County seat. That is the way we have interpreted same. However, we would like your verification before warrants are issued to the Court for mileage. An early reply will be deeply appreciated"

The statute referred to is found in Laws of Missouri, 1939, at page 332, and reads as follows:

"In all counties of this state now or hereafter having seventy-five thousand inhabitants and less than ninety thousand inhabitants, the judges of the county court shall receive an annual salary of twenty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of Section 7892, R. S. 1929. In all counties of this state now or hereafter having ninety thousand inhabitants and less than one hundred fifty thousand inhabitants, the judges of the county court shall receive an annual salary of three thousand dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, as provided by section 7894. In all counties of this state now or hereafter having one hundred fifty thousand inhabitants, and less than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of forty-five hundred dollars. Said salary to be in lieu of the per diem heretofore allowed by law to said judges as judges of the county court, and in lieu of the salary heretofore allowed by law to said judges as members of the board of road overseers, under the provisions of section 7892, R. S. 1929, and in lieu of all other fees, compensation, or salaries, heretofore allowed by law to said judges, except the per diem as allowed to said judges as members of the board of equalization and board of

appeals. In all counties of this state now or hereafter having more than three hundred thousand inhabitants, the judges of the county court shall receive an annual salary of four thousand eight hundred dollars. Said salary of four thousand eight hundred dollars to be in lieu of the per diem heretofore allowed by law to such judges of the county court, and in lieu of the salary as road overseers heretofore allowed by law to said judges, as provided in section 7897, R. S. 1929, and in lieu of all other fees, or salaries, heretofore allowed by law to said judges, except the per diem allowed to said judges as members of the board of equalization and the board of appeals. The salaries herein fixed for the judges of the county court in all counties of this state having more than seventy-five thousand inhabitants shall be paid in equal monthly installments as the salaries of other county officers are paid. In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court; Provided that in all counties now or hereafter having a population of twenty thousand inhabitants or less such mileage shall be charged only once for each regular term and such mileage shall not be charged over eight times per year for special or adjourned terms."

An examination of the former statute reveals that it is only the last sentence which has been amended on at least three occasions by the Legislature. In 1931, the classification according to population was changed by substituting counties having a population of seventy-five thousand (75,000) population for the former minimum of sixty thousand (60,000).

In 1933, Section 2092 was again amended so that judges of the county court in counties having a population of seventy-five thousand (75,000) inhabitants or less should receive five cents (5¢) per mile for each mile traveled in attending court, except that such mileage could be charged only once in each regular term.

We also note that the population of the various counties is to be determined by the last decennial census, in arriving at the compensation to be received by the judges of the various county courts. This Section 2092, found in Laws of Missouri, 1933, at page 208, has not been repealed. We mention this because of your statement that the "estimated" population of St. Francois County is forty thousand (40,000).

This examination shows that the amendment made by the 1939 statutes removes the qualification that mileage may be charged only once for each term of court, and substituted therefor a proviso that county judges in counties having a population of twenty thousand (20,000) or less are entitled to mileage only once for each regular term, and only eight (8) times per year for special or adjourned terms.

Search of the cases construing the old section 2092 reveals that it has been mentioned only three times by our courts, towit, in the case of Young v. Greene County, 119 S. W. (2d) p. 369, in Ruffin v. Greene County, 119 S. W. (2d) p. 374 and in Nodaway County v. Kidder, 129 S. W. (2d) p. 857. None of these bear directly on the point in question, and it becomes necessary to review the applicable rules of statutory construction.

The word "provided" is defined in Ex Parte Andrews, 18 S. W. (2d) 580, l. c. 582, as follows:

> "And in discussing the meaning of the word, the Supreme Court of the United States in an early case used this language: 'The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provision of it, or to qualify the operation of the statute in some particular.' "

It would seem, therefore, that the concluding proviso clause in the section as last amended in 1939, which restricts the operation of the statutes in counties of twenty thousand (20,000) or less, enables us to draw the conclusion that the foregoing part of the final sentence gives county judges their mileage fees in all cases where they necessarily attend court, without restriction.

Another familiar rule of statutory construction is the maxim "expressio unius est exclusio alterius" or "the expression of one thing is the exclusion of the other". State ex inf. v. Sweaney, 270 Mo. l. c. 692.

The Legislature, by excluding counties of twenty thousand (20,000) and less from the operation of statutes, plainly intended that it apply to counties of more than twenty thousand (20,000).

CONCLUSION

Therefore, it is our conclusion, from the foregoing, that county judges in counties having a population of more than twenty thousand (20,000) inhabitants, according to the last decennial census, are entitled to five cents (5¢) per mile for each mile necessarily traveled in going to and returning

from the place of holding court without restriction as to the number of times traveled.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:RV

COUNTY COURTS: Judges of Barton County Court are entitled to receive 5¢ mileage in traveling to and returning from holding county court: may be charged only once for each regular term and not for special or adjourned terms, may not collect mileage for making trips to look after county's business or pay a third person mileage to transport the county court.

FILED
18

January 6, 1939

Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion wherein you state in part as follows:

> "The deputy recorder of our county was in my office yesterday afternoon consulting with me concerning the amount that should be charged by the recorder of deeds for marriage licenses. I note that the state auditors have also raised this question in several counties in which the recorders have been making a charge of $2.00 for the issuance of a marriage license and the recording of the same, with the certificate attached thereto.
>
> "I would like to have the opinion of your office as to the amount which the recorder of deeds should charge for issuing a marriage license and the recording of the same. There is no question in my mind as to the meaning of Sec. 2979 which provides that the recorder shall receive $1.00 for recording the license, but the question as I see it, is whether or not under Sec. 11804, which provides

> that for every certificate and seal the recorder shall receive 50¢, where both parties make their affidavit for a license, the recorder can charge the 50¢ fee for each affidavit, and if one or both of the parties are under age and the affidavit of a parent is necessary, whether or not the recorder is entitled to charge a 50¢ fee for the certificate and seal on the affidavits of the parents. If this is true, it would be possible for the recorder to charge $3.00 for issuing and recording the marriage license."

I.

The above questions are fully answered in an opinion rendered by this department under date of March 26, 1935, to Mr. John E. Bohon, Recorder of Deeds, Sedalia, Missouri, a copy of which is enclosed.

II.

Your letter further states:

> "I would also like to have the opinion of your office concerning the mileage to be charged by the county court of the county in attending court, as to whether or not I am right or wrong in my opinion that the county court can charge mileage only once for each regular term, but if for any reason a special term is called after the regular term has been adjourned, no matter how many special terms are held by the court,

> that the judges are entitled to charge their mileage in attending court for each special term."

Section 11780, R. S. Mo. 1929, contains the following provision:

> "For each mile necessarily traveled in going to and from the place of holding such court ..... .05
>
> Provided, that such mileage shall be charged only once for each term of court."

Barton County, according to the last decennial census, contained a population of 14,560 inhabitants. Section 2092, Laws of Missouri 1933, page 205, provides in part:

> " * * * in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term, and no mileage shall be paid for any special or adjourned term."

From the foregoing, we are of the opinion that, Barton County having a population of less than 75,000 inhabitants, judges of the county court are entitled to receive five cents (5¢) per mile for each mile necessarily traveled in going to and returning from the place of holding county

court and such mileage may be charged only once for each regular term and the judges are not entitled to mileage for any special or adjourned term.

III.

Your letter further states:

> "I would also like your opinion on whether or not the members of the county court are entitled to charge the county mileage in making trips to look after the county's business where a term of court is not held, and whether or not the court is authorized to employ and pay a third person mileage to transport the county court to different places in the county to make an inspection or to look after the necessary business of the county."

We have searched the statutes diligently in an effort to find any authority for members of the county court to charge the county mileage in making trips to look after the county's business where a term of court is not held, and to employ and pay a third person mileage to transport the county court to different places in the county to make an inspection, or to look after the necessary business of the county. We have failed to find any statute which would constitute any authority for such charge. The office of judge of the county court was created by statute; likewise, the duties and compensation are controlled entirely by certain sections. It is a well recognized principle of law that when the fees or compensation are demanded by a public officer said officer must be in a position to point to the statute, as was said in the case of State ex rel. Linn County v. Adams, 172 Mo. l.c. 7:

> "In order to maintain this proposi-

> tion some statute must be pointed out which expressly or by necessary implication provides such compensation for such officer. For it is well settled law, that a right to compensation for the discharge of official duties, is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. (Jackson County v. Stone, 168 Mo. 577; and other cases cited.)"

The statutory authority, allowing members of the county court mileage in making trips to look after the county's business where a term of court is not held, and employing and paying a third person mileage to transport the county court to different places in the county to make an inspection or to look after the necessary business of the county, being absent, we are of the opinion that the members of the county court can not legally collect any mileage for said purposes.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

TAXATION
COUNTY COURT

(Title to real estate left to city by will vests in city after will is probated, as of date of testator's death and is thereafter tax exempt.

May - Eighth
1 9 3 9

FILED
18

Hon. J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

We are in receipt of your letter of May 2nd which reads as follows:

"I would like to have the opinion of your office on the following matter, both for the benefit of the county court and because of the fact that the state is interested in the taxes.

"In 1935, one Lillian M. Belk-Sibley was the owner of a considerable amount of property in the City of Liberal, Barton County, Missouri. In July of 1935 she executed a will leaving a considerable amount of residence property in Liberal, Missouri, to the City of Liberal, Missouri, for the purpose of selling the same to create a trust fund for cemetery maintenance, and she also left all of her business properties located on Main Street in Liberal, including Lots 18 and 19 of Block 6, which are now in controversy, to the City of Liberal to be sold by said City for the purpose of paving Main Street of Liberal, Missouri.

"Mrs. Sibley died in August of 1935 and her

will was immediately probated in the Probate Court of Barton County, Missouri. The executors of her estate paid the taxes on all of this property in 1935. The final settlement in her estate was filed and approved by the court at the February, 1937, term of the Probate Court. The City, under the terms of the will, became the owner of the real estate devised to it and took possession of the property in 1936, getting the rents from the same and managing the property for the interests of the City.

"The question now is whether or not the property, because it belonged to the City of Liberal, Missouri, was taxable for the years 1936, 1937, and 1938, or whether or not it is exempt under the provisions of Article 10 of the Constitution and the statutory provisions for the exemption of municipal properties.

"It is my opinion that this property is exempt, however, I first want to obtain the opinion of your office for the benefit of the county court before any action is taken by that body to abate the taxes which were assessed against this property in the name of Lillian M. Belk-Sibley, the assessor never having changed the property to the name of the present owner, the City of Liberal, Missouri. I yesterday informed the county court to await a reply to my request for the opinion of your office before taking any steps in this matter."

You state that the testatrix left considerable real estate to the city of Liberal; that she died in August, 1935, and her will was immediately probated;

that the executors paid the taxes on such property in the year 1935, and the question is whether the city owes the taxes for the years 1936, 1937, and 1938.

Our courts have held that the title to land coming through a will conveys such title to the legatee after the will is probated as of the death of the testator. After the will is probated the conveyance relates back and takes effect as of the time of the death.

The Supreme Court of Missouri, in the case of Jones v. Nichols, 216 S. W. 962, l.c. 965 said:

> "It is true, as asserted by respondent's learned counsel, that title to land does not pass by will until the will is probated. Smuffer v. Howerton, 124 Mo. 637, 28 S. W. 166. But it is equally true that title does pass upon the probating of the will, and relates back and takes effect as of the time of the testator's death. Barnard v. Bateman, 76 Mo. loc. cit. 415; Wilson v. Wilson, 54 Mo. 213."

In the case of Henderson v. Calhoun, 183 S. W. 584, l.c. 586, the Supreme Court of Missouri said:

> "The will of William Calhoun, taken as a whole, indicates upon its face an intention upon the part of said testator to dispose of all his property by the terms and provisions of said will. In the absence of any expressed intention to the contrary, it will be presumed that the testator intended that the provisions of paragraph 8 of the will aforesaid should become effective at his death. We therefore hold that Mrs. Henderson, upon the death of said uncle, William Calhoun, became the absolute owner of all the property she thereafter received from his estate.

Underhill on the Law of Wills, secs. 553 and 861; 2 Jarman on Wills (6th Ed.) p. 1357; 2 Washburn on Real Property (5th Ed.) sec. 1544; Eckle v. Ryland, 256 Mo. loc. cit. 449, 165 S. W. 1035; Heady v. Hollman, 251 Mo. loc. cit. 638, 158 S. W. 19; Tindall v. Tindall, 167 Mo. loc. cit. 225, 66 S. W. 1092; Chew v. Keller, 100 Mo. loc. cit. 368, 13 S. W. 395; Martin et al v. Lachasse et al., 47 Mo. loc. cit. 593; Collier's Will, 40 Mo. 287; Anderson v. Menefee (Tex. Civ. App.) 174 S. W. loc. cit. 908; Rhode Island H. Trust Co. v. Noyes, 26 R. I. loc. cit. 334, 58 Atl. 999.

"The rule upon this subject is ably stated in 2 Underhill on the Law of Wills, sec. 861, as follows:

'Under the rule elsewhere explained by which a modern will speaks as of the date of the death of the testator, every gift to a person who is alive at that date vests at once, in the absence of an expression of an intention that the vesting shall be postponed. It will be presumed, when the testator does not expressly or by implication indicate that the vesting of the title to his bounty is to be postponed, that he means it to vest at once upon his death. His silence on this point will raise a conclusive presumption that the interest in the gift is to vest as soon as the instrument by which it is given shall take effect, which, under the general rule, is at his death.'"

Since that is nothing in your letter to indicate that the testatrix did not expressly, or by implication, indicate that the vesting of the title to the properties in question was to be postponed we presume that there was no such indication in the will, and, consequently the title to the properties vested in the city of Liberal, in the month of August,

1935, when the testatrix died. In this connection we also call your attention to Sec. 9746 R. S. Mo. 1929, which provides that:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The constitution and laws of this state provide that municipal corporations shall be exempt from taxation. Section 6, Article 10, Constitution of Missouri, provides in part as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation."

Section 9743 R. S. Mo. 1929, reads in part as follows:

> "The following subjects are exempt from taxation: * * * * * * * * * * * * ; fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament. * * * * * * * * * * * * "

As to the property left to the City of Liberal to be sold by the city for the purpose of paving its main street we are of the opinion that it is tax exempt. The city received the title and also the beneficial interest of the same.

In the case of St. Louis v. Wenneker, 145 Mo. 230, the city of St. Louis, as trustee, under a will, held title to real estate "in trust to furnish relief to all poor emigrants on their bona fide way to settle in the west". The court held this property was taxable because the city was not the beneficial owner.

The court said further:

> "The reason for exempting from taxation property of the State and its municipalities is plain. Judge COOLEY in his work on Taxation (2 Ed.), p. 172, expresses it thus: 'All such property is taxable if the State shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself.' This reason does not exist for excluding from the tax books the Mullanphy real estate. The city, as trustee, can only use the property for the class and in the manner designated in the will. It can not be applied by said city to its own benefit, or for municipal purposes. * * * *
>
> "We think that the property of a county or city exempted from taxation by the constitutional provisions hereinbefore quoted, is that of which such county or city is the beneficial owner, which is held by it 'for its own use' and not merely in trust. It does not include that in which the only interest of the municipality is as trustee. We therefore hold that this real estate is not exempt from taxation." (Underlining ours).

In this case, however, the city is in fact the beneficial owner and the property and proceeds held by it "for its own use" and not merely held in trust for a beneficial owner not exempted from taxation. The

real estate, or the proceeds from the sale of the same, is to be used and applied by said city to its own benefit and for municipal purposes. Therefore, this particular property must be exempted from taxation.

As to the property left to the city for the purpose of sale to create a trust fund for cemetery maintenance a different rule applies. Section 6, Article 10 of the Missouri Constitution exempts from taxation only such real estate as is actually used for cemetery purposes and as a burial ground, and does not exempt other lands owned by such association or any of its personal property.

In the case of State ex rel Mt. Mora Cemetery Association v. Casey, 210 Mo. 235, the court said:

> "It must be remembered that the assessment of the taxes complained of here is not against the cemetery grounds or improvements, but against the personal property of the association, amounting in value to at least $120,000, as found by the assessor of the city of St. Joseph, which has been invested and used by the association as its capital, and not for cemetery purposes.
>
> "It is quite clear that, under section 6 of article 10 of the Constitution, and section 9 of relator's charter, all of the land held by it for cemetery purposes is exempt from taxation for general purposes, but does it necessarily follow that its personal property and moneys on hand acquired from the sale of lots are also exempt from taxation? As a rule, all property is subject to taxation, and, therefore, laws exempting property from taxation are to be strictly construed, and the right of exemption established beyond a reasonable doubt. (Fitterer v. Crawford, 157 Mo. 51.) An exemption from taxation exists only where it is expressed in explicit terms, and it cannot be extended beyond the

plain meaning of these limits. (State v. Wilson, 52 Md. 638) * * * * * * * * * * *

"It is in accordance with the common wish of mankind that the places where the dead are buried should be protected and preserved against the interference of possible sales for unpaid taxes, or under execution for debts, and be kept free from all molestation or desecration. These legislative exemptions of cemetery property are the expression of that wish. But it is not perceived how that wish is made effectual by exemption from taxation property not used for burial places that has no associations connected with it, and may be disposed of by the association at any time, to any person for any purpose. *

" *
Nor do we think that section 6 of article 10 of the Constitution, supra, can be construed as indicating an intention on the part of the framers of that instrument to exempt from taxation the personal property of cemeteries, whether owned by a corporation or otherwise. In that section the words, 'the property, real and personal, of the State, counties and other municipal corporations,' are separate from and have no connection with the words 'and cemeteries' as such, but the section makes no reference to any kind of property in that connection, and section 7 of said article expressly provides that ' all laws exempting property from taxation other than the property above enumerated shall be void." (Underlining ours).

CONCLUSION

It follows therefore that the real estate left

to the city to be sold and the proceeds thereof used for purely municipal purposes in building a paved street for the city is exempt from taxation by section 6, article 10 of the Constitution of Missouri and also section 9743 R. S. Mo. 1929. If the property is left to the city for municipal purposes and the municipality is in fact the real beneficiary of the devise, it makes no difference whether such property is real or personal since both are exempt from taxation when owned by a municipal corporation for its own benefit. Since it appears that the title to this property vested in the city in the month of August, 1935, it would follow that the county court should levy no taxes against the same for the years 1936, 1937 and 1938.

However, only the grounds actually used as a cemetery and burial grounds are exempted from taxation under the Constitution of Missouri. Other real estate owned and not used as a burial ground and all personal property are not so exempted. Therefore, under the authority of St. Louis v. Wenneker, 145 Mo. 230, supra, the city of Liberal apparently holds the legal title to such property as trustee and since the beneficiary and the purpose for which such property is to be used is not exempted from taxation all of such property should have been taxed and the tax should have been paid on the same since the time the legal title so vested in the city of Liberal as trustee.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:RW

PROSECUTING ATTORNEYS: Required to represent county officers in proceedings in which the county is the interested party.

September 1, 1939

9-5

FILED
18

Mr. J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

We are in receipt of your request for an opinion in regard to the duty of the prosecuting attorney to represent the collector, the assessor and the county clerk in a proceeding in which it is sought to enjoin each of the foregoing officials from collecting a personal tax.

The general duties of the prosecuting attorney in regard to civil matters are set out in Section 11318, R. S. Mo. 1929, which is as follows:

> "He shall prosecute or defend, as the case may require, all civil suits in which the county is interested, represent generally the county in all matters of law, investigate all claims against the county, draw all contracts relating to the business of the county, and shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court, or any judge thereof, except in counties in which there may be a county counselor. He shall also attend and prosecute, on behalf of the state, all cases before justices of the peace, when the state is made a party thereto: Provided, county courts of any county in this state owning swamp or overflowed lands may employ special counsel of attorneys to represent said county or counties in prosecuting or defending any suit or suits by or against said county or counties for the recovery or preservation of any or all of said swamp or overflowed lands, and

> quieting the title of said county or counties thereto, and to pay such special counsel or attorneys reasonable compensation for their services, to be paid out of any funds arising from the sale of said swamp or overflowed lands, or out of the general revenue fund of said county or counties."

In the case of State ex rel. Lashly v. Wurdeman, 183 Mo. App. 28, a mandamus proceeding was brought against the judges of the county court of St. Louis County in which the plaintiff sought to compel said judges to hear an application for a dramshop license. The prosecuting attorney sought to intervene on behalf of the county under Section 1008, R. S. Mo. 1909, which is the present statute above quoted. We find the following in the opinion of the court, which bears directly on the question at hand:

> "In an early case in this court, the prosecuting attorney of the same county declined to permit the use of his name in a certiorari proceeding against the county court to remove and review the record of a dramshop proceeding, for that he deemed it his duty, under the statute, to represent the interest of the county, through appearing for the county court in the matter, and this court affirmed such to be the correct view of the duty of the prosecuting attorney. (State ex rel. v. Heege, 37 Mo. App. 338, 345.) Obviously such is the sound law of the question, for, though the judges of the county court themselves are respondents in the mandamus suit pending in the circuit court, it is clear the county is interested therein. The statutes (sections 1007 and 1008) are to be read together for they are in pari materia and pertain alike to the duties of the prosecuting attorney, which they annex to his office, and the officer is required by virtue of his oath to perform them. While section 1007, in so far as its consideration here is essential, applies more particularly to cases in which the county is concerned and suits against it, section 1008 imposes a duty on the prosecuting attorney in respect of all civil suits in which the county is 'interested.'

"It is clear that the county is interested in a civil suit in mandamus directed against the judges of the county court by which it is sought to compel them, through utilizing the franchises of their office, to issue a dramshop license in favor of any citizen, authorizing him to sell intoxicating liquors in the county. In respect of this matter, it is to be said the judges of the county court as individuals, apart from their office and the franchises which inhere in it could confer no privilege under the law, and it is only because of their office as county judges that they may be compelled to act thereon at all, and this is true though the writ runs against them as judges of the county court, rather than against the office of the county court eo nomine. The idea is to compel the judges, as individuals in whose hands the franchises pertaining to the office are accumulated, to exercise the powers of the office in acting upon the application for a dramshop license and thus proceed in the performance of a public duty affixed by statute. To say that St. Louis County is not even interested in such a proceeding involves but a partial view of the subject matter. Under our statutes the county is pecuniarily interested in the matter of dramshop licenses, for a portion of the revenue received therefor goes into its treasury."

One judge dissented in the opinion and it was ordered certified to the Supreme Court, however, the citator fails to reveal that this case ever reached our Supreme Court. The above case was apparently decided on the theory that the court was also interested in the matter of dramshop licenses for the reason that a part of their revenue was derived therefrom. In the matter at hand, the county would benefit by the receipt of the taxes which are sought to be avoided by the petitioners in the injunction suit, therefore, they are pecuniarily interested, and the prosecuting attorney should appear for the officers you mention to represent the interest of the county.

It is our conclusion, therefore, that it is the duty of the prosecuting attorney to defend various county officers in proceedings in which the county has an interest and where such officers are made parties only by reason of their official positions.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:VC

TAXATION AND REVENUE: Construction of Senate Bill No. 94, Laws of Missouri 1933 and Senate Bill No. 311, Laws of Missouri 1939 as to the question of description in procedure affecting title.

October 27, 1939.

11-V

FILED
18

Honorable W. E. Coffer
Assistant Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Coffer:

We desire to acknowledge your letter of October 23, 1939, which is as follows:

> "Replying to your favor of October 19, addressed to Judge Frank Foshee, Senior, of the County Court, Desloge, Missouri, will say that the attorneys representing the owners of the property in question on which there are several years taxes delinquent, contend that if the Collector sells this tract of land for the payment of taxes, the premises being erronously described, as they are in the view of these attorneys, that the Collector could not give a clear title under the Missouri Court decisions. Particularly, State ex rel vs. Borough, 174 Mo. 700 and State ex rel vs. Sanford, 127 Mo. 368 and others.
>
> In other words, the contention of these gentlemen is that if the Collector made sale for the payment of taxes, he could not deliver a good title under his deed and even though the property is bought in by a Trustee appointed by the County Court, said Trustee having purchased under an insufficient description, could not in turn, sell the property and convey a good title for the reason that he would likewise have to convey

the same under an erroneous description.

"I am enclosing you at the request of these attorneys their brief in the matter touching the points at issue. If you will kindly go over this matter and advise the State Auditor whom we are writing today and also let this office know your ruling and we shall be very grateful.

"The following is the description of the property in question: 49 A. being the SW part of SE fractional quarter, Section 7, in Township 36, Range 6 all in St. Francois County, Missouri."

Section 9952a, Laws of Missouri 1933 provides, in part, as follows:

" * * * and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale * * * . The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, etc."

Section 9958b thereof, is as follows:

"No sale or conveyance of land for taxes shall be valid if at the time of being listed such land shall not have been liable to taxation, or, if liable, the taxes thereon shall have been paid

> before sale, or if the description is so imperfect as to fail to describe the land or lot with reasonable certainty and for the first two enumerated causes, the money paid by the purchaser at such void sale shall be refunded, with interest, out of the county treasury, on order of the county court."

Section 9958c thereof, is as follows:

> "If any conveyance for taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient, or for any other cause than the first two enumerated in the preceding section, the lien which the state has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to a lien on such land for the amount of taxes, interest and penalty, legally due thereon at the time of such sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof."

Section 9958d thereof is, in part, as follows:

> "Every person holding a lien upon any real estate in this state by virtue of any illegal or invalid tax deed, shall, upon the payment or tender to him by the owner * * * of the full amount of said lien, * * * make, execute and acknowledge * * *, and deliver to the person making such payment or tender a deed of release * * * ."

Section 9962c thereof, providing a manner of quieting title by purchaser under deed at a delinquent tax sale, and for procedure of sale is, in part, as follows:

> "Any person holding any deed of lands or lots executed by the county collector for the non-payment of taxes, may commence a suit in the circuit court of the county where such lands lie, to quiet his title thereto, without taking possession of such lands, and all parties who have, or claim to have, or appear of record in the county where such land or lot is situated, to have any interest in, or lien upon, such lands or lots, shall be made defendants in such suit, and no outstanding unrecorded deed, mortgage, lease or claim shall be of any effect as against the title or right of the complainant as fixed and declared by the decree made in such cause. The court shall examine into the facts, and if upon the hearing of such cause it shall appear that the complainant's title was or is invalid for any cause, such suit shall not be dismissed by the court, but the court, in cases where the tax was due and unpaid, or where the complainant's title was invalid for defect or uncertainty of description shall ascertain the amount due the complainant, for principal and interest, to be computed at not to exceed ten per cent per annum, and from whom due, and shall decree the payment thereof within a reasonable time by the owner of such land, the owner of any life estate therein, or any other person in possession as lessee thereof and owing such sum ascertained, and in default thereof shall direct that such leasehold, life estate and land or lot be sold therefor, and that the equity and right of redemption of all defendants in such suit, and all persons claiming under them shall be forever

> foreclosed. In any such sale the rents and profits of said land for a term not exceeding seven years shall be first offered for sale and on failure to realize a sum sufficient to discharge said lien and cost of sale, then the interest of the person so adjudged to be oweing (owing) the amount so ascertained shall be next offered for sale; on failure to realize therefrom a sum sufficient to discharge said lien and cost of sale then the life estate in such land together with the interest of the person adjudged to be owing the amount so ascertained shall be next offered for sale and on failure to realize a sum sufficient to discharge said lien and costs of sale, then finally, the fee simple of such land shall be offered for sale. In case of the sale of such land or any part or parcel thereof or any interest therein, the sheriff shall upon the receipt of the purchase money execute to the purchaser a deed in fee simple, or a lease for the unexpired term of the interest so sold, as the case may be, and there shall be no redemption from any such sale, and the purchaser shall have the right of immediate possession of such land or lot. At such sale if such land or any part or parcel thereof or any interest therein be sold for a sum in excess of the lien and cost, then such surplus shall be paid over to the person or persons lawfully entitled thereto as such rights are determined by the court in its decree in said cause. If the court shall upon the hearing of such cause determine the title of the complainant to be valid it shall so decree. * * * "

Section 9962d thereof, is, in part, as follows:

"If any conveyance made by the county

collector, pursuant to a sale made for the non-payment of taxes under this or any former tax law, shall prove to be invalid and ineffectual to convey title for any other cause than such as are enumerated in section 9960b the lien which the state had on such land for state, county, township, school and all lawful purposes, together with all lawful charges, shall remain in full force, and shall be transferred by such deed to the grantee and vested in him, his heirs and assigns, who shall be entitled to a lien upon such lands, and the same shall be bound for the final payment thereof; and in case judgment be rendered against the person holding the title from the collector, as aforesaid, for the recovery of such land, in an action of ejectment or other action, either at law or in equity, brought by the owners of such lands, heirs or assigns, the court shall ascertain the amount due to the party holding such tax deed and from whom due for principal and interest and for all improvements made by him on such lands including subsequent taxes paid with interest, and shall decree the payment thereof within such reasonable time by the owner of such land; if there be an owner of any life estate or any other person first liable for the payment of such taxes, such ownership and liability shall be ascertained by the court and entered of record in such cause, and in default of such payment the court shall decree that such life estate, the interest of such debtor in such lands and the fee simple thereof, shall be sold therefor or sufficient thereof to pay the amount of such improvements, principal and interest as above set forth, due to the party having the collector's deed, his heirs and assigns. Such property

> shall be offered and such sales shall be made in the order, and in the manner and form as provided in section 9962c: * * * "

Section 9953a of Senate Bill No. 311, Laws of Missouri 1939, at page 851, provides that the highest bidder at a third sale shall be entitled to the immediate issuance and delivery of a collector's deed.

If the description in a notice for the third sale of delinquent tax lands is perfect or describes the land with reasonable certainty and the procedure provided in Senate Bill No. 94 of the Laws of Missouri 1933 is strictly followed, the recipient of a deed, under the provisions of Senate Bill No. 311, Laws of Missouri 1939 and especially Section 9953a thereof, at page 851, would obtain a good title from such sale.

"If any conveyance for delinquent taxes shall prove to be invalid and ineffectual to convey title because the description is insufficient", as provided in Section 9958c, supra, the purchaser at such sale becomes the transferee of the lien of the state in and to the delinquent tax on the land and may obtain his rights under the provisions of the above statutes.

"When the description in the assessment", levy and notices of sale "fails to lead to identification so that neither the owner nor officer can tell that this land is taxed * * * the assessment is void" and, therefore, the levy, notices of sale and sale thereunder, are void.

Such was the conclusion reached by the court in the case of National Cemetery Association vs. Benson, 129 S. W. (2nd) 842, 845 (10, 11) in the following quotation:

> "The assessments are not void because the description '65 acres unplatted portion of Valhalla Cemetery' in Normandy School District is insufficient. In some assessments the word 'unplanted' was inadvertently substituted for 'unplatted.' We have followed the general rule in this State that a description is sufficiently definite and certain if the description by its own terms

> will enable one reasonably skilled in such matters to locate the land. Elsberry Drainage District v. Seerley, 329 Mo. 1237, 49 S. W. 2d 162. A valid assessment is essential to a valid tax. In State ex rel. Wyatt v. Wabash Railway Company, 114 Mo. 1, 21 S. W. 26, we quoted from City of Philadelphia v. Miller, 49 Pa. 440: 'Where the assessment wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed, the duty of payment cannot be performed, and the assessment is void.' * * * "

Section 9952a, supra, provides that, "it shall not be necessary to include the names of the owner, etc" in the notices of sale. Also that the entry of record by the county collector listing the delinquent land and lots shall become a levy. The levy and notices constitute due process and if there were a description of land and lots therein where the description "wholly fails to lead to identification, so that neither the owner nor the officer can tell that his land is taxed" certainly the owner could not be held responsible under a subsequent summary proceeding.

We can not pass upon your individual case for it may develop into a matter of controverted fact. Let us presume that the Southeastern fractional ¼ of Section 7, Twp. 36, Rng 6, St. Francois County, Missouri, was in the corner, adjoining two counties, and there was only 49 acres of land in such fractional quarter and all in the Southwest part thereof. Or that all of such fractional quarter was washed away by the river except 49 acres in the Southwest part thereof. All owned by one person. The very fact that said quarter is <u>fractional</u> shows that it is not uniform. Any statement of facts might develop. Therefore, we are rendering the opinion on the basis of general rules of law.

Another question arises, has the collector authority to determine whether the description in the levy is valid, invalid or void, and on such decision, advertise, or fail to advertise, lands or lots for sale for delinquent taxes.

This question was passed on by this department in an opinion to Honorable Morgan M. Moulder, Prosecuting Attorney of Camden County on May 21, 1937, a copy of which is enclosed herein.

CONCLUSION

Therefore, it is the conclusion of this department that a description in an assessment, levy and notice of sale of lands for delinquent taxes is sufficiently definite and certain when such description "by its own terms will enable one reasonably schooled in such matters to locate the land". That even though such description in a conveyance, made by the county collector for delinquent taxes is so imperfect as to fail to describe the land and lots with reasonable certainty and is thereby ineffectual to convey title, the delinquent tax lien of the state is thereby transferred, if the description in said conveyance comes within the requirement of the above rule.

It is, further, our opinion that when the assessment, levy and notices of sale carry a description which would wholly fail to lead to identification, so that neither the owner nor officer could tell that the land is taxed, such assessment, levy, notices of sale and all proceedings thereunder are void.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

COUNTY COURTS AND SCHOOL FUND MORTGAGES : The County Court under its powers to manage and dispose of properties purchased under school fund mortgages may enter into contracts of sale for same and bind subsequent courts.

December 15, 1939

12-16

FILED
18

Honorable J. Carrol Combs
Prosecuting Attorney
Barton County
Lamar, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you request an opinion from this department on the question of whether or not in cases in which the county court has purchased at foreclosure lands sold under school fund mortgages can enter into contracts of sale with prospective purchasers for such lands, providing for the payment of the lands at so much per month, and upon payment of a certain amount providing for the execution and delivery of a deed to the lands by the county court.

As you state in your letter, the title to the land would remain in the county court pending certain payments made under the contract, and since the title would remain in the county court, of course, such lands would not be subject to taxation until the deed was delivered.

The count, courts, by virtue of provisions of Section 9256 R. S. Mo. 1929 are authorized to purchase at foreclosure sales, lands which are sold under school fund mortgages. The latter part of this section provides that the county court may purchase and manage such lands, and provides as follows:

> " * * * The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best

> for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expense thereof, shall become part of the school fund out of which the original loan was made."

It will be seen by this section, that the county court acts as a trustee for the school funds in the management and handling of these lands, and it derives its power and duties from the statute.

In the case of Hillside Securities Co. v. Minter, 300 Mo., 380 the court held that county courts or other public authorities in managing public affairs must follow the expressed provisions of their statutes or their contract will be void.

Since there are no cases reported in this state on the question which you have submitted, we will have to look to the statutes only and from a construction of the statutes determine whether or not the court can do what you inquire about. You will note that section 9256 permits the county court to appoint an agent to take charge of these lands; to rent, lease or otherwise manage them under the direction of the court. It further provides that as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, the county court may resell the lands in such manner and on such terms, at public or private sale, as such court may deem best for the interest of the school or schools. These provisions are very broad, and it seems that the law makers intended that the county courts sell these lands in such manner and on such terms as it may deem best for the interest of the school funds involved.

One of the reasons assigned in your letter, that the court might not be authorized to enter into a contract of sale for these lands, is that the land, pending the delivery of the deed, would be in the name of the county and not subject to taxation. You are correct in that conclusion, but that would be a matter which the county court would take into consideration in determining the best interests of the school funds when it entered into the contract of sale.

As I understand your question, the contract of sale would provide that when certain payments are made the county court would execute a deed to the lands. While the prospective purchaser would not have such an interest in these lands that he would be

taxed as the owner of an interest, yet we think that the interest which he has in the contract would be taxable under Section 9756 R. S. Mo. 1929, under the 11th subdivision thereof. We think that the taxpayer who held such a contract as you describe in your request would be required to return as his property whatever the value of his interest is in the contract which he holds with the county court for the sale of such lands. That being true, the state, county and any political subdivisions of the state interested in the tax would not be losing any taxes on account of such a contract.

You also ask in your letter, whether or not the county court by a contract as heretofore described, could bind future county courts so that such courts, when the prospective purchaser had made certain payments, would be required to execute a deed to the purchaser, and take back a mortgage on the land payable to the school fund out of which the money was loaned. The answer to this question would depend upon the circumstances of each particular transaction, but if the county court in entering into such a contract has not acted arbitrarily or fraudulently or irregularly, and if at the time the prospective purchaser has made payments under the contract authorizing him to demand the deed, then if that purchaser can meet the requirements of the statute as to giving proper security for the school fund mortgage we think a subsequent county court would be bound by the contract.

In the case of Aslin vs. Stoddard County, 106 S. W. (2d) 472, l. c. 477, it was held that the county court has power to make a contract for a reasonable time, the performance of which will extend beyond the term of their office of a member or members of the court and at l. c. 476 in the Aslin case the court said:

> "The county court, as we have said, is a continuous body. It represents and acts for the county. In making contracts it may be said to be the county. Many contracts, proper enough and reasonable as to the time of performance, can be conceived which, of necessity, could not be fully performed during the incumbency of all of the judges in office at the time such contracts were made. To hold such contracts invalid and the court powerless to make them simply because some members of the court ceased to be members thereof before expiration of the period for which

> the contract was made might, and in many instances doubtless would, put the county at disadvantage and loss in making contracts essential to the safe, prudent, and economical management of its affairs."

CONCLUSION

From the foregoing, it is the opinion of this department that if the county court, acting as ordinary business men would act deems it advisable and advantageous to the school funds, it may enter into a contract of sale of lands which it has purchased under foreclosure of school fund mortgages, and it may by such contracts bind future county courts to execute and deliver deeds in accordance with the terms of the contract, and accept school fund mortgages thereon, providing the mortgagor furnishes the security which is required.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney-General

APPROVED:

W. J. BURKE (Acting Attorney-General)

TWB/ww

CHATTEL MORTGAGES:
MOTOR VEHICLES:

The provisions of Section 3097a, House Bill No. 546 of the Sixtieth General Assembly do not apply to mortgages given to manufacturers and dealers.

September 1, 1939

9-V

FILED
19

Mr. Roy Coyne
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following letter:

> "The last Legislature passed House Bill No. 546, which was an act to amend Article 3, Chapter 22, relating to chattel mortgages, by adding a new section to said article to be known as Section 3097a.
>
> "This section provides for certifying by the recorder on the certificate of title of a motor vehicle as to the filing and release of a chattel, stating that it does not apply to chattel mortgages given to secure the purchase price or any part thereof, etc.
>
> "Certain individuals request the dealer to omit from the application for certificate the fact that there is a mortgage on the car. The question then arises under this new section as to whether it would be necessary for the recorder to stamp on the title that there is a mortgage on the car. Would the fact that the dealer should omit this fact from the application for title, merely file the chattel with

> the recorder, and where no notation shows on the title by either the Secretary of State or the Recorder, be sufficient compliance with Section 3097a as to making a binding chattel mortgage on the property?

The new section to which you refer as 3097a was House Bill No. 546 passed by the Sixtieth General Assembly, and is as follows:

> "It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. For services herein provided the recorder shall receive a fee of twenty cents (20Cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

From a reading of this new act it seems that the only purpose that the lawmakers had in mind was to impart notice of a mortgage on a motor vehicle by having the same shown on the certificate of title to the motor vehicle. The

first nine lines of the act, that is, that part of the act which ends with the words "twenty cents (20Cts.)" sets out the procedure for getting the record of the mortgage placed on the certificate of title.

The next sentence of the bill contains the purpose of the act which is a manner in which the notice of the mortgage is given to the whole world.

The last sentence of this section which contains the proviso, excludes from the act the manufacturer, or the distributing dealers or the mortgage given to dealers to secure loans on the floor plan stock of motor vehicles.

Section 3097, R. S. Missouri, 1929, is the law under which chattel mortgages are given and filed on motor vehicles and other chattels. The last clause of Section 3097, supra, applies somewhat to the same subject that 3097a of the new bill applies. That part of Section 3097, supra, to which we refer is as follows:

> "* * * * and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

Since the mortgage given to secure the purchase price of a motor vehicle sold by the manufacturers or their distributing dealers is excluded from the provisions of said Section 3097a, then the foregoing provisions of said Section 3097 are still in full force and effect as to the mortgages given to secure the purchase price of the motor vehicle sold by the manufacturers or their distributing dealers. The language of the last proviso of said Section 3097a of the new act is plain and unambiguous. There is no doubt that the lawmakers have excluded from the act the chattel mortgage given to secure the purchase price of the motor vehicle which is sold by the manufacturers or their distributing dealers.

While the proviso clause of the new act excludes from it the mortgages given to secure the purchase price of the motor vehicle sold by the manufacturers or the distributing dealers, yet we think that the lawmakers intended that such transactions were excluded from the provisions of the act which are as follows:

> "* * * A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. * * * * * * * * "

It seems that under the first sentence of the new act that it would be the duty of the recorder of deeds, on the request of the mortgagee or his assignee, to place this certificate on the title providing the proper fee is paid therefor.

The new act does not indicate why this proviso was placed in it, but by a reading of sub-section (c) of Section 7774, R. S. Missouri, 1929, we can see some reason for this proviso. This subsection requires the applicant for a certificate of title to state whether or not a lien is on the motor vehicle for which the title is sought. It also requires the Secretary of State to note this information on the certificate of title when he issues it. Said sub-section (c) of Section 7774, in so far as it applies to liens on motor vehicles, provides as follows:

> "* * * * * * Application shall be made upon a blank form furnished by the commissioner and shall contain a full description of the motor vehicle or trailer, manufacturer's or other identifying number, together with a statement of the applicant's source of title and of any liens or encumbrances on the motor vehicle or trailer. The commissioner shall use reasonable diligence in ascertaining whether the facts stated in such application are true, and, if satisfied

> that the applicant is the lawful owner of such motor vehicle or trailer, or otherwise entitled to have the same registered in his name, shall thereupon issue an appropriate certificate over his signature and sealed with the seal of his office, procured and used for such purpose. The certificate shall contain a description, manufacturer's or other identifying number, and other evidences of identification of the motor vehicle or trailer, as the commissioner may deem necessary, together with a statement of any liens or encumbrances which the application may show to be thereon. * * *

above, since the mortgage on the cars sold by the manufacturers and distributing dealers are exempt from the act, then said Section 3097, R. S. Missouri, 1929, only applies to such mortgages.

CONCLUSION.

From the foregoing it is the opinion of this department that the provisions of said Section 3097a, which provide that: "A mortgage on a motor vehicle shall not be a notice to the whole world unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle," do not apply to chattel mortgages which are given to secure the purchase price of motor vehicles sold by the manufacturers or their distributing dealers or to chattel mortgages given by dealers to secure loans on a floor plan stock of motor vehicles; and in such cases of original purchase if such dealer fails to place on the application for the certificate of title that there is a mortgage on the motor vehicle, or where no notation shows on the title by either the Secretary of State or the recorder of deeds, the chattel mortgage would be binding on the property described therein since Section 3097a does not apply to such cases.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CHATTEL MORTGAGES: Section 3097A , Laws of Missouri 1939, must be followed to give notice to the world of all chattel mortgages except those given to a manufacturer or dealer who do not come within the act of 3097A.

September 19, 1939

9-25

FILED 19

Hon: Roy Coyne
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

We are herein rendering you an opinion in accordance with your request, regarding certain sections of House Bill No. 546, as passed by the last General Assembly known as Section 3097A Laws of Missouri, 1939, page 278. Section 3097A reads as follows:

"It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. For services herein provided the recorder shall receive a fee of twenty cents (20 Cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

I

Your first question reads as follows:

"When a refinancing is made of the original mortgage, is it necessary for the person doing the refinancing to present the title to the motor vehicle and have it stamped when the chattel mortgage is filed, if the person doing the financing or refinancing happens to be or does not happen to be the party doing the original financing when the sale is made of the motor vehicle."

Refinancing, means the cancellation of the original mortgage and the making of another mortgage covering the same motor vehicle, but which may be for a different amount or to a different person, or to the same person and of course will bear a different date. Section 3097A specifically says:

"*to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. * *"

The above quoted part of Section 3097A, supra, is not ambiguous, and when a refinancing is made, in order that the chattel mortgage be notice to the world, it would be necessary that the original mortgage be released on the certificate of title and a new stamp be made upon the certificate of title showing the different date, the different amount and, if to a different person, a different payee.

Therefore, it is the opinion of this department that when a refinancing is made of the original mortgage, it is necessary for the person doing the refinancing to present the title to the motor vehicle and have it stamped when the chattel mortgage is filed in order that the chattel mortgage be notice to the world.

II

The second part of your request reads as follows:

"When an individual sells a motor vehicle to another, is it necessary to have the Recorder certify on the title regarding the chattel loan, if the loan is taken as part of the purchase price of the car."

Section 3097A specifically reads:

" * * * Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, * * * ."

This proviso applies only to sale of cars by the manufacturer or their distributing dealers, and not to a sale by an individual to an individual, and therefore certification of the recorder must be made upon the certificate of title.

It is therefore our opinion that when an individual sells a motor vehicle to another, it is necessary to have the recorder certify on the certificate of title regarding the chattel loan, even if the loan is taken as part of the purchase price of the car.

III

The third and fourth paragraphs of your request read as follows:

"When a dealer or distributor sells a car which

is financed through a loan company or individual, is the notation which the Secretary of State makes on the title, which notation is made from the application showing outstanding liens sufficient, or is it necessary to have the Recorder of Deeds certify on the title because the individual purchasing the car is not the owner until he receives the title and the finance or loan company or individual loaning the purchaser of the vehicle the money is just making an outright loan on the motor vehicle.

"Is it permissible and regular for the Recorder of Deeds to certify on the title of the motor vehicle as to release of the lien which is shown on the title by the Secretary of State, of course making no charge for this."

In answer to the third and fourth paragraphs of your request, I am herein sending you a copy of an opinion rendered to your office on September 1st, 1939, which held that the provisions of Section 3097A, House Bill No. 546, Laws of Missouri, 1939, page 278, do not apply to mortgages given to manufacturers and dealers. In view of that opinion, we are still holding that Section 3097A does not apply to mortgages given to manufacturers and dealers, and for that reason the original certificate of title, when received by the repurchaser of the car, will contain the notations of the loan at the time of the consummation of the sale, since the provisions of Section 3097A, supra, do not apply to transactions between manufacturers and dealers with private individuals. We are further of the opinion that it is unnecessary to have the mortgage released upon the original certificate of title as received by reason of the form of application given the purchaser by the manufacturer or dealer. Since the original certificate of title is not stamped by the recorder of deeds, in compliance with Section 3097A, supra, it is not permissible for the recorder of deeds to certify on the title of the motor vehicle as to the release of the lien which is shown on the title by the Secretary of State.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

DRAINS AND LEVEES: The repairs and upkeep on bridges in counties organized by county courts in drainage districts are controlled by Section 10837, Laws of Missouri, 1937, page 227, and in districts organized by circuit courts bridges must be repaired and kept by the district.

November 10, 1939

11-15 FILED 19

Honorable J. V. Conran
Prosecuting Attorney
New Madrid County
New Madrid, Missouri

Dear Sir:

This department is in receipt of your letter of October 26th wherein you request an opinion based on the following facts:

> "Will you kindly give us your opinion upon the following question?
>
> Where a County Court drainage district widens and deepens a ditch by reconstruction and the ditch crosses a public road where there is a bridge which will have to be extended and higher piers built to meet the new conditions caused by such widening and deepening, which organization is responsible for the work on the bridge, the drainage district or the county road district? The district in question is Drainage District No. 38 of New Madrid County, which was organized in 1923, under the statute for organization of drainage districts by county courts and the District is still under County Court supervision. After construction of the bridge, or extension thereof, which is responsible for the upkeep, the Drainage District or the road district? Is there any difference if the district is a circuit court organization?"

The only section of the statutes which we think is applicable to the question of repairing the bridge which has become necessary due to the fact that the drainage ditch is widened and deepened is originally Section 10837, R. S. Mo. 1929. In Laws of Missouri, 1937, p. 227, the Legislature amended said section so that the same now reads as follows:

> "The county court may, when the same is necessary for the public health, convenience or welfare, cause to be constructed or enlarged any bridge or culvert made necessary by the crossing of any ditch constructed by a district organized under the provisions of this article: Provided, however, that if such bridge or culvert shall belong to any corporation other than the county, the county clerk shall give such corporation notice by delivering to its agent the order of the court declaring the necessity for constructing or enlarging such bridge or culvert. A failure to construct or enlarge such bridge or culvert within the time specified shall be taken as a refusal to do said work, and thereupon the county court shall proceed to let the work of constructing or enlarging the same, and assess the corporation with the cost thereof, and the county clerk shall place such assessment on the tax book against said corporation, and it shall be a lien upon the property of the corporation, to be collected as taxes. But before the county court shall let such work, they shall give to the agent of such corporation at least twenty days' actual notice of the time and place of letting such work. When a bridge has been constructed across a drainage ditch that crosses any public highway in this state, that shall be adjudged sufficiently by the county court of the county in which said drainage district is organized, such bridge shall become a part of such highway and shall thereafterwards be maintained, repaired or replaced by the authority authorized by law to maintain the road of which it becomes a part."

It will be noted that the last sentence constitutes the change in the original section and, according to the terms of the amended section, we think that it becomes the duty of the county to repair and maintain the bridge in question if the road is what is termed a county road or to be maintained by the county. Otherwise, as stated in the statute, it shall "be maintained, repaired or replaced by the authority authorized by law to maintain the road of which it becomes a part .

It would therefore appear to be the duty and the liability of the county, state or other part of the political subdivision to maintain, repair and replace the bridge in question when such district is organized under Article II, Chapter 64, R. S. Mo. 1929, relating to construction and improvement of ditches, water courses and levees by county courts.

There appears to be a difference in the case of bridges in districts organized by circuit courts, as was determined by the case of State ex rel. Chamberlin v. Drainage District, 311 Mo. l. c. 330.

> "In State ex rel. Ashby v. Medicine Creek Drainage District, 284 Mo. 636, the suit was by a county to compel the defendant district to construct and maintain bridges over public highways, crossed by the ditches of the district, and it was a district organized under the Act of 1913. The provisions of that act were exhaustively discussed, and the changes embodied therein, over the former provisions, were pointed out. The most significant change made was that found in Section 30 of the act, concerning the building of bridges, and limiting the application of the word 'corporation' as used in that section. The decisions in the Chariton River and Little River Drainage District cases had turned upon the meaning to be given to the word 'corporation' and had applied the word to counties; but the proviso in Section 30 is, that 'the word 'corporation' as used in this Section shall not apply to counties.' Numerous sections, and various considerations bearing upon the question as to which of the two organizations had imposed upon it the duty of constructing and maintaining bridges, over ditches crossing public highways, were discussed fully. The decision is founded upon the considerations that the drainage district is authorized to construct and maintain any ditch across any of the public highways of the State without proceedings for the condemnation of the same or being liable for the damages therefor; that the further provision is that a bridge shall be constructed and maintained over such drainage ditch where

> the same crosses such highway; that such bridge must be constructed in accordance with the plans, specifications and orders made or approved by the chief engineer of the drainage district, and such plans are not made subject to approval by the county authorities; that the counties are excluded from the class of corporations required to construct such bridges or pay for the construction of same if done by the drainage district; that under the common law that duty would rest upon the drainage district as the person having made necessary the construction of such bridges; that since the duty is not imposed upon the county to construct such bridges, the drainage district must do so. The decision further means that since the duty to construct and maintain such such bridges, as 'works' or 'improvements' made necessary by its plan of reclamation, rests upon the district, it is empowered to levy a maintenance tax for the maintenance of such works and improvements."

We are therefore of the opinion that when bridges are in drainage districts which have been organized by the circuit couts, when the same intersect public roads, the district is required to repair, maintain and reconstruct them whenever their enlargement or renewal is made necessary by the widening of the ditches.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

OWN:VC

COUNTY COURT: Salary of deputy county clerk in county having population of 7,500 and less than 10,000 persons, not to exceed $900.00 per year.

January 9, 1939

1-9

FILED
20

Honorable L. Cunningham, Jr.,
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

This Department is in receipt of your letter of January 4th, wherein you make the following inquiry:

> "The County Court of Camden County, Missouri has requested that I secure a ruling from your office concerning the maximum legal salary of a deputy county clerk in a county the size of Camden County. The last decennial census shows the population of Camden County to be 9,142.
>
> "As I read Section 11811 of the Laws of Missouri for the year of 1933, at page 370 I find such maximum salary to be $900 per year, but would appreciate the opinion of your office as to the matter."

We call your attention to the fact that Laws of 1933, page 370, Section 11811, was repealed by the 59th General Assembly and a new section enacted in lieu thereof, the pertinent part of which is as follows (Laws of Missouri, 1937, page 441):

> "The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month

> by warrant drawn by the county court upon the county treasury, the following sums: In counties having a population of less than 7,500 persons, the sum of $1,000.00 for themselves and the sum of $600.00 for deputies and assistants; in counties having a population of 7,500 and less than 10,000 persons, the sum of $1,100.00 for themselves and the sum of $900.00 for deputies and assistants; * * * "

You have stated in your letter that the population of Camden County is 9,142. Therefore, the salary of the clerk for counties of this population would come within the provision of Section 11811:

> "in counties having a population of 7,500 and less than 10,000 persons, the sum of $1,100 for themselves and the sum of $900.00 for deputies and assistants."

You are therefore correct in stating that it is your opinion that the salary of the deputy clerk should not exceed $900.00 per year.

We are enclosing copy of an opinion rendered by this Department on April 24, 1936 to Honorable Forrest Smith, State Auditor, relating to the employment of a stenographer for the office of prosecuting attorney, as was requested by you.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

Enc.

LOTTERY: Marking fish and offering prizes for those who catch them is a lottery.

FILED
F3 20

January 16, 1939

Mr. L. Cunningham, Jr.
Prosecuting Attorney
Camdenton, Missouri

Dear Sir:

We have your request of January 11, 1939, for an opinion, which in part is as follows:

> "The Lake of the Ozarks Association has a plan under way whereby they would catch some fifty to one hundred crappie and bass and mark them with metal tags through their dorsal fins, upon which was written a number, and then post prizes for persons who caught fish bearing the tags according to the numbers, providing the person catching the fish is a paying guest of one of the members of the Lake of the Ozarks Association.
>
> "I would appreciate your opinion as to whether or not this is in violation of the Missouri Lottery laws."

The above plan would constitute a lottery in violation of Section 4314, R. S. Mo. 1929 because it involves a scheme for the distribution of prizes by chance. State vs. Emerson 318 Mo. 633, 1. S. W. (2nd) 109-111, State ex rel vs. Hughes 299 Mo. 529, 253 S. W. 329, State vs. McEwan 120 S. W. (2nd) 1098.

Therefore, it is the opinion of this office that the above plan involves the elements of consideration,

chance and prize, and is therefore a lottery.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
FER:RT

AUCTIONEERS: An auctioneer may sell certain articles not subject to duty in the county without obtaining a license.

February 22, 1939

FILED 20

2-23

County Court of
Howard County, Missouri
Fayette, Missouri

Attention: Honorable Dan Cuddy

Gentlemen:

In reply to your request on the question of to whom the provisions of chapter lll, Article I, referring to public auctioneers apply, will say Section 13718, R. S. Missouri, 1929, provides as follows:

> "No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license."

It will be noted that this section only requires the auctioneer to obtain a license who sells property subject to duty under chapter lll, Article I, R. S. Missouri, 1929.

Section 13733, R. S. Missouri, 1929, provides as follows:

> "Sales of property at auction shall be free of duty in the following cases: * * * * * * * * * * * * * * * sixth, live stock, agricultural productions, farming utensils and household and kitchen furniture sold in the county of the owner's residence; * * * * * * * * "

It will be seen from this section that the items set out in subsection 6 of Section 13733, supra, are not subject to duty, therefore, the auctioneer would not have to have a license to sell such articles. We particularly call your attention to said subsection that those articles listed in subsection 6, supra, are only exempt from the duty when they are sold in the county of the owner's residence.

CONCLUSION.

From the foregoing it is the opinion of this department that an auctioneer, whether a public auctioneer or not, is not required to have a license to sell live stock, agricultural productions, farming utensils and household and kitchen furniture where such articles are offered for sale in the county residence of the owner.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

TWB:DA

SCHOOLS AND SCHOOL DISTRICTS: APPROPRIATIONS: School funds may not be spent by boards of directors for repairing or building of public highways leading to the schools.

April 26, 1939

5-3

FILED 20

Mr. L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following statement of facts:

> "The school district have voted to furnish transportation for their students and there is a certain stretch of road about one-fourth mile long which will have to be worked and graveled. The road district does not have the funds necessary to do the work, however, the school district has a sufficient sum of money left in its identical funds to have the work done. I was of the opinion that the school district could not use the money in the incidental funds to build or repair roads. However, the district asked me to secure your opinion and would appreciate you sending it to me in duplicate in order that I may give the Board of Directors a copy."

In dealing with school funds we find that the rule is laid down in Volume 56 C. J., at page 550, Section 656 in the following language:

> "School funds in the hands of school officers or boards are in the nature

> of trust funds for the benefit of the public dedicated to specific purposes, and do not belong to the district or to the district officers."

As to the powers and duties of the board of directors we find in Volume 56 C. J., page 294 at section 152, the rule is stated as follows:

> "A county board of education or of school trustees, although a creature of the law, may exercise any powers authorized by law, it however has in general only such powers as are expressly conferred upon it by constitutional or statutory provision or powers which are incidental to those expressly conferred.* * * * * * * * * * "

On the question of the construction of statutes which confer powers and duties on boards of education, we find the rule stated in Volume 56 C. J., page 332, section 202, as follows:

> "It has been held that statutes conferring powers or imposing duties of regulation and administration of schools must be strictly construed, and must be treated not merely as grants of power but also as limitations thereon; but there is also authority, to the contrary, that such statutes should be liberally construed with a view to effectuating their purpose. Any doubt as to the existence or possession of a particular power, or any ambiguity in the terms of the grant, should ordinarily be resolved against the power and in favor of the people; but powers conferred by law upon a board or officer for public purposes are not to be deemed taken away or withdrawn by a subsequent statute merely by implication."

Section 9233, R. S. Mo. 1929, in speaking of the application of school moneys, provides in part as follows:

> "All moneys arising from taxation shall be paid out only for the purposes for which they were levied and collected; * * * * * * * * * * "

In the case of State ex rel. Humphries v. Thompson, 64 Mo. 26, the rule is stated that: "School taxes can only be applied to the purposes for which they are levied."

Section 9311, R. S. Mo. 1929, provides in part as follows:

> "Upon the order of the board of directors, it shall be the duty of the district clerk to draw warrants on the county treasurer in favor of any party to whom the district has become legally indebted, either for services as teacher, for material purchased for the use of the school, or material or labor in the erection of a schoolhouse for said district--the said warrant to be paid out of any moneys in the appropriate funds in the hands of the said treasurer and belonging to the district. The species of indebtedness must be clearly stated and should be drawn on its appropriate fund; all moneys for teachers' wages on the teachers' fund; all moneys used in the purchase of a site, erection of building thereon, and furnishing the same, on building fund; and all other expenses to be paid out of the incidental fund: * * * * * * * * * * * * "

Your question is whether or not the money for the repair and building of a public highway could be paid out of the "incidental fund." The moneys which go into creating the "incidental fund" are derived from taxation. It

appears from your request that in as much as the lawmakers have authorized the voters of the district to vote transportation of the pupils, would that authorization by implication authorize the board to build or repair public highways in order that transportation may be effectually carried out.

From an examination of our statutes we find that the lawmakers have seen fit to set up another system for construction and maintenance of highways which is separate and apart from our school system. For instance, Sections 7890 and 7891, R. S. Mo. 1929, provide for a special tax for such purposes. Our school taxes are for educational purposes and for such other purposes that are incidental to the education of the children of this state.

In the case of City of Edina, etc. v. School District of City of Edina et al., 267 S. W. 112, it was held that such tax bill for the improvement of a street abutting the properties of the public school was not chargeable against the property of said school district. This case quite plainly shows that the lawmakers have not intended that public school funds be used for public road purposes. This is a question wherein a doubt is raised as to the existence of the power of the board of directors to spend public school moneys on public highways, and as stated in the citation, supra, relating to construction of statutes if there is a doubt or ambiguity in the terms of the power it should be resolved in favor of the people or the taxpayers who eventually have to pay the bill.

CONCLUSION.

From the foregoing it is the opinion of this department that a board of directors of a public school district are not authorized to spend incidental funds for the purpose of building or repairing public highways.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

HARRY H. KAY
(Acting) Attorney General

TWB:DA

SCHOOLS: Election and qualification of Directors.

May 17th, 1939.

5-18

FILED
20

Hon. L. Cunningham, Jr.,
Prosecuting Attorney,
Camden County,
Camdenton, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of April 21st, last, requesting an opinion from this office and from which letter we quote as follows:

> "One of the members of the board of directors of the Oak Hill school district in this county, which is a common school district, request that I secure an opinion from your office concerning the legalities of a school board meeting and of contracts for the employment of teachers and bus drivers hired at such meetings, the facts are as follows.
>
> "At the annual meeting of the school district, April 4th, one new school director was elected for a term of three years. He defeated one of the then members of the board. At the close of the annual meeting the president of the board of directors announced that the next meeting of the board of directors to be on Friday April 7th, at 3:30 o'clock, P. M. and further announced that such meeting the board would organize and qualify the new director and contrary to the announce-

ment, the old board met on Thursday, April 6th, including the defeated director, and at that meeting the board with the vote of the defeated director voted to hire teachers and bus drivers for the 1939-1940 term of school in the district, also at the meeting of the board, I understand, hired the son of the then existent president of the board, who is still on the board, in one of the positions.

"No doubt the last act was nepotism, this board has been doing such acts for the past several years. Before I was Prosecuting Attorney of this county I tried out an injunction suit to restrain the board from expending the money erroneously and from calling numerous bond elections. The court admonished the board to refrain from calling the elections as often as they had been calling them but were unable to get sufficient evidence to provide actual misappropriation of the funds. I advised the tax payers of the district to consult you concerning the nepotism matter however, to my knowledge, they did nothing concerning it. The board is trying to operate a high school in the district and have from two to five students above the eighth grade. It, of course, necessitates a very heavy expenditure on the tax payers to benefit the children who could be easily transported to some adjoining consolidated district having high school. I would appreciate your office's opinion as to the legality of the meeting and of the employment of the teachers and bus drivers and your advice as to what proceedings should be taken upon the nepotism proposition.

> No doubt the president voted against the employment of his son, however, I have no doubt that that is a mere subterfuge to avoid the anti-nepotism laws."

Answering your questions in order, we say as follows:

I

Section 9287, Revised Statutes of Missouri, 1929, provides for the election of members of a board of directors of a school district, and said section says, in part, as follows:

> "* * * * shall hold their office for the term of three years, and until their successors are elected or appointed and qualified, * * "

Section 9288, Revised Statutes of Missouri, 1929, provides for and requires an oath to be taken by a director within four days after election. The form of which oath is set forth in the statute.

The rule with respect to qualifying for an office to which a person has been elected is stated in 46 C. J. Section 86, p. 960, as follows:

> "One of the usual neces ary formalities for the qualification of an officer is the taking of the official oath. Where an oath is required, it is a prerequisite to full investiture with the office."

Reading the aforesaid sections of the statute together it is reasonably clear that a newly elected director does not qualify for the office until he takes the required oath, and as a consequence, his predecessor in office holds over until the newly elected director does qualify.

While, in the case you state, the president of the board may have inadvertently or purposely misled the newly elected director into believing he could wait until the announced meeting of April 7th to take the oath and thus become a qualified member of the board, yet we find nothing in law or fact which prevents a newly elected director from immediately, upon election, taking the oath before anyone authorized to administer oaths so as to immediately or promtly qualify himself and thus displace his predecessor on the board. In any event, we find nothing in the school law which would justify us in saying the president's action, as stated, sets aside the prerequisite of the oath to be taken in order for a newly elected officer to qualify, and the mandatory provision of Section 9287 that school directors "shall hold their office * * * * * until their successors are elected * * * * * and qualified."

Hence, our conclusion is that the meeting of the so called "old board" on April 6th, if held within the district, was a valid one and that they were authorized to transact the business indicated.

II

Relative to the question of nepotism, we note you say at the conclusion of your letter as follows:

> "No doubt the president voted against the employmmnt of his son, however, I have no doubt that that is a mere subterfuge to avoid the anti-nepotism laws."

In the late case of State v. Becker, 336 Mo. 815, l. c. 819, the court, speaking on the question of nepotism, says as follows:

> "The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. The only correlation expressed or implied is a specific kinship existing between two individuals, specifically indicated, and none other. No implication may properly be drawn from what has just been said that one clothed with a power of selection or appointment, might not through connivance or confederation with his associates who share in such power, bring himself within said prohibition."

Hence it can be seen by the above pronouncement of the court that if the president of the board, in your case, neither voted for, nor undertook to exercise any influence, directly or indirectly, before or during the board meeting, upon the other two members thereof, to vote for the son of the president of the board, then the president could not be charged with nepotism. On the other hand, even though the president refrained from voting on, or voted against, the election of his son, yet, if through connivance or confederation, directly or indirectly, with his associates, he brought about the election of his son as a teacher, he could be charged with nepotism.

Consequently, you will first have to ascertain the facts in your particular case before we could definitely say whether or not the president can be charged with nepotism. If the facts should justify such charge, then quo warranto would be the proper procedure to follow.

Very truly yours,

J. W. BUFFINGTON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB/rv

CHILD LABOR: Students of the School of the Ozarks are exempt from Article 3, Chapter 125, R. S. Mo. 1929.

June 5, 1939

66

FILED
20

Mrs. Mary Edna Cruzen
Commissioner of Labor
Jefferson City, Missouri

Dear Mrs. Cruzen:

This will acknowledge receipt of your request for an official opinion, under date of May 12, 1939, inquiring if the Department of Labor and Industry Inspection has authority to require students of the School of the Ozarks, Taney County, Missouri, between the ages of fourteen and sixteen to be certified as provided in Article 3, Chapter 125, R. S. Mo. 1929.

In the beginning we are assuming the following premise: that said School of the Ozarks, located in Taney County, Missouri, is more in the nature of a charitable institution. It is not operated for gain or profit, as these words are most commonly used, but for the sole purpose of furnishing education, board and room, clothing, etc. to children between the ages of twelve and eighteen whose parents are unable to send them to school, and in the absence of this institution would, in all probability, fail to receive the proper education. As we understand, the plan for the operation of this institution is that the children help in the fields, prepare food for canning and even help can the food, most of which is consumed by the children and personnel of the school. The school is maintained by contributions and by a very restricted sale of canned goods. Furthermore, this institution is not under the supervision of the State Board of Education, however, we are assuming that they receive an education similar to that offered in the public schools of the State of Missouri.

One of the cardinal rules of construction is to determine the intention of the legislature. State ex rel. Consolidated School District vs. Hackmann, 302 Mo. 558; 258 S. W. 1011.

None of the children in this institution receive any money for their labor, and there is no gain or profit to the institution. Under the laws of this state pertaining to regulation of Child Labor, one of the primary purposes of enacting such laws was to prohibit employment of children between the ages of twelve and eighteen in order that they may attend school. This is evidenced by Section 14085,

R. S. Mo. 1929 which provides that children between the ages of twelve and sixteen may be gainfully employed during hours public schools are not in session.

> "It shall be unlawful for any child in this state under the age of 16 years to be employed, permitted or suffered to work at any gainful occupation unless such employment is authorized as in this article, or otherwise by law provided. Provided that during the hours public schools are not in session, children between the ages of twelve and sixteen years may be gainfully employed except in industries which employ more than six persons."

Likewise, under Section 14086, R. S. Mo. 1929, the legislature has provided an exemption from this article to children under sixteen when school is not in session.

> "No child under the age of sixteen years shall be employed, permitted or suffered to work at any gainful occupation for more than eight hours in any day, nor for more than forty-eight hours or six days in any one week, nor before the hour of seven o'clock in the forenoon nor after the hour of seven o'clock in the afternoon of any one day. Provided, however, that the provisions of this article shall not apply to any child engaged in the sale of newspapers, magazines and periodicals, nor to agricultural labor and domestic service nor to any work, labor or service performed for or under the personal supervision or control of the parent or guardian of such child, nor when school is not in session to industries which employ less than six persons."

It will be noticed in the provisions hereinabove referred to that when speaking of employing children, said provisions refer to those gainfully employed, which leads us to believe that the legislature never intended that children who are enrolled in this school should come under this article; that such provisions apply only to children who are employed in a gainful occupation by some person, company, corporation or association who, for services rendered, pay said children some compensation; that such regulatory provisions were not intended to apply to such charitable institutions as the School of the Ozarks for the sole purpose of such organization is to provide for unfortunate children and furnish them an education which, otherwise, they would not be able to secure. These children are not employed but, are in fact for services rendered, paying for their education, room and board in this manner. It certainly cannot be said that they are employed in a gainful occupation. Webster's New International Dictionary (Second Edition) defines "gainful" and "occupation" as follows:

Gainful - Productive of gain; profitable, lucrative.

Occupation - 2. That which occupies or engages the time and attention; the principal business of one's life; vocation; business.

3. Those engaged in a calling or trade, collectively.

4. Engagement in some activity, calling, etc.; act of employing; use; handicraft; trade.

Another fundamental rule of construction is that when a statute is ambiguous the court may go to the title to aid in ascertaining the legislative intent. Holder vs. Elms Hotel Company, 92 S. W. (2d) 620; 338 Mo. 857.

The title to Section 14084, supra, reads as follows: Prohibiting children under 14 years of age from being employed-exceptions. The title to Section 14085, supra, reads as follows: Unlawful to employ children except as authorized in law. The title to these acts clearly indicates the provisions thereunder pertaining to prohibiting the employment of children under certain ages. We contend there is no employment of children by this school as that word "employment" is intended to be used in the above provisions; that it is merely a means for an end whereby these children may receive

an education; that the purpose of this act was to prohibit the employment of Child Labor in industries, factories and any other business for financial gain to the owners thereof; that these children do attend school and take advantage of all education offered by the institution and that to place these children under the provisions of Article 3, Chapter 125, R. S. Mo. 1929, would limit their possibilities for future training and education, and this was never the intention or purpose of the article.

In State ex rel. Lentine vs. State Board of Health, 65 S. W. (2d) 943, l. c. 950, the court, in holding that it is not only fundamental to try to determine the legislative intent but also that reference should be had to the subject matter, object of statute and the mischief it strikes at or seeks to prevent, as well as the remedy provided, had the following to say:

> "It may be considered trite to again observe that the primary and fundamental purpose in statutory construction is to ascertain and give effect to the legislative intent nevertheless such is always the end sought and the numerous rules for the interpretation or construction of statutes are merely aids in the quest. But such rules should not be so applied as to restrict or confine the operation of a statute within narrower limits or bounds than manifestly intended by the Legislature and whether the proper construction of a statute should be strict or liberal it certainly should be such as to effectuate the obvious purpose of its enactment and the evident legislative intent. Reference should be had to the policy adopted by the Legislature in reference to the subject-matter, the object of the statute and the mischief it strikes at or seeks to prevent, as well as the remedy provided."

The court will not presume the legislature attempted to authorize a proceeding impossible in itself unless the intention is indicated in express terms. What has been said with respect to the state regulating children attending the School of the Ozarks is likewise applicable to the Federal regulations. We fail to see where this school could be considered as violating any Federal provision regulating Child Labor anymore than it violates the provisions of the State Act, especially in view of the fact that no orders have been issued by the chief of the Children's Bureau, United States Department of Labor against the system employed in educating these children.

Therefore, it is the opinion of this department that the students of the School of the Ozarks are exempt from Article 3, Chapter 125, R. S. Mo. 1929.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARH:VC

SCHOOLS: A rate of levy once voted by the district cannot be revoked by subsequent vote.

June 7, 1939

6-8

FILED 20

Hon. Edward Cusick
Prosecuting Attorney
Pulaski County
Waynesville, Missouri

Dear Sir:

This will acknowledge receipt of your recent communication wherein you ask for an opinion from this office, and from which communication we quote as follows:

"Hon. Sir:-

Would you kindly give me the opinion of your office as to the following:

Common School District at annual meeting, 1939, votes to increase levy for school purposes to 50¢ on $100.00 valuation, no question about regularity of election, Board meets, hires teacher and executes contract therefor. Levy not yet certified to County Clerk - Board now served with petitions of majority of voters of district requesting Board to call a special meeting to vote upon proposition of revoking the levy above voted for at annual election.

First - Has the Board the power to call this special election?

Second - Must they call this

special election?

Your opinion on the above will be greatly appreciated."

Answering your letter we say as follows:

I

At the present time the board of directors of each school district in the state is required to provide an annual rate of levy of at least twenty cents on the hundred dollar valuation of taxable property in the district. (Laws 1931, sec. 13, page 340).

Section 9284, sub-section 4, R. S. Mo. 1929, provides in part as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast. * * * * * * * * * * * * * * * to determine the rate, if any, in excess of forty cents on the one hundred dollars' assessed valuation to be levied for school purposes, as provided for in section 9225."

It may be by reason of the 1931 school laws that a rate of levy in excess of twenty cents must be by vote of the qualified voters of the district.

In any event, when the rate of tax required is determined, whether it be a rate that the board can fix, or whether a rate that the qualified voters must pass on, the board must, under section 9214, R. S. Mo. 1929, forward to or file with the clerk of the county court on or before May 15th, of each year, an estimate of the amount of funds necessary to sustain the school for the time required by law, together with the rate required

to raise such an amount. The provisions of section 9214 R. S. Mo. 1929, are mandatory and the board in your case must have certified to the county clerk the only rate the board was authorized to certify, to-wit, the fifty cent rate as voted.

As you can see by section 9284, supra, there is express authority for increasing the rate of tax above the legal minimum by vote of the qualified voters. But there is no provision within the school laws, express or implied, whereby either the board or the qualified voter can decrease the rate beneath the legal minimum, or decrease a rate which has once been voted in excess of the legal minimum, or revoke or wipe out a rate already voted into effect.

The powers of a school board are limited to such as are expresslygiven by the school laws or statutes appertaining to schools. This principle is illustrated by our courts in the case of Consolidated School District No. 6, of Jackson County v. Shawhan, et al, 273 S. W. 182, l.c. 184, wherein the court said:

> "Plaintiff district is a corporation created by statute; its board of directors is what the statute makes it, having only such powers and functions as are expressly delegated to it."

Hence, it is our conclusion the school board in question has no power to call a special election for the purpose of submitting a proposition to decrease, revoke or wipe out, the fifty cent rate voted into effect at the last annual meeting.

II

Relative to your second question, it necessarily follows that if the board has no authority to submit the proposition mentioned in your inquiry, then the board cannot be required to call such special election for such purpose.

Yours very truly,

APPROVED: J. W. BUFFINGTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JWB:RW

CITIES OF FOURTH CLASS: May vote on bond issue for establishing and maintaining a fire department.

July 24, 1939

FILED
20

Honorable L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We desire to acknowledge your request for an opinion on July 21, which is as follows:

> "The Board of Aldermen of the City of Camdenton have requested me to obtain an opinion from your office concerning the following question.
>
> "The City of Camdenton is without any fire fighting equipment and is desirous of purchasing the same, however, it has no money in the treasury for such expenditures and it will be necessary for the City to vote bond to purchase the fire equipment if it be purchased. The assessed valuation of the City is sufficient to allow the City to vote bond in the amount of $10,000.00 or $15,000.00. The fire equipment will only cost around $4,000.00. The Board of Aldermen meet on the first day of August and I will appreciate your opinion on the legality of such a bond issue before that date if it is possible for your office to render such an opinion."

We have been advised by the Prosecuting Attorney of your county that your city is a city of the fourth class. Section 7030 of the Revised Statutes of Missouri for 1929 is as follows:

"Bonds may be issued for erection or purchase of public buildings, bridges, waterworks, electric light plants and ice plants, public parks, and other improvements, and for establishing and maintaining a fire department. The board of aldermen shall have power to borrow money and issue bonds for the payment thereof, within the limits prescribed by the Constitution, for the purpose of erecting waterworks, electric light works, public parks and ice plants, or acquire the same by purchase; also a city hall and other public buildings and improvements and for furnishing the same, and for the erection of public bridges across streams dividing counties, if located within one mile of its corporate limits, the expense of building said bridges to be borne in part by the counties, as provided for by section 7903, R. S. 1929, but bonds for the purpose aforesaid shall not be issued until two-thirds (2/3) of the legal voters of such city, voting at an election held for that purpose, have assented thereto, in accordance with article 10, chapter 38, R. S. 1929. (Underscoring ours.)

Section 7217, Article 10, Chapter 138 R. S. Mo. 1929 is as follows:

"The various cities, towns and villages in this state, whether organized by special charter or under the general laws of the state, may contract a debt or debts in excess of the annual income and revenue for any such year, for any purpose authorized in the charter of such city, town or village, or by any general law of the state, upon the assent of two-thirds of the legal voters of such city, town or village voting at an election held

> for that purpose: Provided, such indebtedness so to be contracted shall not, with the existing indebtedness of such city, town or village exceed in the aggregate five per cent on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness; and provided further, that the proper authorities of every such city, town or village incurring such indebtedness shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting same. (Underscoring ours.)

Section 7218 provides that the proper city officials shall order an election and give notice thereof, which said notice shall be signed by the clerk and published.

Section 7219 provides for ballots and the form thereof. Section 7220 provides for the issuance of bonds, payable in not more than 20 years and the terms thereof. Section 7221 provides the scope of the provisions of the four preceding sections.

CONCLUSION

Therefore, it is the opinion of this department that a city of the fourth class may vote bonds for establishing and maintaining a fire department in a sum which shall not, with the existing indebtedness of such city, town or village exceed in the aggregate 5% on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, when 2/3 of the legal

voters of such city, town or village, voting to an election held for that purpose have assented thereto.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

SVM/ww

STATE VETERINARIAN:
TRAVEL EXPENSES WITHIN
AND WITHOUT THE STATE:

State Veterinarian may receive travel expenses within and without the state when the same are incurred in performance of official duties.

August 16, 1939

8-18

FILED
20

Honorable H. E. Curry
State Veterinarian
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question of whether or not the State Veterinarian has authority to travel outside of the state of Missouri on official business and be reimbursed from the public funds for such travel and incidental expenses.

As a general proposition before an officer may be authorized to incur expenses for traveling within or without the state he must be able to point to the statute which authorizes him to perform such acts. Section 12519, R. S. Missouri, 1929, provides for the appointment of the State Veterinarian by the State Board of Agriculture. Section 12521, R. S. Missouri, 1929, provides that this official shall be under the control of the State Board of Agriculture.

By the Act of 1933, Laws of Missouri, 1933, page 167, the State Board of Agriculture was abolished and the powers and duties of that board were vested in the Department of Agriculture and the Commissioner of Agriculture.

Section 12520, R. S. Missouri, 1929, provides as follows:

> "Said veterinary surgeon shall, before entering upon the discharge of his duty, file with said board of agriculture his oath of office with a satisfactory and sufficient bond for the faithful performance of his official duties. He shall

> have his office with or near the office of the secretary of the state board of agriculture; shall act only as an expert, and shall, when practicable, devote all time possible to the investigation of the nature of, causes of and remedies for the diseases of domestic animals. The secretary of the state board of agriculture shall have charge of all clerical work pertaining to the veterinary service."

By this section it will be noted that the veterinarian is required to devote all of his time that he is able to, for the purpose of investigating the nature, causes and remedies of diseases of domestic animals. Section 12353, Laws of Missouri, 1933, page 168, provides in part as follows:

> "The State Commissioner of Agriculture shall be and is hereby constituted the official who shall have supervision of the State Fair and of all the legalized departments of the state which are of a regulatory nature for the advancement of horticulture and agriculture.
> * * * * * * * * * * * * * * * * * * *
> The Commissioner shall have charge of the veterinary service of the state, the appointment of the state veterinarian, and, with the advice of the veterinarian, of deputy veterinarians, and other assistants. The Commissioner is hereby clothed with the power of reasonable quarantine in relation to the regulatory laws of the State Department of Agriculture, and it is further provided that the power of quarantine in relation to livestock diseases shall include poultry. It shall be the duty of the Commissioner to gather and compile helpful statistics and information,

> singly or in co-operation with the federal government, relating to horticulture and agriculture, and may publish bulletins not duplicating available educational bulletins of the College of Agriculture and the United States Department of Agriculture. * * *"

By this section it would appear that the Commissioner of Agriculture through the State Veterinarian is required to cooperate with the federal government in gathering and compiling helpful statistics and information relating to horticulture, agriculture, etc. The duties imposed by this section would indicate that the State Veterinarian might have some official duties outside the state of Missouri. By Section 12548, R. S. Missouri, 1929, the salaries of the state Veterinarian and his deputies are fixed, and this section also provides that such officers shall receive necessary traveling expenses in the discharge of his official duties payable out of funds provided for the maintenance of the veterinary service. This section, however, does not state whether or not such official's traveling expenses shall be within or without the state.

The Appropriation Act of 1939, which is House Bill 716, Section 10, subdivision D, sheds some light on this question. It is the appropriation for the State Veterinarian and is as follows:

> "General expense, including communication, transportation of things, travel within and without the State, printing and binding, supplies, stationery, office supplies, premiums on bonds, and other necessary expenses ..... $7,000.00"

This act would indicate that the lawmakers intended to pay the traveling expenses of the veterinarian, both within and without the state. However, the Appropriation Act is not controlling on that question. This point was discussed in State ex rel. Bradshaw v. Hackmann,

276 Mo. 600, at 609, wherein the court said:

> "So, again we say, it is not to the appropriation act (save at times as a legislative construction, persuasive in determining the meaning of an otherwise obscure statute) that we must look, but to those statutes which created the office of Warehouse Commissioner and which define his duties, and the duties of the Grain Inspection Department of which he is the head."

If the duties of the official, either by express statute or by implication, require such officer to travel outside the state, then such expenses could be paid from the public funds providing an appropriation is made therefor.

Again in the Bradshaw case, l. c. 610, the court said:

> "We do not mean to say that the expression 'travel within the State' is to be regarded as a legal fetich, or that such a requirement is to be wholly decisive of the liability of the State to pay traveling expenses. It so occurs here that the statutory duties of the Warehouse Commissioner, as at present defined, are such as in the very nature thereof cannot entail travel outside of the State. If, however, the statutory duties of an officer of this State be such as require, or entail in their proper performance, travel beyond the borders of this State, then such travel is as much a necessary expense, for which the State would be liable, as is travel within the State."

In State ex rel. Lamkin v. Hackmann, 275 Mo. at 47, the question of the payment of traveling expenses of the state superintendent of schools to a convention outside of the state of Missouri was under consideration,

and at l. c. 53, the court said:

> "The point presented is a narrow one. Is the State under the law which provides for the duties of the State Superintendent of Public Schools (hereinafter called for brevity, Superintendent) liable to pay the traveling expenses of such Superintendent, incurred under the circumstances set forth in our statement of the case? * * * * * * * "

Again at l. c. 57, the court said:

> "* * * It is, we think, necessary if standards and efficiency in education in this State are to be kept abreast of the progress in other States, that the head of the public school system should be advised as to what educators elsewhere are doing. No better way perhaps for doing this has been devised than by conventions and conferences of the leaders in educational progress. That it is possible for the privilege of attending such conventions at the expense of the State to be abused is no argument in favor of entirely cutting off the necessary privilege. If it is proper and necessary to attend these conferences, some one must be vested by law with the authority of deciding upon the expediency of it. We think the question of the necessity and expediency of incurring the expense in issue for the purpose mentioned has been by the statute conferred on the Superintendent of Schools, and not upon the State Auditor. If the privilege be abused the people exercising their political power can correct the abuse at the polls. * * "

In the Lamkin case, supra, it will be noted that the statute creating the office of the superintendent of schools did not, in express language, authorize the expenditure of public funds for travel outside of the state of Missouri for which the bill was presented. However, in that case it was held that the statute fixing the duties of the superintendent of schools contemplated the necessity of the superintendent attending conventions either within or without the state in order to properly perform his duties.

As stated in Section 12520, supra, the State Veterinarian is required to devote all time possible to the investigation of the nature, causes and remedies of diseases of domestic animals, and to cooperate with the federal government in gathering and compiling helpful information and statistics in relation to agriculture. Whether or not it is necessary to go outside the limits of the state of Missouri to perform these duties, this department is not in a position to state. If it is necessary for the State Veterinarian to travel outside of the state of Missouri in the performance of his official duties, then with the Appropriation Act of 1939 as it is, and since said Section 12548 authorizes an expenditure for traveling, it would follow that such expenditure would be lawful and the payment therefor would be authorized.

CONCLUSION.

From the foregoing it is the opinion of this department that if it is necessary for the State Veterinarian to travel outside the state of Missouri for the purpose of investigating the nature, causes and remedies for diseases of domestic animals, and in cooperating with the federal government in gathering and compiling helpful information and statistics in relation to agriculture, then such veterinarian may be reimbursed for traveling and incidental expenses incurred in connection with such official business.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CRIMINAL LAW: Giving false information for the purpose of a birth certificate is a misdemeanor and is barred by the statute of limitations.

September 12, 1939

9-13

FILED
20

Hon. L. Cunningham, Jr.
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 6th, 1939, which reads as follows:

"I would appreciate an opinion from your office as to whether there would be any criminal law violation in the following set of facts.

"A man and his wife were divorced six or seven years ago, three years ago his wife had a daughter and in the birth certificate with the Board of Health, she stated that her ex-husband was the father of the child. Sometime later in a suit in the nature of habeas corpus to determine the custody of child born during the married life of the man and his ex-wife, she testified that the man was not the father of the three year old daughter and stated that another in another county was the father of the child and that the birth certificate was false. Of course, the proceedings were in the Circuit Court and the testimony was taken by the Court reporter. The man is very desirous of prosecuting his ex-wife for her misstatement on the birth certificate,

however, I have been unable to find any law to base such a prosecution upon."

Section 9061 R. S. Mo. 1929, partially reads as follows:

"* * * And any other person or persons who shall violate any of the provisions of this article, or who shall willfully neglect or refuse to perform any duties imposed upon them by the provisions of this article, or shall furnish false information to a physician, undertaker, midwife, or informant, for the purpose of making incorrect certification of births or deaths, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five dollars nor more than one hundred dollars. * * "

Under the above section, an informant, who furnishes false information to a physician in reference to the certification of a birth, shall be deemed guilty of a misdemeanor.

Section 3393 R. S. Mo. 1929, reads as follows:

"No person shall be prosecuted, tried or punished for any offense, other than felony, or for any fine or forfeiture, unless the indictment be found or prosecution be instituted within one year after the commission of the offense, or incurring the fine or forfeiture."

Under this section, and in accordance with the statement of facts in your request, prosecution under section 9061, supra, will be barred by the statute of limitations. After a careful research, the only statute

under which the ex-wife could be charged is Section 3878 R. S. Mo. 1929, which reads as follows:

> "Every person who shall willfully and corruptly swear, testify or affirm falsely to any material matter, upon any oath or affirmation, or declaration, legally administered, in any cause, matter or proceeding, before any court, tribunal or public body or officer, and whoever shall falsely, by swearing or affirming, take any oath prescribed by the Constitution of this state, or any law or ordinance thereof, when such oath shall be legally administered, shall be deemed guilty of perjury."

The punishment under this section is set out in section 3879 R. S. Mo. 1929, which partially reads as follows:

> " * * * for perjury committed in any other case wherein the punishment is not otherwise prescribed by law, by imprisonment in the penitentiary for a term not exceeding seven years."

It is very doubtful that a conviction could be had under the perjury charge, and under the statement of facts, as set out in your request. The evidence would be very technical and involve considerable medical testimony, and should conclusively show that the ex-wife committed perjury beyond a reasonable doubt. This section, which is a felony section, would be barred under the statute of limitations, after a period of three years. The statute would begin to run at the time that the ex-wife testified to the false testimony at the time of the habeas corpus proceedings.

CONCLUSION

After a careful research, we find that the perjury section is the only section under which there can possibly be a prosecution under the statements set out in your request.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

ANIMALS AND APPROPRIATIONS: Appropriation for diseased animals in H B 716, Section 12a is invalid because other laws must be referred to in order to ascertain the purpose of the appropriation contrary to Article X, Section 19.

September 12, 1939

9-14

FILED
20

Dr. H. E. Curry
State Veterinarian
Department of Agriculture
Jefferson City, Missouri

Dear Dr. Curry:

This department is in receipt of your request for an official opinion which reads as follows:

> "We are receiving many requests from livestock owners wanting to know when they will receive state indemnity on cattle condemned on account of reacting to the agglutination test for Bang's disease, under the cooperative Federal-State Bang's Disease Control program, after signing a waiver agreement on indemnity, as per copy enclosed.
>
> "The Sixtieth General Assembly enacted a law known as House Bill 667 providing for the carrying on of Bang's disease eradication work in cooperation with the Federal government and authorizing the Commissioner of Agriculture to certify to claims for payment of indemnity on cattle that were condemned on account of reacting to the agglutination test. House Bill 716, enacted by the Sixtieth General Assembly, provides on page 10, section 12-a, as follows:

> 'Pay for diseased animals slaughtered.-- There is hereby appropriated out of the State Treasury, chargeable to the General Revenue fund the sum of Ten Thousand Dollars ($10,000.00) to pay for diseased animals slaughtered under the provisions of Section 12536f inclusive according to House Bill 667 passed by the Sixtieth General Assembly."

> "You will note that Section 12536-f of House Bill 667, referred to in Section 12-a of House Bill 716, provides that the State Veterinarian may certify that herds are Bang's free when all animals in the herd have passed three consecutive clean tests within the period of a year. This section does not provide for the payment of indemnity; therefore, I would greatly appreciate it if you would give me an opinion as to whether I may lawfully certify to claims for indemnity on cattle condemned as reacting to the agglutination test for Bang's disease, under the provisions of section 12-a of House Bill 716, after the owner has signed a waiver agreement on indemnity."

Article X, Section 19 of the Constitution of Missouri provides in part as follows:

> "* * * * * every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. * *"

We can find no Missouri cases which interpret this provision of the Constitution, but we refer you to the case of State ex rel. Hopkin v. King's County, 52 N. Y. 556, in which a New York constitutional provision almost identical with the one quoted above was involved. The provision provided as follows:

> "Every law which imposes, continues or revives a tax shall distinctly state the tax and the object to which it is to be applied; and shall not be sufficient to refer to any other law to fix such tax or object."

The court said at l. c. 567:

> "* * * The Constitution says that neither the tax nor the object shall be fixed by reference to any other law. The object of the tax imposed by this law is fixed only by references to chapter 700 of the Laws of the same session. It is 'to provide for the payment of the canal and general fund deficiencies directed to be paid by the act, chapter 700 of the Laws of 1872.' The provision is for certain deficiencies mentioned in the act referred to. If the act to which reference is made be resorted to, reference to still other acts, and to a report of the comptroller to the legislature, is necessary to ascertain the particular deficiencies intended to be provided for, and the object of the tax. There is no attempt, as in the act authorizing the debt, to preserve the semblance of a compliance with the Constitution, by incorporating into the enactment a phraseology somewhat resembling that of the Constitution.
>
> "The object of the tax is plainly and clearly fixed, or attempted to be fixed, by a reference to other acts and State documents. There is no escape from the conclusion to which this examination leads, and the only safety is in adher-

> ing strictly and giving effect to every part of the Constitution, regulating the appropriation of public moneys, and restraining and regulating taxation and the debt-creating power. The power of taxation can only be exercised within the limits and in the forms prescribed by the Constitution."

We believe that the case is apposite and is authority for holding that the appropriation of ten thousand dollars found in House Bill 716, Section 12a which is to be used for diseased animals "slaughtered under the provisions of Section 12536f, inclusive, according to House Bill 667 passed by the Sixtieth General Assembly," is not a proper appropriation because it is necessary to look to House Bill 667 to ascertain the object of the appropriation and is, therefore, in violation of Article X, Section 19, of the Constitution of Missouri.

CONCLUSION

It is, therefore, the opinion of this department that the appropriation of ten thousand dollars to pay for diseased animals slaughtered under the provisions of Section 12536f, inclusive, according to House Bill 667 passed by the Sixtieth General Assembly is not a proper appropriation because it violates Article X, Section 19 of the Constitution of Missouri which provides that in an appropriation act it shall not be sufficient to refer to any other law to fix the object of such act.

Respectfully submitted,

ARTHUR O'KEEFE,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:RV

AGRICULTURE:
STATE VETERINARIAN: The State of Missouri has sufficient enabling acts to justify the Federal Department in cooperating with the state in the eradication of diseases of livestock.

November 3, 1939

11-4

FILED
20

Dr. H. E. Curry
State Veterinarian
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date requesting an opinion from this department on the following question:

> "Does the State of Missouri have sufficient laws to authorize it to set up a cooperative program between the Federal Government and the State of Missouri for the eradication of scabies in sheep?"

In the letter from the United States Department of Agriculture which accompanied your request it seems that that department might question the authority of the Missouri Department of Agriculture and the State Veterinarian in enforcing quarantine and other regulatory measures that may be necessary in order to carry out the program for the eradication of scabies in sheep.

The United States Department of Agriculture, in performing its duties pertaining to the eradication of diseases of livestock, operates under the Act of Congress of May 29th, 1884, which is found in the United States Statutes at Large, Volume 23, page 32, Section 3. Section 3 provides as follows:

> "Sec. 3. That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such

> rules and regulations to the executive authority of each State and Territory, and invite said authorities to co-operate in the execution and enforcement of this act. Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to cooperate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."

By this section of the Federal Act it seems that if the plans and methods of the Commissioner of Agriculture of the United States are accepted by a state or territory in which communicable diseases of animals exists, or if a state adopts plans or methods for suppression of such diseases and such plans are accepted by the Federal Department, or when the governor of a state or other proper authorities signify their readiness to cooperate with the Federal Department in extincting these diseases, then the Federal Department is authorized to furnish aid in such acts.

Looking to the Laws of Missouri on this subject to determine whether or not we have such legislation as would authorize the Federal Department to cooperate with the Missouri authorities in the suppression and eradication of contagious diseases of animals, we find that by Section 12353, page 168, Laws of Missouri, 1933, it is provided:

> "* * * The Commissioner is hereby clothed with the power of reasonable quarantine in relation to the regulatory laws of the State Department of Agriculture, and it is further provided that the power of quarantine in relation to livestock diseases shall include poultry. * *"

Section 12535, page 235, Laws of Missouri 1939, provides as follows:

> "The Governor of Missouri may, in his discretion, order said State Veterinarian to visit any State or territory and investigate any dangerous or infectious disease, including Bang's disease, said to exist in any designated locality in the State named and report to the Governor the result of said investigation, together with such suggestions that he may deem proper and right. On receipt of such report, or any official report of the State Veterinarian, the Governor may call the Commissioner of Agriculture and the State Veterinary Surgeon together, and said Commissioner and said Veterinary Surgeon may, if deemed wise, arrange and adjust such rules and regulations as safety may demand for the transportation of Livestock through or into this State from any State or territory, or any foreign country or parts thereof, where dangerous, contagious or infectious diseases, including Bang's disease may exist.

Such rules and regulations shall not be in contradiction with constitutional laws of transportation and commerce, and shall be subject to the approval of the Governor. The Governor, on the approval of such rules and regulations, shall issue his proclamation, scheduling and quarantining against such localities in which domestic animals may be considered as capable of conveying infectious, contagious or communicable diseases, including Bang's disease and prohibit the importation and the unloading in this State of any livestock of the kind capable of causing such disease, except under the aforesaid rules and regulations. Such rules and regulations, after approval by the Governor, shall be sent to all corporations or other agencies doing the business of transportation or conveying livestock through or into the State of Missouri; and any corporation or agency or individuals who shall violate such rules and regulations by transporting prohibited animals shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than a thousand dollars nor more than ten thousand dollars for each and every offense, and shall be liable forany and all damages or loss that may be sustained by any party or parties by reason of such importation or transportation: Provided, that in no case shall such corporations or agencies (agencies) or individual be liable for any damages resulting from the shipping of stock into this State which has been inspected by the proper authorities and a certificate of health as to same having been given by said

authorities. Such penalty shall be recovered in any county in this state into or through which such stock is brought upon information filed in the Circuit Court of any such County."

And Section 12536 at page 256, Laws of Missouri 1939, provides as follows:

"The Governor, when informed by the State Veterinarian that either contagious pleuro-pneumonia, rinderpest, foot and mouth disease, maladie du coit, Bang's disease, or any other contagious or infectious livestock disease has become largely disseminated or epidemic among domestic animals throughout any municipality or geographical district in this state, or is found to exist in any herd or herds in this state, may call the Commissioner of Agriculture and the State Veterinarian together, and said Commissioner and said veterinarian shall, if deemed necessary to eradicate, or prevent the spread of such disease formulate for the State Veterinarian and the County Courts rules and regulations under which stock capable of carrying said diseases, or any of them shall be permitted to move to other parts of the State; such rules and regulations shall be subject to the approval of the Governor, who thereupon shall issue his proclamation scheduling and quarantining such localities, and forbidding the carrying or transportation or moving of all domestic animals of the kind diseased from such municipalities or district or County to another, or from one premises to another, or over any public highway or any lot or ground not sufficiently fenced to prevent animals from going through or from being brought into such infected districts,

> municipalities or counties except in accordance with the aforesaid rules and regulations. The County Court or other legally substituted Court of the County in which such infected locality or district shall have been quarantined by the Governor, shall be notified by the State Veterinarian, and furnished with copies of said regulations. Said County Court shall thereupon comply with said rules and regulations, and issue order to the sheriff to assist said State Veterinarian in carrying out the provisions of the same."

Also, Section 12534, R. S. Missouri 1929, is another act which pertains to the suppression and eradication of communicable diseases among livestock, and it provides as follows:

> "Whenever the state veterinary surgeon shall have sufficient evidence to satisfy him that any private or public or corporate barn, or shed, or stock car, or any pen, yard or field, is infected and so injudiciously used as to be liable to convey contagious or infectious disease to live stock, he shall prescribe in writing, to the owner or owners or person or persons in charge thereof, the most rapid of the effective modes of disinfecting and cleansing deemed necessary, and shall prohibit, also in writing, to the owner or owners or persons in charge, the occupation by susceptible live stock or the removal of such infected property as may be movable, until such disinfection has been thoroughly carried out, and that the danger of conveying contagious or infectious disease is removed.

> Such cleansing and disinfection shall be at the cost of the owner or owners. The state veterinary surgeon may call for help on the county court or legally substituted court, if necessary, and the courts shall thereupon order the sheriff or other officer to give the assistance necessary to enforce the law."

We think that by the foregoing sections the Missouri lawmakers have set up and adopted plans and methods for the suppression and extinction of contagious, infectious and communicable diseases among livestock in the State of Missouri with the view of complying with the requirements of said Section 3 of the federal acts cited above.

While Section 12534, supra, only authorizes the State Veterinarian to exercise jurisdiction over premises and property which he may find to be infected with a disease contagious to livestock, yet we think that this is an act to enable and assist the federal authorities to carry out the provisions of said act of Congress.

CONCLUSION.

From the foregoing it is the opinion of this department that if and when the Commissioner of Agriculture, the Governor of the State of Missouri and the State Veterinarian have done those things required by them of the sections of the Missouri laws cited above, then the State of Missouri has sufficiently complied with the requirements of Section 3 of the Act of Congress dated May 29th, 1884, pertaining to the Bureau of Animal Industry and is qualified to ask for the federal aid provided for in said Section 3.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

AGRICULTURE:
DISEASED CATTLE:
STATE'S LIABILITY
FOR PAYMENT:

Contract between owner of cattle and with the federal and state department does not obligate the State of Missouri to pay for cattle infected with Bang's Disease which are destroyed pursuant to such contract.

November 9, 1939

11-10

FILED
20

Dr. H. E. Curry
State Veterinarian
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date which is as follows:

> "Inclosed please find copy of memorandum of agreement for the carrying on of cooperative work of control and eradification of Bang's disease of cattle in Missouri, signed by Dr. John R. Mohler, Chief of the United States Bureau of Animal Industry and by me as cooperating state official.
>
> "At the time this agreement was signed the Federal Government was paying all indemnity on animals reacting to the test for Bang's disease. This plan was changed, effective May 1, 1939 when congress enacted a proviso whereby the Federal Government would not pay indemnity in excess of the amount paid by the state, county or municipality and as we do not have any proviso for the paying of indemnity in the State of Missouri, the Federal Government discontinued the payment of indemnity on reacting cattle, effective May 1, 1939. Since that time, owners of animals tested have signed a waiver agreement as per copy inclosed and you will note that the waiver agreement provides that payment cannot be made by the Federal Government unless the state

pays indemnity within two years from the date of appraisal of reactor cattle. This has caused us to wonder whether there is any liability on the part of the state and also whether the memorandum of agreement signed by me as cooperative official for the State of Missouri contains anything that might obligate the state to pay indemnity on reactor cattle.

"I would greatly appreciate it if you would let us have an opinion on this question."

Included with your request is a form of an indemnity waiver which is as follows:

"The Acts of Congress which provide funds for the payment of indemnities on cattle that have reacted to the test in our cooperative Bang's disease elimination work and are slaughtered after June 30, 1939, provide that Federal payments cannot be made unless the State also pays indemnity, within two years from the date of appraisal of reactor cattle.

"In accordance with the above, I hereby waive claim to any indemnities for the slaughter of my reactors to this one test unless the State also pays indemnity.

_____
Owner's Signature

_____
U. S. Bureau of Animal Industry."

Also, with your request is a form of memorandum agreement referred to in the letter which agreement is as follows:

"UNITED STATES DEPARTMENT OF AGRICULTURE, BUREAU OF ANIMAL INDUSTRY

7/14/ 1934

"MEMORANDUM OF AGREEMENT REGARDING THE BLOOD TESTING OF CATTLE FOR BANG'S DISEASE IN THE STATE OF MISSOURI BY COOPERATION BETWEEN THE STATE OF MISSOURI AND THE BUREAU OF ANIMAL INDUSTRY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE.

"A. The Bureau of Animal Industry of the United States Department of Agriculture agrees:

"1. To detail a competent veterinary inspector to be known as the inspector in charge of the Bureau.

"2. To detail additional veterinary inspectors and employ other necessary personnel to the extent of the means at hand.

"3. To pay the salaries of Bureau inspectors and such traveling expenses as are incurred under Bureau instructions and authorized by the fiscal regulations of the United States Department of Agriculture.

"4. To furnish the necessary blank forms and supplies for conducting this work, if not supplied by the State.

"5. To pay indemnity for cattle slaughtered on account of reacting to the blood test for Bang's disease, in accordance with the regulations of the United States Department of Agriculture.

"b. The State Agrees:

"1. To cooperate in Bang's disease work in providing laboratory facilities and personnel for the operation of same and field personnel to the extent permitted by means available.

"2. To enforce State regulations governing the handling of herds of cattle under supervision for the detection of Bang's disease.

"c. The State and the Bureau of Animal Industry agree:

"1. That Bang's disease work shall be cooperative.

"2. That the inspector in charge of the work for the Bureau of Animal Industry shall confer with the proper State official at frequent intervals with a view of improving methods of this work.

"3. That all charts and other reports shall be rendered in accordance with instructions of the inspector in charge and the proper livestock official.

(Signed) J. R. Mohler
Chief of the Bureau of Animal Industry, U. S. Department of Agriculture.

(Signed) H. E. Curry
State Veterinarian of the State of Missouri"

Both the indemnity waiver and the memorandum agreement seem to be in plain language and, therefore, it is not necessary to attempt to give them any other construction than what they really are.

In the case of State ex rel. National Life Ins. Co. v. Allen et al., 256 S. W. 737, 739, the court, in

considering the rule on construction of contracts, said:

> "2. It is a cardinal rule of construction that when the language is plain there can be no construction because there is nothing to construe.
> * * * * * * * * *"

In Blanke Bro. Realty Co. v. American Surety Co., 247 S. W. 797, 801, the court stated the rule as follows:

> "* * * * Courts cannot write provisions into contracts not written by the parties to them. They can only enforce agreements as written."

Referring back to the memorandum and to the agreement between the owner of the livestock and the federal agency, we do not find any indication in these instruments of an intention to make the State of Missouri liable for the payment of stock which may be slaughtered pursuant to these agreements.

Even if the contracts attempted to make the State of Missouri liable, it would not be binding on the state without some act of the legislature authorizing same and an appropriation by the lawmakers to pay for such obligation. Our examination of the laws and of the appropriation for the Sixtieth General Assembly reveals that no such provisions were made.

CONCLUSION.

It is, therefore, the opinion of this department that the State of Missouri has no liability under the agreements which you have submitted, and that it is not obligated to pay any indemnity on reactor cattle which may be slaughtered under such agreements.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

LICENSE:
MERCHANTS: The legislature has determined that the license required "begins" on the date when the county collector approves the bond and grants the license, and that said license ends twelve months thereafter.

January 5, 1939

1-6

FILED
21

Mr. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Sir:

Your request for our opinion dated November 14, 1939, is as follows:

> "It has been quite confusing to me to determine what power or authority, or who is to determine when a merchant's or manufacturer's license begins and when it ends. It is my understanding it has been the practice or precedent in the Counties for the Collector to determine when the license should begin and end, and sometime it is decided by the county courts by court order when this license should begin and end. Will you please advise me as to this matter at your earliest convenience?"

It is assumed that the license to which you refer is the license required in connection with the ad valorem tax on merchandise of merchants.

The legislature has determined that said license begins on the date the collector approves the bond given to guarantee payment of said tax, and ends twelve months thereafter, as will appear from the following.

Section 10077 R. S. Mo. 1929, Mo. Stat. Ann. page 8063, provides that said tax shall be paid.

Section 10076 R. S. Mo. 1929, Mo. Stat. Ann. page 8062, requires said license.

Section 10078 R. S. Mo. 1929, as amended Laws of Missouri 1935, page 407, Mo. Stat. Ann. pages 8063-8070, provides:

> "Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety, conditioned that he will, on or before the first day of January next following, pay to the collector of the proper county the tax due upon such license; which bond shall be approved by the collector, and his approval indorsed thereon."

Section 10084, R. S. Mo. 1929, Mo. Stat. Ann. page 8067 provides that the county clerk shall issue (to the collector, Section 10085, R. S. Mo. 1929, Mo. Stat. Ann. page 8068) blank licenses at the direction of the county court, and provides that the authority of the license shall extend "for twelve months".

Section 10093, R. S. Mo. 1929, Mo. Stat. Ann. page 8070, in part provides:

> "Each collector, at each regular term of the county court, shall return on oath: First, all blank licenses not granted by him; second, a list of all licenses granted by him and not before accounted for, showing * * * the commencement and termination of each license granted by him."

The statutory provisions above cited and quoted have this effect: The county clerk must, at the direction of the county court, issue blank licenses to the collector. Said license must be obtained by merchants from the collector. But before a merchant can obtain said license, he must furnish a bond. It is the duty of the collector to approve or disapprove said bond. Inasmuch as the collector has no legal authority to issue said license until he has approved said bond, the license

can not begin until the bond is approved; the license does begin on the day when the bond is approved. The collector should fill in the blank license accordingly.

As a general illustration: If a license becomes effective on February first, the bond makes certain the payment of the tax on the following January first. On the following February first, a bond makes certain the payment of the tax on the following January first.

CONCLUSION

In our opinion, the legislature has determined that the license (required by Section 10076 R. S. Mo. 1929, Mo. Stat. Ann. page 8062) "begins" on the date when the county collector approves the bond (required by Section 10078 R. S. Mo. 1929, as amended Laws of Missouri 1935, page 407, Mo. Stat. Ann. pages 8063-8070) and grants the license, and that said license ends twelve months thereafter.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
EH:RT

PRELIMINARY EXAMINATION: Plea of not guilty in a justice court is not a waiver.

January 24, 1939

1-28

FILED
21

Mr. Donald B. Dawson
Attorney at Law
Bates County
Butler, Missouri

Dear Sir:

We have your request of January 10th for an opinion as to whether or not a plea of not guilty entered in the justice court to a complaint charging a felony constitutes a waiver of a preliminary hearing.

The duty of a justice at a preliminary hearing is to determine two things; first, whether a felony has been committed, and second, whether there is probable cause to believe the defendant guilty thereof. Section 3483 R. S. Mo. 1929. In discharging these duties, it is necessary for the justice to ascertain whether or not a felony has been committed. It is now well established in this state that the commission of a felony can not be established solely by a confession of the defendant. State vs. Bowan 294 Mo. 245, 243 S. W. 110. It therefore follows that even a plea of guilty in the justice court to a felony complaint would not be sufficient for the justice to find that a felony had been committed.

A preliminary hearing may be waived by entering a plea of not guilty in the circuit court. State vs. Batson 96 S. W. (2d) 384, State vs. McKinley 111 S. W. (2d) 115. The reason for this rule is that a preliminary hearing goes only to the regularity of the proceedings, which matter is waived when the defendant fails to file motion to quash on that ground and enters a plea of not guilty in the circuit court.

Since our law relating to preliminary examinations does not require a plea of guilty, or not guilty, such a

plea would appear to be surplusage, and of no binding effect on the defendant in the justice court. This is apparent when it is considered that the justice has no authority to determine the guilt of the defendant charged with a felony. When a defendant in justice court is not guilty of the felony charged, his only defense is a plea in the negative--that there is no probable cause to believe him guilty of the felony charged. It would appear that State vs. Langford 293 Mo. 436, 240 S. W. 167 attempts to lay down the rule that a plea of not guilty in the justice court constituted a waiver of a preliminary hearing. The writer of that opinion failed to distinguish between the duties of a justice at a preliminary hearing, and the duty imposed upon the circuit court in the trial of the case. In the former, the duty of the justice is to determine whether a felony has been committed, and whether there is probable cause to believe the prisoner guilty thereof, while in the circuit court the only pleas authorized by law are one of not guilty, or a plea of guilty, and the principal issue to be determined by the circuit court is the guilt or innocence of the defendant. In the Langford case 240 S. W. 169, Division No. 2 said:

> "It is evident from these rulings that the effect of the plea of the general issue is the same whether made before the justice or in the trial court. There is even more reason why this plea may be regarded as more effective before the examining tribunal than before the trial court. Before the former, the determination of the guilt or innocence of the accused not being in question, a plea in regard thereto is not required, and has no proper place in the proceeding, but, if voluntarily entered, it cannot be otherwise construed than as an admission by the accused of the probable grounds for the proceeding for the purpose of the case. It was so held in State v. Ritty, 23 Ohio St. 562, in which one brought before a justice of the

> peace for a preliminary examination was held, notwithstanding he pleaded not guilty, to have waived an examination of witnesses to sustain the charge, and to have submitted to be bound over without the examination. This holding was on the ground that a plea of not guilty in a case of this kind is analogous to the plea of nolo contendere at common law, and like a demurrer, admits the charge for the purpose of the case."

It will be noted that the opinion in the Langford case, above quoted, relies principally upon an Ohio decision (State vs. Ritty). Thereafter Division No. 2 of the Supreme Court in an opinion by Ellison, J., in State vs. Nichols 49 S. W. (2d) 14, l.c. 19 had occasion to comment upon the holding in the Ohio case (State vs. Ritty), and said:

> "The other decision cited in the concurring opinion in the Flannery Case is State v. Ritty, 23 Ohio St. 562, which is clearly not in point. There, there was a complaint, and the defendants 'pleaded not guilty,' 'waived an examination,' and were bound over to the probate court. In the latter court they moved to quash the information filed because the justice had not 'inquired into the complaint' before bonding them over. The motion was sustained, but the Ohio Supreme Court held this ruling erroneous, which we should say was obviously correct."

It therefore appears that by subsequent decisions, the Supreme Court has repudiated the holding in the Langford case insofar as it relies and is based upon State vs. Ritty.

CONCLUSION

It is, therefore, the opinion of this office that a plea of "not guilty" entered in the justice court to a complaint charging a felony is not a waiver of the preliminary hearing, and that the rule so attempted to be announced in State vs. Langford to the contrary would not longer by followed by the Supreme Court.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
FER:RT

PEDDLERS: Trucks selling groceries from house to house to individuals, deemed peddlers; if orders are taken and goods delivered later they are not peddlers.

January 31, 1939

23

FILED
21

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This office is in receipt of your letter of January 16th, wherein you make the following request:

> "I would like to request your opinion on the provisions of Chapter 96, Revised Statutes of Missouri for 1929, pertaining to peddlers and the license required of one who operates as a peddler. A number of merchants here in Bates County have complained that two or three concerns operating in an adjoining county are sending grocery trucks over here into Bates County and selling to the farmers on a regularly established daily route. I wrote to two of the concerns complained of and talked with some of the parties today in my office. The officials of the concern I talked with stated that they were engaged in operating a truck and in the selling of general grocery supplies and general merchandise over regular routes running throughout the country in Bates and surrounding counties. This truck operates on a regular route each day and the sales are made to any party who wants to buy. Also, the operators of trucks

are authorized to take orders for future delivery. The orders are, of course, filled by the parent store which is located in Archie, Missouri. This concern that I talked with took the position that the peddlers law in the state is a very old and obsolete enactment and in view of the modern conditions pertaining to the selling of merchandise from trucks and in view of the wide spreading use of this method of selling the law was no longer in effect. One of the officials of the concern informed me that he had been in Jefferson City and had found that it was not necessary to secure a peddlers license. In order to clear this matter up, I felt it advisable to ask your opinion on Chapter 96.

"You can readily understand the objections which are made by Bates County merchants to a concern which has its place of business in Cass County and comes into Bates and sells to the farmers who should be spending their money here in Bates County. A large number of smaller grocery stores are unable, financially to operate a fleet of trucks and yet are absolutely dependent upon the farmers in their trade territory. When these Cass County trucks are able to sell the farmers all of their grocery supplies and when they come on regular days and carry a complete line of groceries it makes it very difficult for the Bates County merchants to compete with them.

"I have taken the position that the provisions of Chapter 96 are still good

> law and that any concern who sells groceries and other merchandise throughout the country is liable to pay a peddlers license."

For convenience we have quoted your letter in full.

On May 10, 1937, this Department rendered an opinion to Honorable Richard H. Musser, Prosecuting Attorney of Johnson County. A copy of said opinion is enclosed for the reason that it contains many citations with reference to "peddlers," "itinerant merchants" and others, which makes it unnecessary to requote the same in this opinion to you.

Your question relates to the construction of Section 13312, R. S. Mo. 1929, which is as follows:

> "Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except pianos, organs, sewing machines, books, charts, maps and stationery, agricultural and horticultural products, including milk, butter, eggs, cheese, by going about from place to place to sell the same, is declared to be a peddler."

Applying this section to the facts: "A number of merchants here in Bates County have complained that two or three concerns operating in an adjoining county are sending grocery trucks over here into Bates County and selling to the farmers on a regularly established daily route.", we assume that they are selling to the farmers, groceries which would be termed under the statute as "wares or merchandise." This manner of operating appears to be clearly within the statute, and as stated in State v. Holmes, 62 Mo. App. 178, wherein the court said:

> "One who goes from place to place and sells kitchen cabinets (merchandise) which are manufactured by him in this State, is a peddler and is required to have a license."

Therefore, we think the action of the grocery trucks constitutes them peddlers within the meaning of the statute.

With reference to that portion of your letter which states:

> "Also, the operators of trucks are authorized to take orders for future delivery. The orders are, of course, filled by the parent store which is located in Archie, Missouri.",

it was held in the case of State v. Hoffman, 50 Mo. App. 585, that orders taken from samples and later the goods are made up according to the samples and sent or shipped to the customer, that the same does not constitute peddling.

We are, therefore, of the opinion that if only orders are taken by the grocery trucks and the groceries delivered later, that the same does not constitute peddling within the meaning of Section 13312, supra. We agree with your statement that the provisions of Chapter 96, R. S. Mo. 1929, are still in full force and effect and it was the purpose of the chapter and the statutes thereunder to regulate peddling in the State of Missouri, and we know of no later statute which makes said chapter obsolete or in anywise cause the officials of the county to disregard the enforcement of same.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

OWN:EG

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

CRIMINAL LAW: Validity of warrant of arrest immaterial after conviction.

March 21, 1939



Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Mr. Dawson:

We have your request of March 16th for an opinion as to the legality of the return made on a warrant of arrest issued in Bates County where the defendant was arrested in Jackson County. It appears that the defendant was arrested in Jackson County and was placed in jail in Bates County for an offense committed in Bates County. Subsequent thereto, a warrant was issued for the arrest of the defendant, and the sheriff made a return that he had served the warrant in Jackson County, when as a matter of fact, the defendant was then in jail and at no time had the warrant been endorsed and certified by the county clerk of Bates County. It also appears from your letter that the defendant waived a preliminary hearing and has subsequently been tried in the circuit court, and is now under sentence of four years in the penitentiary, but that one of the assignments in the motion for new trial alleges that the warrant for defendant's arrest was void and that the defendant was improperly arrested and illegally held.

The legality of an arrest is determined from the particular facts in the case and the ultimate question is, did the officer have the authority to make the arrest? State vs. Padgett 289 S. W. 954.

It appears that the arrest of the defendant on a felony charge is now immaterial. We may assume that the warrant was void, and that the case stands as though no warrant was ever issued. It is of no consequence now for at least three reasons:

(1) no warrant is necessary for the arrest of

a felon , Section 3492, R. S. Mo. 1929;

(2) any person arrested without a warrant may be legally held for twenty (20) hours, Section 3952, R. S. Mo. 1929;

(3) the defendant was accorded a preliminary hearing and waived it, and since that time his detention has been under and by virtue of a commitment by the justice of the peace. Section 3483 R. S. Mo. 1929.

We have carefully examined Stubbs vs. Mulholland 168 Mo. 47, and State vs. Doley 121 Mo. 591, and find that neither are in point on this matter. In the Stubbs case, the court merely held that an arrest under an invalid warrant is evidence of malice in an action for malicious prosecution. In the Doley case, the court merely held that a warrant issued in Lafayette County could not be served in Saline County without an endorsement thereon by either the county clerk of Lafayette County, or by a magistrate in Saline County. The court also held that the officers had no right to seize certain horses under a warrant to arrest one Price.

It is, therefore, the opinion of this office that the question of defendant's arrest is now immaterial since the defendant is being held under and by virtue of first, a commitment issued by the justice of the peace and second, under a conviction in the circuit court.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

SCHOOLS: Appropriations for State Teachers Colleges.

April 25th, 1939.

21

Honorable Delmar Dail,
State Senate,
Jefferson City, Missouri.

Dear Senator:

We have your letter of April 21, last which reads as follows:

> "Pursuant to our conversation of a few days ago, I am writing to request an opinion of the Attorney General relative to the appropriation for teachers colleges in the State of Missouri.
>
> In so far as the information I have at hand these appropriations could be made from the fund provided by the one-third appropriation of general revenue to the free school fund, and I would like to have a definite opinion as to whether or not under the existing statutes this could be taken from that fund."

In answer to your question, beg to say that the Constitution of the State of Missouri, Section 6, Article 11, created a public school fund derived from the various sources set forth in said section. This section further provides as follows:

> "* * * * * the annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

Section 7, of the Constitution provides that no less than twenty-five percent (25%) of the state revenue shall be set apart and applied annually to the support of public schools.

Section 9712 R. S. Mo., 1929, is a legislative declaration by way of repetition of Section 6 of the Constitution. Section 9712, however, winds up as follows:

> "* * * * together with not less than twenty-five per cent of the state revenue, shall be applied annually to the support of the public schools provided for in this chapter, to be apportioned as hereinafter provided."

The "chapter" referred to is Chapter 57 of the present revised statutes, and which chapter as a part thereof contains Article 18 relating to the setup and operation of the State Teachers College. Hence, it is reasonably clear that the Legislature intended that the support of the state teachers colleges, along with the other public schools, was to be provided for out of the income from the school fund created under the statutes together with the not less than twenty-five per cent (25%) of the state revenue.

While we do not find that the issue has been directly raised and passed on in any form in our courts as to whether a state teachers college is a public school, or a part of the public school system, within the meaning of the Constitution or statutes, yet we believe that the inclusion of the teachers colleges in the chapter of the statutes relative to the public school system is a recognition by the Legislature that a teachers college is a public school.

Furthermore, there is no provision in our law for appropriation out of the public school money for the support of an educational institution, unless it is a public school within the meaning of the Constitution and statutes.

Based upon the minimum amount that the General Assembly must set apart from the state revenue, to-wit, twenty-five per cent (25%), for school purposes, the custom has become more or less established whereby one-third instead of one-fourth of such revenue has been appropriated for school purposes.

Our research has failed to disclose any special fund or any special provision pertaining to support of the several teachers colleges. Consequently, there appears to be no inhibition in making an appropriation for support of the teachers

colleges from the income of the aforesaid school fund together with the one-third part of the state revenue.

Yours very truly,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB:RV

ATHLETIC COMMISSION: State commission may employ as inspector person who is already employed by federal, state or county government.

May 5, 1939

FILED 21

Mr. Horace T. Dawson, Secretary
Missouri Athletic Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 11, 1939, presenting this question for an opinion:

> "Is it a violation of the state law for the Athletic Commission to employ an individual as an inspector for the commission who is already employed by the federal, state or county government?"

The constitutional provisions which may or may not be violated by this action of the commission are as follows:

Section 18, Article IX, Missouri Constitution, which says:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality. * * * ."

Section 4, Article XIV, Missouri Constitution, which says:

> "No person holding an office of profit under the United States shall, during his continuance in such office, hold any office of profit under this State."

It will be noted that these provisions limit the disqualification to those holding "offices". The definition of this word, as there used, determines the conclusions to be reached.

In State ex inf. v. Bode, 113 S.W. (2nd) 805 (Mo. Sup.), is the latest expression we find in this state as to what constitutes an "office". The court said at l.c. 806:

> "It is not possible to define the words 'public office or public officer.' The cases are determined from the particular facts, including a consideration of the intention and subject-matter of the enactment of the statute or the adoption of the constitutional provision. In other words, the duties to be performed, the method of performance, end to be attained, depository of the power granted, and the surrounding circumstances must be considered. In determining the question it is not necessary that all criteria be present in all the cases. For instance, tenure, oath, bond, official designation, compensation, and dignity of position may be considered. However, they are not conclusive. It should be noted that the courts and text-writers agree that a delegation of some part of the sovereign power is an important matter to be considered. The question is considered at length in 46 C.J. p. 924."

Further, the court quoted from State ex rel. v. Bus, 135 Mo. 325, the following:

> "'A public office is defined to be 'the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is

invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.' Mechem, Pub. Off., 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer.

"The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. State v. Valle, 41 Mo. (29) 30; People ex rel. v. Langdon, 40 Mich. 673; Rowland v. Mayor (etc., of City of New York), 83 N.Y. (372) 376; State ex rel. v. May, 106 Mo. 488, 17 S.W. 660.

"Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they 'shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff.' Rev. St. 1889, sections 8181 and 8182. (Mo. St. Ann. sections 11513, 11514, pp. 7433, 7434).

"The right, authority, and duty are thus created by statute; he is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and

> is, consequently, a 'public officer,' within any definition given by the courts or text writers."

From this case, we ascertain that the following is to be considered in ascertaining what is an office - (1) duties to be performed, (2) method of performance, (3) end to be attained, (4) depository of the power granted, (5) tenure, (6) oath, (7) bond, (8) official designation, (9) compensation, (10) dignity of position, (11) the duties exercised must be sovereign functions, (12) they must be for the benefit of the public.

Chapter 92, R.S. Missouri, 1929, creates the Athletic Commission and we look there to see to what extent an inspector will come within the above conditions.

The duties of such inspector are to aid the commission to carry out the law. Method of performance is left to the commission's discretion. End to be attained is to carry out the law. The power is deposited with the commission, not its inspectors. No tenure, oath, bond or official designation other than "other employees and clerical assistants". Dignity of position, of no great moment. Compensation $5.00 a day while actually engaged in carrying out the law. Since the right to control athletic exhibitions is an exercise of the state police power (Fitzsimmons v. N.Y. Athletic Comm. 146 N.Y.S. 117), a portion of the sovereign functions is exercised. The public who attend such exhibitions are benefited, ostensibly, in that they will see an authentic athletic exhibition.

Thus, we have in reality only the exercise of a sovereign function under orders of the body in which that power is deposited and perhaps some accuring benefit to a portion of the public. The inspectors have no specific duties prescribed other than to aid the commission. The compensation is small and the other conditions above set out are absent. We do not feel that such is sufficient under the above authority to constitute the employment held by these inspectors an office.

CONCLUSION

Therefore, it is our opinion that the position of inspector for the Athletic Commission is not an office. Not being an office, the commission may employ as inspectors persons who may also be employees of the federal, state or county governments.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAC

SCHOOLS: Donations or gifts to teacher ... valid.

5-11

May 10th, 1939.

FILED
21

Mr. Donald B. Dawson,
Prosecuting Attorney,
Bates County,
Butler, Missouri.

Dear Mr. Dawson:

This will acknowledge receipt of your letter of April 14th last, requesting an opinion from this office, from which letter we quote as follows:

> "I have been asked for an opinion on the legality of donations or gifts made by the board of education of the school district to a teacher or teachers. One school board composed of three members voted to give the teacher of the school $10.00 last year as a Christmas present. Some of the members of the school district objected to that as being unlawful. I took the position however that a school board had the authority to do such an act under the circumstances of the case although I did not believe the school board could engage in any such course of action over a period of time.

> The second situation is a little more complicated. The board of a consolidated school district met this last week and voted to raise the salaries of several of the teachers and also passed a motion to allow a bonus to each of the teachers for the last years school term. This bonus amounts of $5.00 per teacher and $10.00 for the superintendent. A rather serious objection has been raised to this proposition but I again took the position that the school board had authority to do this although I must confess that I was not at all sure I was right. I should like your opinion on the power of the school board to make gifts or donations such as those mentioned above."

Answering your questions in the order stated, we say as follows:

I.

A school district is a public body created by the Constitution of the State, and is likewise a political corporation or subdivision of the State within the meaning of the Constitution. The supervision of a school district is vested in the Board of Directors, whose duties and obligations are such as are specifically prescribed by law. The support of public schools is derived solely from taxation or public money.

The aforesaid axiomatic principles of law constitute the basis for determining the validity of the Christmas present or gift made the teacher in question.

A thorough research of the present statutes or legislative enactments relative to schools fails to show any provision whereby the Board of Directors can give away any part of the public school funds of the district for any purpose. In fact, even though it could be said that the Legislature either by express enactment, or by implication, permitted such a donation or gift, such authorization would be void. The Constitution, Article IV, Section 47, provides in part as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established to lend its credit, or to grant public money or thing of value in aid of or to any individual * * * * * *".

In the case of Hitchcock v. City of St. Louis, 49 Mo., 484, l. c. 488, the ~~court~~ City undertook to donate public money to the support of a private orphan asylum, the court said:

> "The donee is a mere private institution, not under the control of the city and having no connection with it. If the tax-payers' money can be taken and given to it, it

> may be also to any other private corporation, or it may be distributed gratuitously to individuals. It is clear that the charter confers no such authority and we think, therefore, that the judgment should be affirmed. The other judges concur."

When and while the teacher you mentioned was performing the services called for in her 1938 contract and for which she was being paid the amount named in her teacher's contract, the school district was no further obligated to her for any additional sum of money whatever, nor was she in any way under the control or obligated to the district save as to satisfactory performance of her duties as teacher.

Although the directors might justify the giving of the present in question upon some social or personal basis, yet such is not sufficient. The directors must show a legal basis, and this they can not do. Consequently, the giving away of school money in question as a present constitutes an unlawful use of school funds on the part of the School Board.

II.

Relative to your second question, we call attention to Section 9209 as amended by Laws of Missouri, 1933, page 387, concerning teachers contracts, which reads in part as follows:

> "The contract * * * * * shall specify the number of months the school is to be taught and the wages per month to be paid; * * *."

It can thus be seen that a teachers contract must be definite and certain as to the amount a teacher is to receive thereunder for services.

In the case of Rudy v. School District, 30 Mo. App. 113, l. c. 117, the court in speaking of the powers of a School Board said:

> "There is no question that a school district is a quasi corporation, and that the powers of its corporators and directors are prescribed and limited by statute (Buchanan v. School District, 25 Mo. App. 85), and, also, it may be added, by such provisions of the constitution of the state as are self-enforcing. Nor is there any doubt that a person entering into a contract with a school district, through its directors, must, at his peril, take notice of the limited powers of the directors, and if he enters into a contract with them in excess of their powers, no recovery can be had by him thereon. Cheeney v. Brookfield, 60 Mo. 53."

Hence, in view of the fact that a school board in paying a teacher is limited to a definite amount, which must be set forth in the teacher's contract, any payment of a greater amount, whether it be designated as a "bonus" or otherwise, would be no thing more nor less than making a gift of the school funds in the amount you name to the respective recipients, and hence, are invalid for the reasons given in the above paragraph one.

On the other hand, if the so-called "bonus" should be classed as a part of the teachers compensation for the year in question, by reason of it being understood at the beginning of the school year that a "bonus" in a then unascertained amount would be paid, it would not avail anything for the reason that such understanding would have rendered the contract indefinite and uncertain as to the monthly wage or total amount to be paid the teacher, which would be contrary to the provisions of the aforesaid statutes.

Hence, our conclusion is that the payment of a so-called "bonus" was unlawful.

Very truly yours,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. B. TAYLOR,
(Acting) Attorney General

JWB RV

SCHOOLS: Appropriation of funds for State University.

May 11th, 1939.

5-11

FILED
21

Honorable Delmar Dail,
State Senate,
Jefferson City , Missouri.

Dear Senator:

We have your letter of April 21, last which reads as follows:

> "Pursuant to our conversation of a few days ago, I am writing to request an aopinion of the Attorney General relative to the appropriation for the state University of Missouri.
>
> In so far as the information I have at hand these appropriations could be made from the fund provided by the one-third appropriation of general revenue to the free school fund, and I would like to have a definite opinion as to whether or not under the existing statutes this could be taken from that fund."

In answer to your question we first call attention to the applicable part of Section 5, Article XI, of the Missouri Constitution, which reads in part as follows:

> "The General Assembly shall, whenever the public school fund will permit and the actual necessity of the same may require, aid and maintain the State University."

Section 6 of the said Article of the Constitution created, and specifies what constitutes the public school fund, namely, property and money derived therefrom as set forth in the section, and which section further provides as follows:

> "The annual income of which fund, together with so much of the ordinary revenue of the State as may be by law set apart for that purpose, shall be faithfully appropriated for establishing and maintaining the free public schools and the State University in this article provided for, and for no other uses or purposes whatsoever."

It is to be seen by reason of the context of Section 6 aforesaid, the public school fund in the aggregate consists of the income from the corpus of the property specified and the one-third part of the state revenue set apart for and which becomes thereby a part of the school fund.

The Legislature in the earlier history of the state carried out the mandate of the Constitution by way of legislative or statutory declaration, which statute is now Section 9712, R. S. Mo., 1929, and is substantially a repetition of the provisions of the aforesaid Section 6 of the Constitution. Section 9712, however, winds up as follows:

> "* * * * * together with not less than 25% of the state revenue, shall be applied annually to the support of the public schools provided for in this chapter."

The chapter alluded to is Chapter 57 of the Revised Statutes and which chapter by Article XX thereof, contains the set-up of the State University. We believe it fair to say that the Legislature intended by its revision of the laws from time to time and including in such revision the State University in the chapter of which Section 9712 is a part, that the support of the University should come from the school fund.

So far as the support of the University is concerned, an additional and another fund exists, for such purpose known as the "Seminary Fund" provided for in Article 25 of Chapter 57 of the present statutes.

The "Seminary Fund" was created for the support of the University at the same time the University was established by the Laws of 1838-39, and appeared at that time to be the only source of support provided. The Constitutional Convention of 1865 provided in the organic laws of the state for the creation or establishment of the University "as soon as the public school fund would permit", and at the same time created the public school fund substantially as it is now (See Sections 4 & 5, Article 9, Constitution of 1865). The Seminary Fund had been carried along as legislative enactment and was in effect at the time of the 1865 Convention.

When the present Constitution was enacted in 1875, a change was made respecting the maintenance of the University, which in effect made it mandatory on the General Assembly to support the University along with the other public schools out of the public school fund, as such fund was then and is now constituted as above mentioned. The seminary fund at the time of the enactment of the present constitution was still in existence and has ever since been.

We recite the above sequence of legislative and constitutional enactments respecting the support of the University, because it may be fairly inferred therefrom that at the time of the Convention of 1865 it was

seen that the seminary fund which the Legislature had theretofore set up as a source of support for the University, was or would be, inadequate and thus it was written into the organic law that the University was to share in the use of the public school fund for its support when its necessities so required.

We are not prepared to say that the support for the Univeristy is limited to an appropriation from the public school fund, towit, the income from the corpus of the fund, together with the one-third of the state revenue set aside as a part of such fund, and that the legislative set-up of the seminary fund and the appropriation therefrom or thereof is unconstitutional, because we are not called upon to pass on such question. But granting, for the purpose of this opinion, that the Assembly is not mandatorally so limited or confined to an appropriation from the school fund for the support of the University, our conclusion is, however, that it is at least permissible for the Assembly to make its appropriation for the University from the school fund, if it will permit, which fund, as we have said comprises as a part thereof the one-third part of the state revenue set apart for school purposes.

Very truly yours,

J. W. BUFFINGTON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General

JWB RV

TOWNSHIP TRUSTEES: Vacancy filled by county court; construction of "ten days" time in which to qualify.

6/0

May 19, 1939

FILED
21

Mr. Donald B. Dawson
Attorney at Law
Butler, Missouri

Dear Mr. Dawson:

We have your request for an opinion, which in substance raises two questions:

(1) Does the failure of a township trustee duly elected at a township election to qualify for his office within ten days after he has been notified of his election create a vacancy in that office, which would authorize the county court to appoint a man to file the vacancy.

(2) Does the statute pertaining to ten days notice of election impose upon the clerk a directory or mandatory duty, and if the township clerk fails to notify an official of his election within the ten days, does that prevent the official elected from being able to qualify.

With reference to the first inquiry, our answer is that the failure of the duly elected person to qualify within ten days after notice creates a vacancy. The pertinent portions of the statutes leading to this conclusion are as follows:

Section 12277 R. S. 1929:

> "Every person chosen * to the office of township trustee * before he enters on the duties of his office and within ten days after he shall be notified of his election * shall take and subscribe *

such oath * as is prescribed by law."

Section 12278 R. S. 1929 provides that: a

> "such person shall, within ten days thereafter, cause such certificate, together with his acceptance of the office, to be filed in the office of the township clerk; his neglect or refusal to do so shall be deemed a refusal to serve."

Section 12285 R. S. 1929 provides:

> "whenever * any person elected * shall fail to qualify, * it shall be lawful for the township board to fill such vacancy *; provided, that any vacancy in the office of * township board shall be filled by appointment of the county court."

The county court is authorized to fill a vacancy. State ex rel vs. Olenhouse 23 S. W. (2d) 83.

It will be noted that the above statute, particularly Section 12278 creates a vacancy upon the officer's neglect or refusal to qualify.

With reference to the second proposition, the ten days notice of the clerk is merely directory insofar as the elective official is concerned. It is a mandatory duty upon the clerk to give such notice because the statute, Section 12274, provides that the clerk shall notify the elective official. The use of such term "shall" imposes a mandatory duty upon the official. State ex inf. vs. Wymore 119 S. W. (2d) 941.

The failure, however, of the clerk to notify the officer

does not affect the officer's right to qualify after ten days subsequent to the election have elapsed. The elective official has ten days after written notice from the clerk in which to qualify. State ex rel vs. Caldwell 276 S. W. 631.

CONCLUSION

It is, therefore, the opinion of this office that the failure of a township trustee to qualify within ten days after written notice of his election is received from the clerk creates a vacancy which is to be filled by the county court; and that such official has ten days after receiving such written notice from the county clerk in which to qualify.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

TOWNSHIP ASSESSORS: Not required to give bond for performance of their duties.

June 17, 1939

6-28

FILED
21

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This will acknowledge receipt of your letter of June 15, 1939, in which you request an opinion of this department as to whether or not a township assessor must give bond before he is entitled to hold his office.

You refer to Section 9754, R. S. 1929, being a part of the general statutes in regard to the county assessors. In the case of State ex rel McDaniel vs. Schremm, 272 Mo., page 541, there is a lengthy discussion as to the application of these general statutes to the City of St. Louis, and it was held that they did not apply to the assessor in said city.

Section 12268, R. S. 1929, provides for the election of a township clerk who shall be ex officio township assessor. This is under the township organization statute. Article V, Chapter 86, under the township organization law, sets out the qualifications and tenure of office of township officers and there provides for the taking of an oath by the township clerk, the ex officio township assessor. Section 12279, as amended by Extra Session Laws of 1933, at page 167, provides that the treasurer and collector shall give bond, but makes no reference to the ex officio assessor.

Again, Section 12327, R. S. 1929, provides that every assessor shall take an oath, and Sections 12328, 12329 and 12330 prescribe his duties.

Due to the fact that under the sections above mentioned, we find the qualifications of the ex officio assessor and the requirements for his taking office, with no mention of a requirement that he give bond, it is our conclusion that it was not the intent of the legislature to require a bond of such township assessor.

You also ask in your letter what the duty of the county court is in the event the assessor refuses to make bond, and whether or not the county court can declare the office of township assessor vacant, and make an appointment to fill same. We believe that our answer to your first question disposes of these other two questions, but refer you to the case of Cantley vs. Village of Mt. Moriah, 49 S. W. (2nd) l.c. 277, for a discussion of statutory provisions in regard to bonds.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
RLH:RT

ROADS AND BRIDGES: It is not necessary to notify landowners to cut hedge fence before brining civil action under section 7929 R. S. Missouri, 1929.

July 19, 1939

7-31

FILED
21

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 13th, 1939, which reads as follows:

"I would like your opinion on certain provisions of Section 7929, R. S. of Missouri for 1929, pertaining to the regulation of hedge fences. This section provides that the owner of hedge fences situated along or near the right of way of a public road shall cut these fences down to a height of not more than five feet between May 1st and August 1st of each year. It provides a penalty for any owner failing to comply with this section. The section also provides that any prosecuting attorney who shall fail or refuse to institute suit within thirty days after being notified by any road over-seer, county or state highway engineer that any hedge has not been cut down to the height required shall be removed from office.

"In accordance with provisions of this section I did, on the first of May send out notices to every township board in Bates County suggesting that the township board should order and authorize the township road over-seer to notify all hedge fence owners whose fences bordered a public road to cut the same down by August 1st.

I suggested that these notices be given by the road over-seer on the 28th day of June which would make the thirty days notice before August 1st which I construed the statutes contemplate. There has been a great deal of objection to cutting the hedge fence and most of the farmers take the position that July is their busiest month and that they can't afford to drop harvesting to cut hedge. This law has never been enforced in Bates County to any extent and I expect it is true a majority of the farmers did not know that there was a law requiring them to cut their hedge fences each year. Upon a basis of that I have taken the liberty of telling some of these farmers who came in my office to complain that if they would cut part of their hedge by August 1st I would agree to extend the time to October 1st by which time all of the hedge must be cut. I realize the statute does not give me that right but inasmuch as this is the first time the law has been brought to the attention of the people I felt that justice demand that I allow that extention.

"Another matter has arisen, however, which is not covered by the statute. Some of these townships do not have road over-seers. I would like your opinion as to whether or not a notification by a township board member is in sufficient compliance with the statute in those townships where there is no road over-seer. In other words, just who must notify the land owner to cut the hedge? Also, the township board and the road over-seer refuses to notify the landowners to cut their hedges. Would a complaint filed in my office by a private citizen of a township be sufficient authorization for me to bring a suit under the terms of this section?"

Section 7929 R. S. Missouri, 1929, partially reads as follows:

> "Every person owning a hedge fence situated along or near the right of way of any public road shall between the first days of May and August of each year cut the same down to a height of not more than five feet, and any owner of such fence failing to comply with this section shall forfeit and pay to the capital school fund of the county wherein such fence is situated not less than fifty nor more than five hundred dollars, to be recovered in a civil action in the name of the county upon the relation of the prosecuting attorney, and any judgment of forfeiture obtained shall be a lien upon the real estate of the owner of such fence upon which same is situated, and a special execution shall issue against said real estate and no exemption shall be allowed. * * * * * * * * "

Under this section it does not require any notice from anyone or notice from any road over-seer, county or state highway engineer before the prosecuting attorney can file a civil action in the name of the county, upon the relation of the prosecuting attorney, for the forfeiture of a sum of money not less than fifty nore more than five hundred dollars, for the violation of the hedge fence law. This part of the section is very clear, and is not ambiguous. All that is necessary is for the prosecuting attorney to file the civil action and it does not require notice from any of the above officers set out, or notice to the landowners, before the civil action is filed. According to 59 C. J., page 952, it is well settled that the intention of the legislature should be taken into consideration for the construction of statutes. The above citation reads as follows:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction.

> Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning." citing Cendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Crier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

In taking the whole of section 7929 R. S. Missouri, 1929, it does not require notice to the land owners before a suit is instituted by the prosecuting attorney.

The notice which you refer to in your request only applies to the latter part of section 7929 R. S. Missouri, which reads as follows:

> "Any prosecuting attorney who shall fail or refuse to institute suit as herein provided within thirty days after being notified by any road overseer, county or state highway engineer, that any hedge fence has not been cut down to the height herein required within the time required shall be removed from office by the governor and some other person appointed to fill the vacancy thus created. The cutting of any such fence after the time herein required shall not be a defense to the action herein provided for."

In taking into consideration the intention of the legislature it saw fit to include in section 7929 R. S. Missouri, 1929, a provision that where the prosecuting attorney shall fail or refuse to institute the suit after receiving thirty days' notice from the road overseer, county or state highway engineer, that the hedge fence has not been properly cut down, he is subject to removal by the Governor. This part of section

7929, supra, requiring a notice, does not prevent the prosecuting attorney from instituting a civil suit without notice.

As to the construction of a statute, 59 C. J. at page 961 says:

> "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used," citing Betz v. Columbia Telephone Co., (Appl.)24 S. W. (2d) 224.

Again referring to your request, in which you say the main question upon which you desire an opinion is who must notify the land owners to cut the hedge, as said before, this section does not require a notice to the land owners, but should be considered the same as any other law in which notice is not required.

CONCLUSION

In view of the above authorities, it is the opinion of this department that under section 7929 R. S. Missouri, 1929, it is not necessary to notify the landowners to cut a hedge fence to the proper height, as described in said section, but it is necessary for the road overseer, county or state highway engineer to give notice to the prosecuting

attorney of any hedge fence which has not been cut down to said height, and then if the prosecuting attorney fails to institute a civil action, as provided in section 7929 R. S. Missouri, 1929, then the prosecuting attorney shall be removed from office by the Governor. In other words, unless the prosecuting attorney receives the thirty days' notice as set out in section 7929, supra, he is not subject to removal by the Governor for failure to institute the civil action in regard to the forfeiture for not cutting the hedge fence to the proper height.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TOWNSHIPS: (1) May recover books and records from outgoing trustee by replevin or mandamus; (2) Governor may order audit of township records.

August 3, 1939

8-4

FILED
21

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Walton Bank Building
Butler, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of July 25th, as follows:

"The Township Board of Lone Oak Township here in Bates County has asked me to write you for an opinion on the matter of township law. In April in the township election in Lone Oak Township a new trustee was elected to office. One of the board members was also new and the other member elected had previously served. The trustee turned over to the newly elected trustee some money which he claimed belonged to the township and a new township trustee book which covered only the year of 1938. The old trustee refused at that time, and has refused up to date to turn over to the new trustee the records, warrants, vouchers and other papers and books covering the previous year or years and pertaining to township affairs in Lone Oak Township. It appears that from what has been turned over to the new trustee there is a shortage of $53.00 in the accounts of one of the school districts in Lone Oak Township. The old trustee more or less admits that this is the case and stated that he wanted to repay that as quickly as possible. Up to date he has not done so. It is almost impossible for the township board to conduct the business of the township or to understand the financial condition of the town-

ship unless and until the complete records, warrants, etc. which were held by the old trustee are turned over to the new trustee and township board. Section 12290, Revised Statutes of Missouri for 1929, provides that the expiration of his term of office of township trustee shall turn over to his successor all moneys, books and papers belonging to the office. Section 12284, Revised Statutes of Missouri for 1929, also provides that outgoing officers shall turn over to their successors all papers, etc. belonging to such office.

Under the above statement of facts and in view of the statutes pertaining thereto the Township Board of Lone Oak Township would like an opinion from your office as to how the township board can proceed to force or compel the old trustee to turn over to the new trustee and board all of the books, papers, records, warrants, etc. belonging to the township and which may have accrued to the old trustee by virtue of his office. Also, how can the township board go about securing an audit of the books and record of the township in order to know the amount, if any, of the shortage which it is expected the records will disclose.

I would appreciate an opinion on these matters just as quickly as you can get around to it because until the township knows the proper procedure it is impossible for the township business to be discharged satisfactorily. I might add that I have advised the township board and stated it could institute mandamus proceedings against the old trustee to compel him to deliver the papers but the board feels an opinion from your office would give it more authority to proceed and I am inclined to agree with the board."

Section 12284, R. S. Mo. 1929, provides:

"Whenever the term of office of any township officer shall expire, and others are elected or appointed and qualified as their successors, such successors shall, immediately after

entering upon the duties of their office, demand and receive from his or their predecessors, or their legal representatives, all the books, papers and money under his or their control belonging to such office, and such books, papers and other property shall be delivered upon oath that the same are all the moneys, books, papers and other property under his control belonging to such township; duplicate receipts shall be given the outgoing officer for the same, who shall retain one copy and deliver the other to the township clerk, who shall charge the incoming officer with the value thereof."

Section 12290, R. S. Mo. 1929, provides:

"He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, and shall pay all warrants drawn on him by the board of school directors in his township out of the funds belonging to the district, making the order, and he shall not pay any money out belonging to any other fund than that mentioned in the

> warrants, and he shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received and paid out, to whom and out of what fund, and the amount on hand, and at the expiration of his term of office he shall turn over to his successor all moneys, books and papers belonging to the office, and take duplicate receipts for the same, one to be filed with the township clerk, the other to be retained by himself."

Under the above sections, township officers, including the trustee and ex officio treasurer, must, at the expiration of their terms of office, turn over to their successors all books, papers and moneys belonging to the office.

I.

Your first question is how the township board can proceed to compel the old trustee to turn over to the new trustee and board all the books, papers, records, warrants, etc. belonging to the township and which may have accrued to the old trustee by virtue of his office.

We are assuming for the purpose of this opinion that the newly elected trustee is properly qualified for office.

46 C. J., Section 216, p. 1009, declares that:

> "It is the duty of an outgoing officer to surrender to the proper governmental officer or agent the records and other paraphernalia of the office, and such duty may be enforced by mandamus, or replevin may lie."

In the case of Kirkwood v. Allen, 120 S. W. 641, 138 Mo. App. 478, defendant, the duly elected and qualified collector of revenue of the City of Kirkwood, resigned and his resignation was accepted by the mayor, who thereafter appointed his successor until the next election. After the successor had qualified

the city made demand on defendant for the books, papers, etc., but the latter refused to surrender them, wherein suit in replevin was brought for possession thereof. Judgment was entered for the city, and the Missouri Court of Appeals, in affirming the judgment, said:

> "Having no substantial foundation and no possible justification for retaining the public documents, defendant insisted on putting the city and its authorities to the cost and trouble and inconveniences of this suit."

And in the case of State ex rel. Cannon v. May, 106 Mo. 488, l. c. 509, the court, in holding that where the title to office is uncontested mandamus will lie to compel the delivery of books and papers belonging to the office, said:

> "It is, however, also well settled that where the relator holds an uncontested title to a public office, or his title has been adjudicated and finally established by a competent tribunal, and he is in possession of the office, that mandamus will lie to compel the delivery to him of the books and papers belonging to his office by his predecessor in office, who has refused his demand therefor. State ex rel. v. Trent, 58 Mo. 571."

From the foregoing, we are of the opinion that the township board of Lone Oak Township in Bates County may resort to a suit in replevin, or the newly elected trustee may bring a suit in mandamus, since title to office is uncontested, to compel the old trustee to turn over to the new trustee and board all of the books, papers, records, warrants, etc., belonging to the township and which accrues to the old trustee by virtue of his office.

II.

Your second question is how the township board can go about securing an audit of the books and records of the township.

We find no statute providing for audits of the books and records of the township other than the authority conferred by the legislature on the governor when, in his judgment, such audit is for the public interest of the state.

Laws of Missouri, 1933, Sections 1 and 2, page 162, provides as follows:

> "The Governor may at any time, when in his judgment the public interest of the state will be conserved, select competent auditors or accountants to audit the accounts of any department, office, commission, board, bureau, institution, or any subdivision of the state; also road districts, school districts, townships, municipalities and counties receiving for or from the state any money.
>
> It shall be the duty of every public official, agent or employee of the state, and every official and employee of any county, muncipality, township, school district or road district to permit such auditor or accountant to have access to the accounts, records, documents, vouchers and papers in the care or custody or under the control of any public official, or any employee of the state or any subdivision thereof upon any subject relating to the condition, management and expenses of the office, department, board, bureau, commission or institution being audited."

From the foregoing, we are of the opinion that the township can obtain an audit of the books by convincing the governor that the public interest will be conserved by ordering an audit of said township.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TOWNSHIP COLLECTORS: BONDS: Township collector may give personal or surety bond. Surety bond may be paid for by township if consent and approval is given by governing body.

September 22, 1939 9/23

FILED 21

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "I have been asked for an opinion on the matter of a township furnishing bonds for township collectors. Is there authority, statutory or otherwise, for requesting, allowing or permitting a township to furnish or pay for the bond required of township collectors.
>
> "Several township collectors have asked me to write your office for an opinion on this question. These collectors state that formerly a personal bond was accepted by township boards, but that now a surety bond is required, the cost of which is around $10.00. This is the main objection that is being made by township collectors."

Laws of Missouri, 1937, page 190, Section 1, provides as follows:

> "Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any

> deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town, village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

It will be noticed under this section that "he may elect, with the consent and approval of the governing body." In other words, it is not mandatory upon the township collector to obtain a surety bond, but he may furnish a personal bond.

Section 12279, Laws of Missouri, Extra Session, 1933-34, page 167, provides in part as follows:

> "* * * * The township collector shall before he receives the tax books, give bond and security to the state, to the satisfaction of the county court, in

> a sum equal to one half the largest, amount collected during any one year preceding his election or appointment, including school taxes; such bond shall be executed in duplicate; one part thereof shall be deposited and recorded in the office of the clerk of the county court, and the other part shall be transmitted by the clerk to the state auditor. The conditions of such bond shall be that he, the said collector, will faithfully and punctually collect and pay over all state, county, township and other revenue, including school taxes, that may become due and collectible during the period for which such collector shall be elected or appointed; and that he will in all things faithfully perform all the duties of the office of township-collector according to law. Provided the county court or township board shall annually examine the collectors or trustees bond as to form and sufficiency of surety and in case of any doubt shall require additional security."

This department, on April 4, 1939, rendered an opinion to Honorable W. J. Melton, holding that an officer could give a personal or surety bond, and if he elected to give a surety bond, that the public body protected by such bond could pay the premium thereon provided the governing body of such public body consented to and approved such payment.

The question presented by your request is: Are township officers included within the scope of the statute above permitting the public body to pay the premium upon a surety bond? The statute specifically includes, "any officer of any district or other subdivision of any county," is then a township a subdivision of a county.

In Harshman v. Bates County, 92 U. S. 569, 23 L. Ed.

747, the Supreme Court of the United States said:

> "* * * A township is a different thing from a town in the organic law of Missouri; the latter being an incorporated municipality, the former only a geographical subdivision of a county. * * * * * *"

"Township" is defined in 63 C. J. 99, as:

> "* * the term employed * * * to describe a subdivision of the county, created by the state legislature as a governmental agency and sometimes vested with certain powers of local government, * * * "

In view of the above definitions, we believe that a township collector is an officer of a subdivision of a county.

CONCLUSION.

It is, therefore, the opinion of this department that the premium of the surety bond of township collectors may, with the consent and approval of the governing body of such township, be paid by the township.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

LOTTERIES: Gift auction at which merchandise certificates are bid not a gift enterprise or lottery.

November 15, 1939

11-16

FILED
21

Mr. Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "Twenty merchants in Butler are buying fake paper money that varies in denominations. With each purchase by a customer, an amount in this fake money equal to the amount of the purchase is given to the customer. In other words, a 10¢ purchase by a customer entitles him to 10¢ worth of the fake money. Every two weeks these merchants will have what they call a fake money auction. At this auction, each merchant will give two gifts from his store. An auctioneer will be employed and he will auction off all of these gifts to the highest bidder who will, of course, bid with the fake money that he has received from his purchases at the stores.
>
> "I, personally, am a little doubtful about this scheme but I do not believe that it will constitute a lottery, mainly because there is no direct element of chance present in the scheme. The inducement to purchase at the stores carrying this fake money is, of course, present,

> but the auctioning off of the articles to the highest bidder who must use the fake money in payment does not seem to me to constitute a valid element of chance. If a party has not secured enough of the money by the time the first auction is held, and is thus unable to purchase anything at the auction, he can, of course, retain what money he has, add to it, and bid at the next auction. Whether or not a customer receives one of the gifts does not depend upon any lucky ticket or chance but merely upon the amount of money he may have and that will depend upon the amount of purchases he makes at these stores."

Section 10, Article XIV of the Constitution of Missouri provides:

> "The General Assembly shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery, in this State; and all acts or parts of acts heretofore passed by the Legislature of this State, authorizing a lottery or lotteries, and all acts amendatory thereof or supplemental thereto, are hereby avoided."

Section 4314, R. S. Missouri 1929 (Mo. St. Ann. Section 4314, page 3002) provides:

> "If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or

> cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It will be noted that both the Constitution and statute prohibit any scheme in the nature of a lottery; and it has been held that within their meaning and intent a lottery includes every scheme or device whereby anything of value is for a consideration allotted by chance. State v. Emerson, 318 Mo. 633, 1. S. W. (2d) 109.

The word has no technical meaning in our law. Lotteries are judicially denounced as especially vicious because by their very nature they are public and infect the whole community. They prey upon the credulity of the unwary and widely arouse and appeal to the gambling instinct. State ex rel. Home Planners v. Hughes, 299 Mo. 529, 253 S. W. 229; State v. Becker, 248 Mo. 555, 154 S. W. 769.

The elements of a lottery are: (1) Consideration; (2) prize; (3) chance. State ex Inf. McKittrick, Attorney General v. Globe-Democrat Pub. Co., 110 S. W. (2d) 705. Your request concedes that the first two of these are present in the scheme here involved, the sole question being whether the third element--chance, is present.

A "gift enterprise" is a scheme under which goods are sold for their market value but by way of inducement each purchaser is given a chance to win a present or prize. Russell v. Equitable Loan, etc., 129 Ga. 154, 58 S. E. 881,

Thomas, Nonmailable Matter, page 85. However, as noted in 38 C. J. 297, "It is obvious that where a gift enterprise lacks the essential element of chance * * * * it is not a lottery. * * * * "

We find no cases in Missouri in which this exact scheme, or one similar thereto, has been before the courts for determination as to whether or not it is lottery. Foreign jurisdictions are almost uniform in holding that a scheme by which the award depends upon votes is not a lottery because the absence of the element of chance.

In Strand Hardware Co. et al. v. Moose et al., 224 N. W. 158, the scheme, as related by the court, was as follows:

> "* * * The purchaser of merchandise received votes proportionate to the amount of his purchase or bought coupon books and might cast them for any person who had entered as a contestant. Payments on overdue accounts entitled the one paying to votes on a specified basis. * * * * * * * * * * "

The person receiving the highest number of votes was declared the winner. The court said, l. c. 159:

> "Vote contests or popularity contests similar to the one before us usually have not been held lotteries within like statutes. The reason assigned is the absence of the element of chance."

In State v. Lindsay, 2 Atl. 201, which was decided by the Supreme Court of Vermont in November, 1938, the scheme in question was as follows, l. c. 202:

> "The campaign consisted of giving tickets or ballots to the several merchants and business men engaged therein, which they in turn gave to customers with a number of votes, so-called, written thereon, this

> number varying in proportion to the amount purchased at the usual retail price, ten votes being given for each one cent's worth of merchandise so purchased. The customer in turn wrote his name, or the name of any person not engaged in sponsoring or promoting the campaign, on the ballot and deposited the same in a box kept at each store for that purpose, the person whose name appeared on the ballot becoming thereby entitled to the indicated number of votes.
>
> "At intervals the ballots were collected from the several boxes by the respondent or his agents and taken to the contest headquarters where they were counted, the totals for each contestant as disclosed by such count being later posted at the stores participating in the contest. At the close of the contest the person who had received the greatest number of votes was to receive the first prize which was a Plymouth automobile. Those having the second, third and fourth largest number of votes respectively were also to receive prizes."

The court said:

> "A scheme by which a merchant or association, on selling merchandise at regular prices, issues to purchasers ballots entitling them to express their choice a certain number of times, according to the price of articles bought, in favor of any person competing for prizes to be given to the persons receiving or holding the greatest number of votes, is not a 'lottery.'"

Other jurisdictions which have held schemes similar to the ones described above and very much like

the one in question not to be within the inhibition of the lottery statute, are: Quatsoe v. Eggleston, 42 Or. 315, 71 P. 66; Commonwealth v. Jenkins, 159 Ky. 80, 166 S. W. 794, Brenard Mfg. Co. v. Jessup and Barrett Co., 186 Iowa 872, 173 N. W. 101; Dion v. St. John Baptiste Soc., 82 Me. 319, 19 A. 825; Whitman v. Fournier, 233 Mass. 154, 125 N. E. 303; Conqueror Trust Co. v. Simmon, 62 Okla. 252, 162 P. 1098; Millsaps v. Urban, 116 Ark. 90, 171 S. W. 1198.

CONCLUSION.

In view of the above authorities it is, therefore, the opinion of this department that a scheme whereby a customer of a merchant is given a ten cent certificate with every ten cent purchase which certificate can be used to bid upon merchandise at an auction every two weeks is not a lottery or gift enterprise within the meaning of Article XIV, Section 10 of the Constitution and Section 4314, R. S. Missouri 1929, because the element of chance is not present.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

TAXATION AND REVENUE: Uncollected taxes belonging to a district should go into the special road district to which such unorganized territory is attached.
ROAD DISTRICTS:

December 20, 1939

12-20

FILED
21

Honorable Donald B. Dawson
Prosecuting Attorney
Bates County
Butler, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question as follows:

"I desire your opinion on a matter pertaining to the levy and collection of back taxes by a special road district in a township.

"Section 8180 Revised Statutes for 1929 sets up that when a special road district is organized in a township it shall be entitled to receive taxes levied against property located within the special road district. Apparently under this section there is no doubt but what all taxes which are assessed and become due and payable after the organization of the special road district are payable to the road district, however, I desire your opinion as to the payment of taxes which were assessed and levied prior to the organization of the special road district but which are not paid when due, become delinquent and are paid after the organization of the road district.

"Under the section cited above I

am confident that it was the intention of the Legislature to provide that all taxes paid after the organization of the district are payable to the road district funds, regardless of when assessed, but that is a question that you must decide."

Section 8180, R. S. Missouri 1929, deals with special road districts in counties under township organization. It provides as follows:

"The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts and parts of district formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. The township boards shall also cause the township treasurer to pay over to the treasurer of the special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the

> power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

It seems by this section that it was the intention of the lawmakers that the newly organized territory shall be entitled to all of the assets of the old district. The commissioners of the new district have exclusive jurisdiction over the old district together with the new as reorganized. There does not seem to be any question but that the newly organized district would be entitled to receive the taxes levied against the property located within the special road district, which would include the territory which was added to the special road district.

In the case of Abler v. School District, 124 S. W. 564, the Court of Appeals said at l. c. 566:

> "The only remaining question is whether the merger of the two districts annulled the execution of the contract sued on, leaving the district liable only for the value of services already performed under the contract at the time of the merger.
>
> "It is said: 'Where performance

of a contract is dependent upon the continued existence of a person or thing, and such continued existence was assumed as the basis of the agreement, the death of the person or the destruction of the thing puts an end to the obligation.' (7A. and E. Ency. of Law, 116.) And so we find the law in Mumma v. Potomac Co., 8 Peters 281; Read v. Frankfort Bank, 23 Me. 318; People v. Glove Mutual Insurance Co., 91 N. Y. 174; and other cases. We have no doubt about the correctness of the principle and cannot see how it could be otherwise, but there is much room for difference of opinion in its application.

"We do not think the rule has any application to this case. The question has been decided by the Supreme Court in Thompson v. Abbott, 61 Mo. 176. It is there held that where one corporation goes entirely out of existence by being annexed to or merged in another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist, the subsisting corporation will be entitled to all the property and answerable for all the liabilities.' This case was where under the statute a township school district became merged in an adjoining town for school purposes and the board of education of the municipality took possession and control of the school property of the annexed district."

Also, in Gray v. School Dist. No. 73 of Clay County, et al., 28 S. W. (2d) 683, the Kansas City Court

of Appeals said, page 686:

> "* * * * * Defendants' school districts were organized not only from the territory in the consolidated district but with some unorganized adjacent school territory never in the consolidated district. However, this circumstance does not exonerate defendants from liability for the obligations of the consolidated district properly entered into. * * * * "

Under said Section 8180 it seems that it was the intention of the lawmakers that when the special road district is organized that the district take over all the assets of the old territory and assume all obligations. We think that the delinquent taxes of the old territory would be considered as assets of that territory.

In the case of State ex rel. Road District v. Burton, 283 Mo. 41, the Supreme Court held that road funds which are collected in special road districts must be turned over to the district in which they are collected, therefore, the delinquent taxes collected in the territory which is incorporated in the newly organized district would come along with other properties belonging to that territory.

CONCLUSION.

From the foregoing it is the opinion of this department that delinquent taxes on property which is incorporated in a special road district should, when collected, be paid into the treasury of the newly organized special road district.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION: Merchants who do not file bond and do not obtain a merchant's license may be subject to forfeiture action under Section 10076, R. S. Missouri, 1929.

December 22nd, 1939

FILED
21

Hon. George O. Dalton
Collector of Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 16, 1939, which reads as follows:

"On December 31, 1939, the time will have expired for Merchants and manufacturers to pay their ad valorem tax. I was unable to receive a bond or the cash payment of their ad valorem tax before it was due from some 75 merchants.

"I am at a loss to know how I will proceed to collect this tax. Under the law it is not supposed to go delinquent, and I am to file suit against the principal and sureties on the bond, but the ones I was unable to get a bond from, I would like to know how to proceed, and what penalty I can charge the merchant, if any, and what attorney fee I would be permitted to charge the merchant, and turn it over to the attorney to file suit?"

Laws of Missouri, 1935, page 407, Section 10078, reads as follows:

> "Any person, corporation or copartnership of persons applying for a license to vend merchandise shall, before he or they shall receive such license, execute a bond to the state, with good and sufficient surety, conditioned that he will, on or before the first day of January next following, pay to the collector of the proper county the tax due upon such license; which bond shall be approved by the collector, and his approval indorsed thereon."

Section 10080, R. S. Missouri, 1929, shows the form of bond that is required before a license can be issued to a merchant.

Section 10076, R. S. Missouri, 1929, reads as follows:

> "No person, corporation or copartnership of persons shall deal as a merchant without a license first obtained according to law; and every person so offending shall forfeit to the state not less than fifty nor more than five thousand dollars for every such offense, to be recovered by indictment or information."

Under the above section a penalty may be recovered by indictment or information which shall be filed by the prosecuting attorney of the county. This section does not provide for an attorney's fee, but only for a forfeiture for the state.

Under Section 10084, R. S. Missouri, 1929, the clerk is directed to issue a license form therein contained, and under Section 10085, R. S. Missouri, 1929, is directed that the clerk shall deliver to the collector of his county all licenses so issued and charge him therewith in a book to be kept for that purpose.

Under Section 10086, R. S. Missouri, 1929, the Collector is authorized to receive the sum of fifty cents (50¢) for issuing the license and twenty-five cents (25¢) for issuing bond and statement to be retained by the Collector as his fee.

Under Section 10087, R. S. Missouri, 1929, it provides for the forfeiture of the bond where the merchant has not paid the amount of taxes. It also provides for the forfeiture of the bond.

Under Section 10088, R. S. Missouri, 1929, it provided that after the bond has been forfeited, a suit shall be brought and judgment shall be rendered against the merchants for three times the amount of revenue which shall be found to be due for the year including the costs.

According to your request you state that you were unable to receive a bond or a cash payment of the ad valorem tax before it was due. I am assuming that the 75 merchants did not receive the license as set out in Section 10084, supra. I make this assumption for the reason that the collector could not deliver such a license without first having a bond on record in his office.

Under Section 10079, R. S. Missouri, 1929, a Collector who shall fail to require a bond before issuing a license shall be deemed guilty of a misdemeanor.

CONCLUSION

In view of the above authorities it is the opinion of this Department that since no bond has been filed in the office of the Collector, the only suit that can be filed is a proceeding by way of indictment and information under Section 10076, supra, which provides for a forfeiture from any person, corporation or copartnership of persons who shall deal as a merchant without a license first obtained according to law. The forfeiture is not less than Fifty ($50.00) Dollars, nor more than Five Thousand ($5,000.00) Dollars for every such offense.

It is further the opinion of this Department that since the 75 merchants did not file a bond according to law, the only procedure that can be followed by the Collector of Marion County is the procedure set out in Section 10076, R. S. Missouri, 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RV

I. County Collectors: Laws of Missouri 1937, page 502, impinge upon Section 12184 R. S. Mo. 1929 and repeals the same by implication as to the irreconciliable features.

II. 1937 Laws, supra, do not impinge upon Section 9885, Laws of Mo. 1935, page 408.

March 22, 1939.

H-5

FILED
22

Honorable Jack H. Denny
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Mr. Denny:

We desire to acknowledge your request for an opinion on March 3, 1939, which is as follows:

> "Section 1, page 502 R. S. Mo. 1937 provides that notwithstanding any provisions of law of this state, the public funds of every County, Township, City, town, village, school district, etc. shall secure their funds by deposit of securities. This section does not specifically name County Collector funds.
>
> "Does this statute repeal by implication the authority granted to governing bodies, such as the County Court exercises in designating depository for County Treasurer's funds and for County Collector's funds--specifically Sections 12184 R. S. 1929, and 9885, as amended?
>
> "My idea is that Section 1, page 502, Session Acts, 1937 simply relates to the class of securities required to secure public deposits, and does not take away the authority of the County Court to designate a depository for the Collector.

"It has been suggested to me that since this statute does not specifically mention County Collector's funds, that the Collector is an insurer of his deposits, although the County Court has designated his depository.

"It is my opinion that when the Collector's depository is named by the County Court and his funds are placed in the County Collector's fund as provided in Section 9885, Session Acts, 1935, page 408, his funds become part of the public funds of the County, and are therefore protected by the securities in any event.

"May I have your opinion on these questions?"

A depository of county funds was formerly selected under the provisions of Section 12184 R. S. Mo. 1929, which is as follows:

"It shall be the duty of the county court of each county in this state, at the May term thereof, in the year 1909, and every two years thereafter, to receive proposals from banking corporations, associations or individual bankers in such county as may desire to be selected as the depositaries of the funds of said county. For the purpose of letting such funds such county court shall, by order of record, divide said funds into not less than two nor more than ten equal parts, and the bids herein provided for may be for one or more of such parts. Notice that such bids will be received shall be published by the clerk of said court twenty days before the commencement of said term in some newspaper published in said county, and

> if no newspaper be published therein then such notice shall be published at the door of the courthouse of said county: Provided, that in counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are herein conferred upon county courts with reference to county funds at the same time and manner, except that township funds shall not be divided, but let as an entirety: Provided, also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting. (R. S. 1919, Section 9582.)"

The General Assembly of 1937 materially changed the depository laws of the State of Missouri with reference to the payment of interest and the securities to be given by the banking institutions selected as depositories, to safeguard and protect the public funds of the state, its various institutions and the political sub-divisions thereof.

Laws of Missouri of 1937, page 502, Section 1 thereof, provides, in part, as follows:

> "Notwithstanding any provisions of law of this state or of any political subdivision thereof, the public funds of every county, township, city, town, village, school district of every character, road district, drainage or levee district, state hospital, Missouri State School, Missouri School for the Deaf, Missouri School for the Blind, Missouri Training School for Boys, Industrial Home for Girls, Con-

federate Soldiers' Home, Federal Soldiers' Home, Missouri State Sanatorium, earnings of Missouri Penitentiary, State University, Missouri State Teachers' Colleges, Lincoln University, which shall now or hereafter be deposited in any banking institution acting as a legal depository of such funds under the provisions of the Statutes of Missouri requiring the letting and deposit of the same and the furnishing of security therefor, shall be secured by the said legal depository making deposit, as hereinafter provided, of securities of the same character as are required by Section 11469 and all amendments thereto for the security of funds deposited by the State Treasurer under the provisions of Article 1 and 2 of Chapter 72 of the Revised Statutes of Missouri 1929, and all amendments thereto. The said securities shall, at the option of the depositary banking institution, be delivered either to the fiscal officer or the governing body of the municipal corporation or other depositor of said funds, or by depositing such securities with such disinterested banking institution or safe depository as trustee as may be satisfactory to both parties to the depositary agreement. The rights and duties of the several parties to the depositary contract shall be the same as those of the state and the depositary banking institution respectively under Section 11469 of Article 2 of Chapter 72 of the Revised Statutes of Missouri 1929 and all amendments thereto, * * * * *". (Underscoring ours)

Section 3, 1937 Laws, supra, is, in part, as follows:

" * * * the award * * * of such funds shall be made in each case, without bids and without requiring the payment

> of any bonus or interest, by the authority or authorities which are by statute empowered to make awards of such funds upon bids." (Underscoring ours)

Section 4, 1937 Laws, supra, is, in part, as follows:

> " * * * * in the event that the selected depository or depositories within such territory shall fail to accept such award or awards of such public funds as may be made, then the authority or authorities which are by law empowered to make such selection of depositories and awards of public funds thereto, are authorized and empowered, etc." (Underscoring ours)

The subject matter of the above statutes is in conflict and said statutes should be construed under the rule stated in State ex rel. Mo. Pacific Ry. vs. Public Service Comm. 204 S. W. 395, 275 Mo. 60, 65, which is as follows:

> " * * * The law is that, if two statutes deal with the same subject-matter and are inconsistent with each other, so that both cannot be operative as to such subject-matter, the latter act will be regarded as a substitute for the former one and will operate as a repeal, although it contains no express repealing clause. A requirement that a carrier shall furnish track scales is a regulation in regard to weighing cars and the freight thereon. * * * "

In the case of Gasconade County vs. Gordon, 145 S. W. 1160, 241 Mo. 569, 583, the court stated the following rule of Construction as to two acts of the legislature:

> "If they are absolutely inconsistent and repugnant, then of course the latter prevails and the former falls."

But a new statute is amendatory, and repeals an old one by implication only to the extent of the irreconcilable repugnancy between the two. State ex rel. Holliday vs. Rinke, 121 S. W. 159.

The county court, in Section 12184, supra, is the proper body to designate a depository of the funds of such county but, in so doing, must follow the procedure provided in the Laws of Missouri 1937, page 502.

CONCLUSION

Therefore, it is the opinion of this department that said Law of Missouri 1937, page 502, is inconsistent with and repugnant to Section 12184, supra, and the Law of 1937, supra, being last, it prevails, but only to the extent of such irreconcilable repugnancy and the county court not having been eliminated as the proper body to select such depository, it is the proper body to make such selection but under the provisions of the 1937 Law, supra.

II.

Section 9885, Laws of 1935, page 408, relating to bond of county collectors and providing for daily deposits in counties having a population of less than 75,000 by order of county court, and bonding of county depositories, is as follows:

> "Every collector of the revenue in the various counties in this state,

and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all collections of money in such depository or depositories as may have been selected by such County Court in accordance with the provisions of Sections 12184, 12185, 12186 and 12187 of the Revised Statutes of the State of Missouri 1929, to the credit of a fund to be known as 'County Collector's Fund,' and such depository or depositories shall be bound to account for the moneys in such 'County

> collector's Fund' in the same manner as the public funds of every kind and description going into the hands of the county treasurer and under the same depository bond as required to be given under section 12187 Revised Statutes of Missouri 1929; provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further the collector shall not check on such 'County Collector's Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories. (Underscoring ours)

The condition of the collector's bond in the above section is exactly the same as in the same section of the Laws of 1933 and Revised Statutes of 1929. The repeal of the 1929 Statute, supra, and the 1933 Law, supra, was obviously not made to vary the liability on the collector's bond.

It is true that Section 9885, supra, refers to Sections 12184, 12185, 12186 and 12187 Revised Statutes of Missouri 1929, but such reference is merely as to the selection by the County Court of a depository under the

provisions of 1929 Revised Statutes and such sections were repealed by implication by the Depository Act of 1937, supra.

Section 9885, supra, containing the provision of the condition of a bond of a collector "that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter and that he will in all things faithfully perform all the duties of the office of collector according to law" is not in conflict with any part of the Session Act of 1937, page 502, supra. There is no inconsistency or repugnance apparent. Therefore, the legislature in the 1937 law made no attempt to vary the condition of the collector's bond.

CONCLUSION

Therefore, it is the opinion of this department that the Depository Law of Missouri, 1937 Session Acts at page 502, does not impinge upon Section 9885, Laws of Missouri 1935 at page 408, nor affect the condition of the collector's bond stated therein.

The question as to whether the County Collector is relieved of liability where he has deposited his funds in a depository selected by the county court, under and by virtue of Section 9885, Laws of Missouri 1933, page 464, is passed on in an opinion from this department to Mr. P. C. Breit, Prosecuting Attorney of Andrew County on February 13, 1935.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

SEWER DISTRICTS: (1) Not necessary to secure permit from bd. of plumbing supervisors before connecting sewer in incorporated sewer district in incorporated town where town has satisfactory plumbing code. (2) Necessary to secure permit from board in unincorporated area. (3) Sewer district may ~~not~~ require its own permit and charge fees; trustees not liable where drain layer acting independently excavates public road without excavation permit.

May 9, 1939

FILED
22

6-8

Mr. C. W. Detjen
Attorney at Law
722 Chestnut
St. Louis, Missouri

Dear Sir:

We wish to acknowledge your recent request for an opinion wherein you state as follows:

"As County Counselor of St. Louis County I have been requested to secure an opinion from you concerning the jurisdiction of the County Court as a Board of plumbing inspectors and supervisors over sewer connections in sewer districts organized under the provisions of the act of the 1933-34 session, page 119.

In St. Louis County a drain layer or plumber, desiring to connect a sewer, is required to take out a permit for which a fee is charged, under certain established rules and regulations of the plumbing board, authorized by Secs. 14864-5 R. S. 1929. Before he can secure this permit he is required to secure an excavation permit from the County Clerk as provided in Chap. 42, Art. 7, R. S. 1929.

Certain newly organized Sewer Districts created under the 1933-34 acts have refused to recognize sewer connection permits from the board of plumbing supervisors and inspectors, have insisted that permits be obtained from the Trustees of the District be-

fore permitting connections to their sewers and have issued connection permits to drain layers having no permit from the board of plumbing supervisors. Furthermore, they have permitted excavations in public roads without requiring the production of a permit from the County Clerk. Some of these districts are in rural areas, others in incorporated towns, and some partly in rural and partly in incorporated areas.

The following questions have arisen:

1. Is it necessary to secure a permit from the board of plumbing supervisors and inspectors before connecting a sewer in an incorporated sewer district:

   a. when the sewer is in an incorporated town
   b. when the sewer is in unincorporated area

2. If so, has the sewer district the right to require its own permit and charge a fee for the same connection?

3. Are the trustees of a sewer district who permit a drain layer to excavate a public road for a sewer connection, without requiring the production of an excavation permit, subject to prosecution under Sec. 8005 R. S. 1929?"

Section 14853 of Laws of Missouri 1931 p. 287 provides for plumbing inspectors in counties containing 200,000 inhabitants or more and less than 400,000, as follows:

"In all counties in this state, which now contain or may hereafter contain a popu-

> lation of 200,000 inhabitants or more, and less than 400,000 inhabitants, according to the last federal decennial census, all plumbing and drains shall be hereafter installed in accordance with the standard inspections, requirements and provisions hereinafter set out, and no person shall now or hereafter engage or work at the business of plumbing in said counties except he, she, it or they first receive a certificate in accordance with the provisions of this law or a certificate authorizing such person or persons, firm, corporation or association to do plumbing in this state."

Thereafter follows a number of sections, 14854 to 14871, inclusive, R. S. Mo. 1929, which set out in detail the specifications and general regulations for various kinds of plumbing and drains.

Section 14864 R. S. Mo. 1929 creates a board of plumbing inspectors or supervisors with various duties and authority and reads in part as follows:

> "(a) The county court of every county herein described are created and made a board of plumbing inspectors and supervisors. There shall be appointed by said board of plumbing inspectors and supervisors such inspectors as shall be necessary, compensation of such inspectors to be fixed by said board, such inspectors in each case to be a duly licensed plumber. It shall be the duty of said board of plumbing inspectors and supervisors to inspect all plumbing, to grant licenses for the installation thereof, and certificates of inspection and to report all violations of the provisions of this law to the prosecuting attorney of the several counties.
>
> (b) The said board of plumbing inspectors

and supervisors shall have the authority to make such rules and regulations, not inconsistent with the provisions hereof, for the construction, installation and inspection of plumbing as said board shall deem necessary for the preservation and improvement of the public health. It shall be the duty of the prosecuting attorney of the several counties in the state to prosecute all violations thereof.

* *

(e) Upon payment of the fees aforesaid and upon completion of the tests and inspections herein provided, there shall be issued by the board of plumbing inspectors and supervisors a certificate of inspection, which certificate shall be prima facie evidence that said plumbing or drains conform to the requirements of this law. (Laws 1921, p. 558, Sec. 12)"

Section 14865 R. S. Mo. 1929 sets out a number of general provisions in part as follows:

"No person, company or corporation shall be permitted to install any plumbing in any building in the county, run water into any house or premises or a sewer from any building, lot or premises without first having been duly licensed by proper authority to do such work.

* *

(c) Where a water service or sewer connections are to be run into a premise only and no plumbing is installed in the building supplied or drained by such service or sewer, a permit shall first be obtained to do such work; a fee of $1.50 shall be charged for such permit."

It is therefore provided that under Section 14865, supra, no person, firm or corporation is permitted to install any plumbing or make necessary sewer connections without being duly licensed and a permit obtained.

Laws of Missouri, 1931, Section 14866, page 288, provides for the appointment by the county court of a board of plumbing inspectors consisting of a master plumber, a journeyman plumber and one person who possesses the qualifications required by law for a county health officer.

Section 14867, R. S. Mo. 1929, provides for the holding of examinations by the board of plumbing inspectors to test applicants as to their practical knowledge of plumbing, sewerage, house drainage and ventilation, and if the board is satisfied of the competency of such applicants, a certificate is issued to them upon the payment of a fee.

Section 14871, R. S. Mo. 1929 declares when additional regulations are permissible, as follows:

> "Nothing in this law shall be construed to prevent or prohibit any incorporated city, town or village from making like, further and additional regulations not in conflict with the provisions of this law. In the event that the ordinances or laws of said incorporated cities, towns or villages should conflict with this law, then this law shall be supreme and shall be the rule of construction on all matters pertaining to any ordinances of said cities, towns or villages."

A complete and comprehensive scheme is thus set up for regulating the practice of plumbing in counties of 200,000 inhabitants or more and less than 400,000.

The 57th General Assembly, at its extra session, Laws of Mo. 1933-1934, Sections 1-41, inclusive, pages 119-136, enacted a law providing for the establishment of sewer districts in counties of 150,000 to 400,000 inhabitants.

You state that certain newly organized sewer districts created under the above act have refused to recognize sewer connection permits from the board of plumbing supervisors and inspectors insisting that permits be obtained from trustees of the district before permitting connections to their sewers and have issued connection permits to drainlayers having no permit from the board of plumbing supervisors.

Such condition has evidently been brought about by reason of Section 29 of the above act, which provides that:

> "The sewer district through its Board of Trustees may promulgate reasonable rules and regulations concerning the construction, maintenance and use of the sewer system or systems constructed and/or maintained by the district."

Nowhere throughout the above act do we find a complete and comprehensive scheme for the regulation of plumbing as provided for under Sections 14853 to 14871, supra. It is merely that the Board of Trustees may promulgate reasonable rules and regulations. Is it to be said that the latter act, being a special one, must prevail over the general act, and that therefore the Legislature which created said sewer districts for the preservation of public health were willing to permit the trustees who were not necessarily chosen for their knowledge about sewer matters to supersede the authority of men trained and particularly qualified for the work.

There are no cases which shed any light on the question presented. There have been two cases which construe the sewer district law of 1934, State ex rel Webster Groves vs. Smith, 87 S. W. (2nd) 147 and State ex rel Webster Groves vs. Smith, 115 S. W. (2nd) 816. However, neither of these cases touch on the matters before us for consideration. We must, therefore, necessarily resort to statutory construction, bearing in mind the cardinal principle that in construing statutes they should, if possible, be construed with a view of effectuating the legislative purpose. State ex rel Smith 67 S. W. (2nd) 50, l.c. 56.

At this point, we find ourselves presented with the following situation as it relates to plumbing regulation and inspection. The 1934 act dealing with the subject in general and comprehensive terms (Section 29 "reasonable rules and regulations") and the sections as they appear in the Revised Statutes of Missouri 1929, and as amended in 1931 (Sections 14854 to 14871) dealing with the same subject in a more minute and definite manner. The court in the case of Bishop vs. Musik Plating Works 3 S. W. (2nd) 256, l.c. 259, in holding that where such a situation presents itself the two should be read together and harmonized, if possible, said:

> "When one statute deals with a subject in general and comprehensive terms, and another deals with a part of the same subject in a more minute and definite manner, the two should be read together, and harmonized, if possible. * * * * There is no ambiguity in either statute, and no repugnancy between them; and no reason appears why the plain provisions of section * * *, should be rejected because of the equally plain provisions of section * * * * * * * * ."

We have carefully read both acts and find no repugnancy between them. They lend themselves readily to harmony when read together, and therefore we will take up your respective questions.

(1) Is it necessary to secure a permit from the board of plumbing supervisors and inspectors before connecting a sewer in an incorporated sewer district when the sewer is in an incorporated town?

Section 14853, supra, provides that:

> " * * all plumbing and drains shall be hereafter installed in accordance with the standard inspections, requirements and provisions hereinafter set out."

Section 14865f, supra, provides that:

> "The plumbing laws of all incorporated places within the county may have a plumbing code equal to this code. Where no such laws exist, all plumbing in such towns shall be duly inspected by the county inspector."

We anticipate that the argument will be advanced that a

sewer district is included within the meaning of "incorporated places", and therefore that the plumbing in the sewer district is not subject to inspection by the county inspector. This might be true were it not for the words "in such towns", which indicates that it was towns that was meant by incorporated places and not sewer districts.

We are, therefore, of the opinion that it is not necessary to secure a permit from the board of plumbing supervisors and inspectors before connecting a sewer in an incorporated sewer district in an incorporated town, where said town has a plumbing code equal to that set up by the board of plumbing supervisors and inspectors.

(2) When the sewer is in an unincorporated area?

We are of the opinion that it is necessary to secure a permit from the board of plumbing supervisors and inspectors before connecting a sewer in an incorporated sewer district in an unincorporated area.

II. (a)

Your second question is whether the sewer district has the right to require its own permit and charge a fee for the same connection.

Laws of Mo. 1933-34, Extra Session, Section 29, p. 132, provides that:

> "The sewer district through its Board of Trustees may promulgate reasonable rules and regulations concerning the construction, maintenance and use of the sewer system or systems constructed and/or maintained by the district."

Laws of Mo. 1933-34, Extra Session, Section 30, p. 132, provides in part that:

> "It shall be the duty of such Board of Trustees to supervise the maintenance of such sewer system constructed under its supervision, or as may hereafter under property (proper)

> authority be placed under its supervision, and to see that sewer system or systems be maintained in good condition."

The board of trustees are charged with the duty of supervising the maintenance of the sewer system and keeping it in good condition. In order to enable them to effectuate this duty, they are given the power to enact reasonable rules and regulations.

In the case of Rexroth v. Holloway, 45 Ind. App. 36, 90 N. E. 87, l. c. 88, the court in defining the term "reasonable" said:

> "'Reasonable' is a term difficult of definition, and usually it must be considered with the facts of the particular controversy in determining its force and latitude. In Re Niece vs. Schreiber (D.C.) 123 Fed. 987. It is sometimes used to express that which is appropriate or necessary. Leavering vs. Union Etc. Co. 42 Mo. 88, 97 Am. Dec. 320."

And, in the case of Borough of Belmar vs. Prior, 79 Atl. 1032, l. c. 1033, 81 N. J. Law 254, the court in defining rules and regulations said:

> "'A rule is a device in words and phrases for the control and direction of those who have something else given them to do.' Taylor vs. Lambertville 43 N. J. Eq. 107, 112, 10 Atl. 809, 811. A regulation is defined to be 'a rule of law by which some right is to be exercised.' Donovan vs. Territory 3 Wyo. 91, 94, 2 Pac. 532, 533."

The power to make rules and regulations imports a power to control and direct, and what is reasonable is to be determined in the particular case by that which is appropriate and necessary. Is it to be said that the legislature imposed a duty on the board of trustees to supervise and maintain the sewers in good condition but denied them the right of any control over the sewers? To so construe the statute would result in an absurdity.

Thus, in the case of Marler vs. Marler's Estate, 104 S. W. (2d) 733, l.c. 736, the court said:

> "A statute will not be given a construction which will make it unreasonable or which will result in an absurdity. Stack v. General Baking Company, 283 Mo. 396, loc. cit, 410, 223 S. W. 89, and cases cited: Johnston v. Ragan et al., 265 Mo. 420, 178 S. W.159; State v. Irvine, 335 Mo. 261, 72 S. W. (2d) 96, 93 A. L. R. 232."

Furthermore, the court in the case of Bull vs. McQuie 119 S. W. (2d) 204, l.c. 207, has held that a sewer district has all the power essential and indispensable to its declared object and purpose.

> "Albeit, as contended by the appellant, the sewer corporation is not invested with broad and general powers, none the less, the power it does possess is plenary, co-extensive with the area of the district, inclusive of the planned sewer system in its entirety as an indivisible unit. In short, the corporation has all the 'power essential and indispensable to the declared object and purpose of the corporation.'"

Obviously, the board of trustees of an incorporated sewer district have no control over their sewers unless they have the right to issue or deny permits to individuals or companies desiring to make connections to their sewers.

We are, therefore, of the opinion that an incorporated sewer district, through its board of trustees, may adopt rules and regulations requiring that a permit be secured from said board in order to make a sewer connection.

II. (b)

In order for the board of trustees to determine whether a proper sewer connection is made, it will be necessary that an inspection be made entailing an inspection cost to the district. The question arises whether the district may meet said cost by imposing a fee for the required permit.

32 C. J., Section 11, p. 936, states that:

> "In order that an inspection law may be valid the fee imposed must be reasonable; it must have reference to the cost of service."

Although the above statement refers to an inspection "law", we are of the view that the same principle would be applicable to a "regulation", which is "a rule of law by which some right is to be exercised", (Borough of Belmar vs. Prior, supra).

We are of the opinion that an incorporated sewer district, through its board of trustees, may adopt a rule or regulation requiring the payment of a fee for a permit to make a sewer connection but that said fee must be reasonable and made with reference to the cost of the inspection service.

III.

Your third question is whether or not the trustees of a sewer district who permit a drain layer to excavate a public road for a sewer connection without the production of an excavation permit are subject to prosecution under Section 8005 R. S. Mo. 1929. Section 7998 R. S. Mo. 1929 provides that:

> "It shall be unlawful in any county in this state which now has or which may hereafter have a population of 100,000 or more for any person, firm, association or corporation to excavate, or cause any excavation to be made, in any county road without first having had and obtained a permit therefor and given a bond or made a cash deposit as hereinafter provided."

In 11 C. J. at page 36, the word "cause" is defined as meaning:

> "Philosophically speaking, the sum of all the antecedents of any event constitutes its cause. Ordinarily, however, each separate antecedent of an event is considered as a cause for such event, provided, however, that the event could not have happened except for such antecedent; in this case, that which supplies a motive, decides action, or constitutes the reason for anything done; that which produces or effects a result, or from which anything proceeds, and without which it would not exist; that which produces an effect, or which brings a thing to be; that condition which determines the final result; that on which a thing under given circumstances follows."

Section 8005 R. S. Mo. 1929 provides that:

> "Any person violating any provision of this article or failing to comply therewith shall, upon conviction thereof, be deemed guilty of a misdemeanor."

From the foregoing, we are of the opinion that if a drain layer acting as the servant and employee of the trustees of the sewer district undertakes to excavate a public road for a sewer connection without obtaining a permit, then the trustees would be liable under Section 8005, supra. However, if said drain layer acting independently of the trustees of the sewer district undertakes to excavate a public road for sewer connections without obtaining a permit, we are of the opinion that said trustees would not be liable under Section 8005, supra, since there is no duty imposed upon them by law to ascertain if a drain layer has obtained an excavation permit.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

MW:RT

STATUTES:
EMERGENCY CLAUSE:
WHEN EFFECTIVE:

If a bill is amended, then the emergency clause must be adopted after such amendment in order that it may be effective.

7/27

July 26, 1939

FILED
22

Mr. C. W. Detjen
County Counselor
St. Louis County
Clayton, Missouri

Dear Mr. Detjen:

This is in reply to yours of recent date wherein you submit the following question:

> "There is some confusion in the minds of the officials of St. Louis County as to when the new law affecting constable's salaries will go into effect.
>
> "The above house bill was passed at the last session of the legislature and as sent to the Governor it contained an emergency clause, but the records of the House disclosed that upon final passage, the required number of members were not present to adopt the emergency clause, and that it was actually passed in the House without this clause. When it originally passed the House, the emergency clause was adopted, but that was not the case when passed in its amended form.
>
> "The County Court has asked me to secure an opinion from you as to whether, under these circumstances, the law went into effect upon being signed by the Governor or whether it will not be effective until 60 days after the date of signing."

It appears from your request that House Bill Number 569, which pertains to constables in counties the size of St. Louis County, was first passed in the House withan emergency clause attached thereto. This Bill went to the Senate where it was amended and then went back to the House for final passage as amended. It also appears that there were not enough members in the House at the time of its passage to adopt the emergency clause.

Section 30 of Article IV of the Constitution of Missouri provides as follows:

> "If a bill passed by either house be returned thereto, amended by the other, the house to which the same is returned shall cause the amendment or amendments so received to be printed under the same supervision as provided in the next preceding section, for the use of the members before final action on such amendments."

It will be noted that this section, in speaking of amendments, provides that such amendments must be printed for the use of the members before final action on such amendments. Section 31 of said Article provides as follows:

> "No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor."

We think this section, in referring to a bill, means the bill, as amended, in its final form. In other words, the bill, as amended, is what is to become the law and that which the members vote upon. Section 36 of said Article provides as follows:

> "No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act), the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

It will be noted that this section provides that a bill does not become effective until ninety days after the adjournment unless the emergency clause is attached.

By reading all of these sections together, we think that the law is plain that it was intended that the emergency clause would be in force only when it has been voted upon after the bill has been placed in its final form and passed by the constitutional majority.

CONCLUSION.

From the foregoing it is the opinion of this department that since the emergency clause to House Bill Number 569 was adopted before said Bill was passed in its final form, that said House Bill Number 569, as amended, was not passed with the emergency clause, and, therefore, will not go into effect until ninety days after the adjournment of the Session.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

PUBLIC SERVICE COMMISSION: Cannot exact contract hauler license from trucker transporting livestock from farm to market and on return trip hauling his (the trucker's) own property.

August 15, 1939.

8-18

FILED
22

Hon. Jack H. Denny
Prosecuting Attorney
Howard County
Fayette, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of August 9, 1939, as follows:

> "Section 5265, Laws of 1931, page 304 provides that the provisions of that act shall not apply to motor vehicles used exclusively in hauling farm and dairy products from the farm to original market.
>
> "The State Highway patrol has issued warnings to truck drivers in this county that if they haul livestock to St. Louis, Missouri, and while in St. Louis, buy other property, pay for it, and own it, they cannot haul it home without coming under the provisions of the act requiring them to have a certificate of necessity and convenience.
>
> "Does the word 'exclusively' in the above law mean that a truck driver cannot haul his own property home after he has hauled livestock to market?"

The power and authority of the Public Service Commission on this subject is contained in Section 5270, Laws of Mo. 1937, page 436, which provides:

> "The public service commission is hereby vested with power and authority and it shall be its duty to license, supervise and regulate every contract hauler in this state except as provided in section 5265 of this act * * * * *"

The term contract hauler is defined in Section 5264 (c), Laws of Mo. 1931, p. 305, in this manner:

> "The term 'contract hauler,' when used in this act, means any person, firm or corporation engaged, as his or its principal business, in the transportation for compensation or hire of persons and/or property for a particular person, persons, or corporation to or from a particular place or places under special or individual agreement or agreements and not operating as a common carrier and not operating exclusively within the corporate limits of an incorporated city or town, or exclusively within the corporate limits of such city or town and its suburban territory as herein defined."

We assume the truckers involved are "contract haulers" as this term is defined. With this assumption it is clear that these truckers must be licensed by the Public Service Commission as contract haulers unless the exceptions made in Section 5265, Laws 1937, p. 439, operate to exempt them from the terms of Section 5270, supra.

Section 5265, Laws of Mo. 1937, p. 439, provides:

> "The provisions of this act shall not apply * * * * to motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm * * *"

These are the only exceptions made in the act with respect to farm products, and it is the meaning to be ascribed to this section which governs your question.

Section 5265 as it appeared in Laws 1931, p. 306, is identical with that appearing in Laws 1937, p. 439, with the exception that in the 1937 act there is added the exemption of a contract hauler when "transporting stocker and feeder livestock from market to farm or from farm to farm."

The case of Schwartzman Service Inc. v. Stahl, 60 Fed. (2d) l.c. 1038 holds the 1931 version of Section 5265 did not authorize the hauling of farm products from market to farm without a contract hauler's permit. The court said, "The motor vehicle employed must return empty, as farm products could not be hauled both ways to market." That this is the meaning to be given Section 5265 as it appeared in 1931 cannot be disputed. The whole exemption is based upon the vehicle being used exclusively in transporting farm products from the farm to the market. There is no language employed which even implies said vehicle is exempt when the transportation is from market to farm.

However, in 1937 the Legislature added a clause to this section exempting contract haulers from need for license when "transporting stocker and feeder live-

stock from market to farm or from farm to farm." Again this use of the vehicle must be exclusive. It is to be noticed contract haulers are only exempt under this clause when transporting stocker and feeder livestock. There is no broad reference to farm or dairy products.

From the foregoing we conclude the correct meaning to be given Section 5265, Laws 1937, p. 439, is this: Truckers are exempt from having to obtain a permit as a contract hauler from the Public Service Commission when the vehicle is used exclusively in transporting farm and dairy products from the farm to the original market, creamery, warehouse or storage place. Said haulers are also exempted when the vehicle is used exclusively in transporting stocker and feeder livestock from the market to the farm or from farm to farm.

At the outset of this opinion we assumed the truckers involved were contract haulers. Now, a contract hauler is one who as his principle business transports for compensation or hire persons or property for a particular person from or to a particular place under an individual agreement.

If the truckers involved are not contract haulers then they are not required to have a license as such issued by the Public Service Commission. A person may transport his own property from or to any place he desires and not be subject to the license provided for a contract hauler. The Public Service is not invested with any authority to control such transportation.

Applying the above to your particular example, it appears that the trucker when hauling livestock for hire to the market in St. Louis, is exempted from having to have a license as a contract hauler because he is transporting farm products from the farm to the original market. On his return trip he is hauling his own property for himself and the Public Service Commission has no control over this. He is not transporting property for hire for a particular person from or to a

particular place under an individual agreement on this return trip.

That provision of Section 5265, supra, pertaining to "exclusive" use has reference to the property transported. It means that the trucker in order to come within the exemption must only transport farm products for hire for a particular person from the farm to the original market under an individual agreement, to the exclusion of other kinds of property transported for hire for a particular person from or to a particular place under an indivudial agreement.

CONCLUSION

Therefore, it is our opinion that a trucker transporting livestock for a person for hire from the farm to the original market and then purchasing property as his (the trucker's) own, and transporting it on his return trip, is not required to be licensed as a contract hauler. Neither is he required to be so licensed if on said return trip he is transporting stocker and feeder livestock from the market to the farm.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:RV

JUSTICES OF THE PEACE: Construing Section 2150, R. S. Missouri, 1929.

October 2, 1939

10-4

FILED 22

Honorable C. W. Detjen
County Counsellor
St. Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of September 21, 1939, which reads as follows:

"The County Court of St. Louis County recently reorganized the township lines and established a new township, so that there are now eight instead of seven. Several questions concerning the jurisdiction of Justices of the Peace have arisen, as follows:

I.

"Carondelet Township formerly contained 31 voting precincts. About 15 of the precincts in the southern portion of Carondelet Township and 1 precinct from the former Bonhomme Township are now known as Lemay Township. The northern 16 precincts in the old Carondelet Township, and 3 precincts from the former Jefferson Township are now known as Gravois Township. Of the two Justices of the Peace

elected at large for Carondelet Township, one lives in Lemay Township and one in Gravois Township. The questions involved are:

a. Does the Justice of the Peace elected for Carondelet Township and now living in Lemay Township, have jurisdiction over all the territory formerly known as Carondelet Township, or is his jurisdiction limited to the present Lemay Township, which includes a part of the territory that was formerly Bonhomme Township; and if his jurisdiction is over the entire territory of the former Carondelet Township, has he jurisdiction under Section 2170, R. S. Missouri, 1929, over defendants residing in townships which adjoin the territory of the former Carondelet Township, but which do not now adjoin Lemay Township? The same questions, of course, arise as to the jurisdiction of the Justice of the Peace in the present Gravois Township, which now includes a portion of the former Jefferson Township.

b. Do the Justices of the Peace in Bonhomme Township and Jefferson Township have jurisdiction over the portions of their respective townships which were added to Lemay and Gravois Townships? Section 2150, R. S. 1929, pro-

vides that when a township is divided, any Justice of the Peace of the original township shall continue to discharge the duties of justice 'as if the township had not been divided.' It is the words quoted above which have caused this question to arise. If they merely mean that the change is not to affect his status as a Justice of the Peace, I take it that his jurisdiction would be limited to the new township just as though he had been elected in that township, but if they are construed to mean that as far as his jurisdiction is concerned, the township lines are to be just as they were before the change, then the respective Justices of the Peace in Lemay and Gravois Townships would have jurisdiction over all of the former Carondelet Township and defendants residing in townships adjoining it.

II.

"At the election in November, 1938, a Justice of the Peace was elected for the town of Valley Park, under the provisions of Article 1, Chapter 10, R. S. 1929. At that time, Valley Park was in Bonhomme township. Under the new change, it is in Meramec Township. The question is, whether the Justice of the Peace elected for the City of Valley Park in Bonhomme Town-

> ship is now a Justice for the new Meramec Township or whether his jurisdiction remains as a Justice of the Peace in area comprising the old Bonhomme Township, and over defendants in townships adjoining the former Bonhomme Township, regardless of whether such townships now adjoin Meramec Township.
>
> "The County Court has requested that I obtain an opinion from you concerning these questions."

Such a request as this requires an interpretation of Section 2150, R. S. Missouri, 1929, which reads as follows:

> "When a township shall be divided, and any justice of the peace of the original township shall fall into the new township, he shall continue to discharge the duties of justice of the peace until his commission expires as if the township had not been divided."

Briefly, a determination of the legislative intent in using the following words in Section 2150, supra, will practically answer your inquiry, "he shall continue to discharge the duties of justice of the peace until his commission expires as <u>if the township had not been divided</u>."

Do the words"as if the township had not been divided" refer back to the duties of the Justice of the peace or does it refer to the original jurisdiction of the Justice of the Peace?

The constitutional provision creating the office of Justice of the Peace grants authority to the Legislature to prescribe the duties, determine the number of Justices of the Peace and their salary. Article VI, Section 37, of the Constitution of Missouri, reads:

> "In each county there shall be appointed, or elected, as many justices of the peace as the public good may require, whose powers, duties and duration in office shall be regulated by law."

Therefore, the Legislature, as often as they deem it necessary, may amend the law pertaining to the office of Justice of the Peace so long as they do not violate the constitutional amendment creating the office of Justice of the Peace.

46 Corpus Juris, Section 30, page 934, reads as follows:

> "The authority in the government which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority [that is, in the case of a municipal authority, some statutory or constitutional provision; in the case of the legislature, some constitutional provision], the implied power to abolish the office it has created, or to consolidate two or more offices it has created, and since every public office is the creation of some law it continues only so long as the law to which it owes existence remains in force; hence, when such law is authoritatively abrogated, the office ceases unless perpetuated by virtue of some other legal provisions. An office which has been provided for by the constitution may not be abolished by an act of the Legislature. * * *"

Section 2138, R. S. Missouri, 1929, provides that a Justice of the Peace shall hold office for a term of four (4) years, until his successor is elected and qualified, said section reads as follows:

> "Justices of the Peace, as herein provided for, shall be elected at the general election to be held in eighteen hundred and eighty-two, and shall hold their offices for four years, or until their successors are elected, commissioned and qualified; but every justice of the peace now in office shall continue to act as such until the expiration of his commission, and until his successor is elected and qualified."

Section 2162, R. S. Missouri, 1929, provides under what conditions a Justice of the Peace shall be removed from office, and reads as follows:

> "Every justice of the peace who shall be convicted of bribery, perjury or other infamous crime, or of any misdemeanor in office, shall be removed from office."

Therefore, it is quite evidenct that the Legislature never contemplated the removal of the Justice of the peace before the expiration of his term of office for any purpose other than those enumerated in Section 2162, supra.

In Southern Ry. Co. v. Payne, 74 S. E. 697, the court upheld a similar statutory provision, which reads as follows:

> "'Making or Changing Districts, Consequences. If, in laying out a new district or in changing the lines of old districts, or in consolidating or abolishing old districts, the residences of Justices of the Peace or Constables elected or appointed are included in the new district, or cut off from the district for which they were elected

> or appointed, they have authority to discharge their duties for the district for which they were elected or appointed, until their terms of office expire and their successors in such districts are qualified, unless elected or appointed to the same office in the new district to which they are eligible.'"

The Court said, at page 698, in construing statutory provisions:

> "We are of the opinion that the legislative intent, as expressed in the statute, can be given effect by placing upon the statute a construction which authorizes justices of the peace and notaries public who are ex officio justices of the peace, in any districts which have been consolidated with another district to continue to discharge the duties of their respective offices until their terms of office expire. Certainly it cannot be said that under this construction there is any clear and palpable repugnance between the statute and the constitutional provision which it is alleged to be in violation of." (This was affirmed in 75 S.E. 816.)

In Proulx v. Graves, 76 Pac. 1025, the law of the State of California declares that such changes in townships "shall not affect any present incumbent of the office of Justice of the Peace or Constable." Such a provision is very broad and might be construed in several ways. We consider this provision analogous to Section 2150, supra, and therefore, the decision rendered in this case should be given much weight. In this case two townships were merged. A Justice of the Peace had been elected and was holding office at the time of the merger. The court concluded:

> "No declaration as to when this ordinance should take effect was necessary. If none had been made, the law would necessarily be that it would take effect 15 days after its passage, so far as it could be effective, and that it would be in force for all the purposes of the next general election, and for all other purposes, except that it could not, in the meantime, affect the terms of the then existing officers, or the jurisdiction of the then existing justices' courts." (This holding is affirmed in In Re Stanton, 18 Pac. (2d) 384).

In Commonwealth ex rel. Graham v. Cameron, 259 Pa. 209, l. c. 211, the respondent was elected a Justice of the Peace in Harmony Township. Subsequent thereto, a part of Harmony Township was annexed to the borough of Ambridge. The respondent resided in that part of Harmony Township that was annexed. The court held that if all of Harmon Township had been annexed, the respondent's commission would not exist. The court further held that if there had been no annexation and the respondent had moved out of his township, there would be no question that he could not exercise his commission. The same is true if he voluntarily changed his residence. The result is precisely the same where the respondent has been changed involuntarily. The annexation proceeding legally removed the respondent from the township of Harmony, hence, he had no legal right to exercise the office of Justice of the Peace. The above holding would probably be applicable to the instant case if it were not for Section 2150, supra. The state of Pennsylvania, at the time this decision was rendered, had no such provision in its laws and this accounts for such a holding.

Apparently the purpose for enacting Section 2150, supra, was to assure the Justice of the Peace elected by the people in his respective township, of his office during the term of office as prescribed by statute, so long as he performed his duties and violated none of the provisions of Section 2162, supra. To hold that a Justice of the Peace may hold office in a district for which he was not elected by the people, but where another Justice of the Peace was elected is not consistent. The vote of the people should be indicative of their choice, and it is unreasonable to think that the General Assembly would grant the county court the power to veto the vote of the people in their respective townships.

It is true that the county court is vested with certain powers of appointing justices of the peace, for instance, when a vacancy occurs in office or when 12 or more qualified voters petition the County Court showing the Court that they lived more than five miles from the nearest Justice of the Peace in their township, the county court may appoint a Justice of the Peace who shall live in the immediate neighborhood of the petitioners, and at least five miles from any Justice of the Peace in the same township. No such authority is vested in the County Court to replace an elective officer who is carrying out the duties of his office.

If the jurisdiction of the Justice of the Peace should be changed by reason of a change of the boundaries of the township by annexation, this might, in some instances, violate Section 2136, R. S. Missouri, 1929, which provides only two justices of the peace shall be elected to certain townships. Townships may be so divided by annexation as to give three Justices of the Peace jurisdiction in one single township.

Therefore, it is the opinion of this Department that when any township is reorganized, under Section 2150, supra, the Justice of the Peace elected to hold office in said township, retains his office for

the duration of the term for which he was elected, and his jurisdiction is not disturbed. He retains the same jurisdiction in the township as if the township had not been divided. To be consistent, it is necessary that such Justice of the Peace have jurisdiction under Section 2170, R. S. Missouri, 1929, of a defendant in a township that joined the original township in which he was elected, as if no division of the township had been made. His term of office is the same as when elected, and his jurisdiction has not been decreased or increased by reason of any division of a township.

To be more specific, we will answer your request in the numerical order in which it appears in your request.

I. (a) A Justice of the Peace elected to Carondelet Township now has jurisdiction over all the territory formerly known as Carondelet Township, and it follows that said Justice of the Peace, under Section 2170, R. S. Missouri, 1929, has jurisdiction over defendants residing in townships which adjoined the territory of the former Carondelet Township at time of his election to the office.

(b) Justices of the Peace in Bonhomme Township and Jefferson Township have jurisdiction over the portions of their respective townships which were added to Lemay and Gravois Townships. This is only true with respect to the Justices of the Peace who were holding office when this annexation was made, and not to their successors.

II.

In State ex rel. v. Powles, 136 Mo. 376, l. c. 380, 381, it was held that the County Court was authorized to appoint a Justice of the Peace who resided in West Plains for the reason that that city was a city of more than two thousand (2,000) inhabitants, and that he was a Justice of the Peace within and for the township of Howell. That he could not have been appointed a justice

of the peace for the city of West Plains for no such office is known to the law. (See also Carpenter v. Roth, 192 Mo. 658.)

Therefore, in view of the foregoing authorities, it is the opinion of this Department that the Justice of the Peace elected under Section 2136, Article 1, chapter 10, R. S. Missouri, 1929, by reason of the town of Valley Park having over two thousand (2000) inhabitants, said Justice of the Peace retains jurisdiction in the area comprising the old Bonhomme township and defendants in townships that adjoin the old Bonhomme Township before the division was made.

Yours truly,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

ARH:RV

COUNTY COURTS: Who may call a meeting of the County Court during adjourned term.

November 30, 1939

12-5

FILED
22

Hon. Jack H. Denny
Prosecuting Attorney
Howard County
Fayette, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of November 28, 1939, which reads as follows:

> "The Howard County Court wishes your opinion as to who can call the court together for a special meeting. The custom here is to adjourn from time to time. Once in a while they wish to meet in between adjournments. They wish to know whether only the presiding judge can call the meeting, whether one other judge can call the meeting, or whether two beside the presiding judge can call the meeting. For example: the court meets on the first Monday in December and adjourns to the third Monday in December. On the second Monday one of the judges decides that it is necessary for the court to meet. Can he require the court to meet, can two of the judges require the court to meet, and can the presiding judge require the meeting?"

Section 2087 R. S. Missouri, 1929, provides the county court may hold adjourned terms of court, and reads as follows:

> "Each county court may hold adjourned terms whenever it may become necessary for the transaction of its business."

Section 2083 R. S. Missouri, 1929, provides for four (4) terms of court, and reads as follows:

> "Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in February, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: Provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

Under Section 2085 R. S. Missouri, 1929, either the president or any two judges of the County Court may hold a special term of court whenever the business of the county requires it, and reads as follows:

> "The president or any two judges of the county court may order a special term whenever the business and interest of the county may require it."

In State ex rel. v. Mitchell, 127 Mo. App. 455, l. c. 458, 459, 460 and 461, the facts were disclosed that during the regular May term of court which had not adjourned finally, but was in recess and had adjourned to June 3rd. That on May 30, 1907, the president of the County Court ordered a special term of court to consider a petition filed on May 20th for a dramshop license. The Court held that under Section 1785 R. S. Missouri, 1899, which is now Section 2085, supra, the president or any two members of the County Court may call a special term of court when the business or interest of the county demands same. This may be done during a regular term of court, even when said court is not actually in session but during an adjourned term of court. The Court, in so holding, said:

> "From the facts stated, it appears clearly that although the regular May Term was not finally adjourned, the court was not in session at the time the petition was filed, nor was it in session at any time after the filing of the petition until it convened in special term. The special term being ordered and held during a recess of the regular term, it certainly did not and could not conflict with the regular term. As a matter of fact, it was then in a state of recess or suspension for the time being. There is a doctrine in our law to the effect that during a term of court, and until the term has finally adjourned, it is, in legal contemplation, but a single day. (Gormley v.

Transit Co., 126 Mo. App. 405, 103 S. W. 1147; Becker v. Schutte, 85 Mo. App. 57; Williams v. Walton, 84 Mo. App. 433; State v. Jeffors, 64 Mo. 376.) It is upon this doctrine the argument proceeds to the effect that it is inconsistent to hold a special term of the court during a time, when, in legal contemplation, the regular term is still in existence. Now, whatever merit this argument might have in the broad field of general law, it is certainly not persuasive here under the several provisions of our statute. Section 1783, Revised Statutes 1899, so far as pertinent here, provides that four terms of the county court shall be held in each county annually, commencing on the first Monday of February, May August and November. Section 1787 provides for adjourned terms whenever it may become necessary for the transaction of the county business, and these adjourned terms are of course continuations and parcel of the regular term. (Trammel v. Railway, 101 Mo. 136, 13 S. W. 505.) Section 1785 provides: 'The president or any two judges of the county court may order a special term whenever the business and interest of the county may require it.' Section 1786 provides for notice of such term. It clearly appears from these several statutory provisions, the Legislature intended to authorize a term of the county court of some character, either regular, adjourned or special, as expressed in the statutes, 'whenever' the business or interests of the county seem to require it. Now it is and has long been the custom and usage of these courts in many of the counties of the state at least, to meet the first Monday in every month of the year; that is to say, to adjourn the May term to the first Monday in

June, and in June to adjourn to the first Monday in July; and so with each succeeding term, preparatory to disposing of such matters as may properly come before the court. The Legislature certainly manifested its concern in this connection by specially providing for adjourned terms when in truth and in fact, the power to adjourn from time to time and to hold adjourned terms were inherent in the court without the aid and wholly irrespective of the statute. (Higgins v. Ransdall, 13 Mo. 205-208.) However that may be, the section manifests the concern of the Legislature in providing for frequent and convenient terms of court, to the end that the business in which the county is interested, be not neglected. It is obvious the Legislature was impelled by the same motive in providing for special terms of court, as above indicated. having specially provided for and authorized frequent adjourned terms, it is quite certain the Legislature had such adjourned terms in contemplation when it enacted the section authorizing the special terms referred to. Now this being true, it certainly contemplated and intended that such special terms be held not only after final adjournment of the regular term, but at intervals during its recess as well. It is manifest from all of the provisions, when read together, the Legislature intended to authorize a term of the county court at any time when the regular or adjourned term was not actually in session, and it was necessary within the language and spirit of the statute. This, it appears, is indicated by the broad language employed in the sections authorizing both the special and adjourned terms, for it is

there said, such terms may be held 'whenever,' etc., etc. Nothing is said in the section limiting special terms to a time after the regular or adjourned term is finally adjourned to court in course. Now suppose that instead of the matter of a dramshop license, there was involved in this case a question arising out of a great catastrophe or fire. Say, on May 17th, the county court adjourned until June 3rd, and during this interval, the courthouse or the county infirmary or poorhouse should be destroyed by earthquake or consumed by fire. Would any one attempt to argue that a special term of the county court could not be lawfully held under this statute during the interval mentioned to deal with this situation of affairs by providing a proper place for the county records and offices or proper quarters for the county poor and infirm? We are persuaded that no one would argue a special term could not be holden during the recess of the regular term for the reason the regular term had not yet finally adjourned and was therefore in legal contemplation, still in session. It is clear the Legislature intended to authorize special terms of the county court under the circumstances presented in this case. In State v. Riddle, 179 Mo. 287-299, 78 S. W. 606, our Supreme Court considered a question which arose on a state of facts where a special term of the circuit court had been holden during the recess of a regular term of the same court, and before its final adjournment, precisely as in this case, and no mention was made of the question here pressed upon the court. It was there said that such special terms are entirely in-

> dependent and are in no manner connected with the regular term of such courts. Indeed, it seems that the salutary provisions of these statutes authorizing special terms would almost entirely fail were the courts to adjudge that no special terms could be held during the interval or recess while the regular terms may not yet be finally adjourned."

Also, in State v. Fulton, 152 Mo. App. 345, l. c. 349 and 350, the court held that Section 4088, Statutes of 1909, which is the same as Section 2085, supra, was enacted for the purpose of providing a means by which the court can be convened at times other than a regular or adjourned term, and when convened it may transact any business. In so holding, the court said:

> "The record, however, in this case is not entirely silent, but it recites that the county court met pursuant to a call by the presiding judge. The presiding judge is authorized by statute to call a special term of the court. Statute 1909, section 4088, and if the court convened pursuant to his call it was legally convened, unless he had failed to give the notice required by the statute. (Section 4089) Whether he had given such notice was a question of fact and if the court proceeded to act it will be presumed that it was first determined that the proper notice had been given. (State v. Baty and Hadley v. Bernero, supra.)
>
> "The statute authorizing the calling of a special term of a county court is as follows:
>
> > 'Section 4088. The president, or any two judges, of the county court may order a special term whenever

> the business and interests of the county may require it.'
>
> "It is contended by appellant that the casting up of the vote in a local option election and ordering the publication of notice thereof is not business of the county, and the county as such was not interested therein, and hence, the presiding judge could not call a special term of the county court for the purpose of transacting this business.
>
> "The statute nowhere requires that in calling a special term the particular purpose for which it is called shall be designated, nor is the power of the court to act restricted to the matters which may have induced the call. The provision for a special term is for the purpose of providing a means by which the court can be convened at times other than a regular or adjourned term, and when convened, it may transact any business that may be legally brought before it. Further, the power to determine when a special term is necessary is left exclusively to the judge or judges who are authorized by law to call the term and their discretion in making the call cannot be questioned."

Therefore, it is the opinion of this Department that either the president or two members of the county court may call a special session to transact business whenever the business or interest of the county demands same. This may even be done during an adjourned term of the court.

Respectfully submitted,

APPROVED:

W. J. BURKE
(Acting) Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:RV

RECORDER
MARRIAGE LICENSES:

A man may marry his step-daughter.

February 9, 1939

FILED
2-24

Mr. Gerald J. Donworth
Recorder of Deeds
St. Louis County
Clayton, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "The following question arose in this office, and we would appreciate having your opinion on it.
>
> "'Is it legal for a man to marry his step-daughter, she being the daughter of his deceased wife.'"

Section 2974, R. S. Missouri, 1929 (Mo. St. Ann. 2974, page 5040) provides in part as follows:

> "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as the whole blood, between uncles and nieces, aunts and nephews, first cousins, white persons and negroes or white persons and Mongolians, and between persons either of whom is insane, mentally imbecile, feeble-minded or epileptic, are prohibited and declared absolutely void;
> * * * * * * * * * * * * "

Marriage is defined in State v. Bittick, 103 Mo. 183, l.c. 191, as:

> "The civil status of one man and one woman, capable of contracting, united by contract and mutual consent for life, for the discharge, to each other and to the community, of the duties legally incumbent on those whose association is founded on the distinction of sex. * * * * * * * * * * "

It is, however, a civil contract (Section 2974, R. S. Missouri, 1929) in which "The state is deeply concerned and over which the state exercises a jealous and exclusive domain." Knost v. Knost, 229 Mo. 170, 129 S. W. 665.

In the United States the degree within which marriages are forbidden has been governed almost exclusively by statute.

It may be well to point out at this time that the term "consanguinity" is "relationship by blood" (14 R. C. L. 32). Affinity is "the relationship resulting from marriage" (Keezer, Marriage and Divorce, 109).

The origin of all such laws forbidding the marriage of those related is the so-called "horror of incest" which is supposed to be in all of us. Coke on Littleton, 235 A., G. E. Howard, History of Matrimonial Institutions. However, there is not the same physical reason for making affinity marriages illegal as exists in the case of consanguinity for there is no enfeebling of offspring, mental or physical, resulting from such marriages. Neither is there a natural repugnance to sexual intercourse between one and his relatives by marriage, especially where the relation is somewhat remote. As Schouler says in his Marriage, Divorce, and Separation, Vol. 2, par. 1090:

> "* * * * It is shown that while the marriage of persons allied by blood produces offspring feeble in body and tending to insanity, that of persons connected by affinity leads to no such result; and further, that consanguinity has been everywhere recognized as an impediment, but not affinity. The worst that can probably

> be said of the latter is, that it leads to confusion of domestic rights and duties. * * * * * * * * * * "

We now examine our own statutes in order to ascertain the view of this state in regard to this question since there are no cases which deal directly with this subject. It is well settled that statutes relating to marriages between those related by affinity are strictly construed. Keezer's Marriage and Divorce, p. 109. For example, a statute prohibiting marriage between a man and his son's wife does not prohibit marriage with his son's widow. Houston Oil Company v. Griggs (Tex. Civil App.) 181 S. W. 833.

It will be noted that Section 2974, supra, provides that marriages "between parents and children" are void. Ballentine's Law Dictionary defines "parent" as a "word which refers primarily to the father of a child but sometimes to the mother or to the two jointly. Step-parents, grandparents and other relatives do not come within the scope of the word." Children are defined in Keeney v. McVoy, 206 Mo. 42, as "Offspring, issue of descendants generally." Therefore, when the statute provides that parents and children shall not marry, it means parents and children related by consanguinity and does not refer to those related only collaterally or by affinity, the statute being strictly construed.

Moreover, our incest statute, the avoidance of which crime is a basis for all statutes such as Section 2974, provides as follows: (Section 4261, R. S. Missouri, 1929, Mo. St. Ann., Section 4261)

> "Persons within the following degrees of consanguinity, to-wit: Parents and children, including grandparents and grandchildren of every degree, brothers and sisters of the half as well as of the whole blood, uncles and nieces, aunts and nephews, who shall intermarry with each other, or who shall commit adultery or fornication with each other, or who

> shall lewdly and lasciviously cohabit with each other, shall be adjudged guilty of incest, and be punished by imprisonment in the penitentiary not exceeding seven years."

The statute above only includes certain degrees of consanguinity and does not mention affinity and, therefore, the latter does not come within the inhibition of the statute.

Other states that have statutes which specifically include the term "affinity" hold that "In the case of a marriage between a man and his step-daughter that the relationship of affinity which existed during the continuance of the marriage relation between the man and the girl's mother terminated when the latter procured a divorce or died and after that time the step-daughter was not the daughter of the man's wife and marriage between them is valid." Back v. Back, 148 Iowa 223, 125 N. W. 1009; State v. Brown, 47 Iowa State 102, 23 N. E. 747; Wilson v. State, 46 S. W. 451; Johnson v. State, 20 Tex. App. 609; Tagert v. State, 143 Ala. 88, 39 So. 293. The only discrepancy between them is that the Alabama case modifies the rule by declaring that the relationship of affinity continues after the dissolution of the marriage if and so long as there is surviving issue of such marriage.

CONCLUSION

It is, therefore, the opinion of this department that Section 2974, R. S. Missouri, 1929, does not prohibit the marriage of a man and his step-daughter.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

ROADS AND HIGHWAYS: Maintenance of road Districts and the right of a road commissioner to employ himself.

February 11th, 1939

2-14 FILED 24

Hon. Herbert H. Douglas,
Prosecuting Attorney,
Newton County,
Neosho, Missouri.

Dear Sir:

This will acknowledge your letter of January 2nd, in which you request an opinion from this office as follows:

> "As to what roads [meaning county, state, U.S. etc.], if any, does the county court in a county the size of Newton have the right to expend money on?
>
> Can a road commissioner properly work for the road district that he is commissioner for without subjecting himself to be disqualified as a commissioner?"

I.

Relative to your first question, we here set forth in brief the existing pertinent statutes pertaining thereto as follows.

Section 7839 defines what are legally established roads.

Section 7858 creates a county highway system consisting of not to exceed one hundred (100) miles of roads in a county and which are denominated "farm-to-market" roads.

Section 7866 provides for transfer of any part or all of the county highway system to the state highway system.

Section 8104 specifies what roads are controlled by the State Highway Commission.

Section 8134 provides for the cost of maintenance of state roads, or the state highway system | and the roads which have been designated or marked as U.S. highway are part of the state highway system |, to be paid by the state Highway Commission from state funds.

Articles 9 and 10, chapter 42, provide for the creation of Special Road Districts in certain counties, and such provisions are applicable to Newton County.

Sections 7890, 7891 and 7867 provide for the levy, collection and distribution of taxes for road purposes.

For brevity's sake, we have not undertaken to set out here in full, or in part, the context of the aforesaid several statutes and articles, but reference to such will enable the interested to turn to them and note in full the respective provisions therein contained.

Suffice it to say, in answer to your question, that a summary of the enactments mentioned authorizes the county court to direct the expenditure of money on any legally established roads in the county, that is, not a part of the state highway system, or a part of the special road district.

As before noted, the county court has nothing to do with the maintenance of roads or highways in a county which constitutes part of the state highway system.

Furthermore, in the case of roads within a special road district, the taxes levied and collected for road purposes on property within such districts, is expended on such districts, under the direction of the road commissioner of the district and not by the county court.

II.

Relative to your second question, we assume that the commissioner you mentioned is working for the road district as an employe thereof, and receiving pay as an employe from the funds of the district.

Section 18, Article 9 of the Constitution of Missouri prohibits a person from holding any two of the different offices enumerated and specified at one and the same time.

The common law rule, in the absence of constitutional or statutory provision, is applied in this state prohibiting any one person holding two offices which are incompatible. See State v. Bus, 135 Mo. 330.

However, a person employed by the Commissioner of a road district is not an officer, nor does he hold an office, by reason of such employment. See State v. Gray, 91 Mo. App. l. c. 443.

Consequently, neither the constitutional provision or the common law rule noted, concerning office and officers have any bearing in this case.

Section 13 of Article 14 prohibits nepotism. The section itself shows that it comprehends or involves two persons, namely, the one appointing and the one appointed to office or service, by reason of the fact that the degree of relationship between the two is the keystone of the section.

Even assuming that the commissioner in question acted with the other two commissioners in appointing, hiring or employing himself, we are unable to find any authority whereby a man, legally speaking, can employ or appoint himself to an office or position of employment, and thereby violate the nepotism provision, by reason of the fact that a person cannot be a relative of himself or herself. The nepotism provision would not be applied in such a case.

In consequence of the foregoing, we are of the opinion that the road commissioner in question has not disqualified himself from further holding his office by reason of the fact that he works for or is employed by the road district.

However, we are not saying that such employment is legal, that is, that such Commissioner is legally entitled to be paid for his services. On the contrary, our opinion is that a road commissioner is not legally entitled to compensation for work done on the roads in his district at the time of holding the office of road commissioner of such a district for the reason that such employment and payment would be and is contrary to public

policy. See State v. Bowan, 184 Mo. App. 541.

Respectfully submitted,

HARRY H. KAY,
Assistant Attorney General.

APPROVED:

J. W. BUFFINGTON,
(Acting) Attorney General.

HHK:RV

MOTOR VEHICLES:
WHEELS:
WEIGHT COMPUTATION: Truck operator may use as many sets of wheels on his truck as he desires so long as he keeps the vehicle within the dimensions of the law as to length, height, width, weight of load and the amount of weight on each wheel.

April 19, 1939

4-24

FILED
24

Mr. Herbert H. Douglas
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you ask the following question:

> "Does a person by the use of the tandem have a right to load his truck according to the rubber space so created or is he limited to the amount of weight provided for by a truck of the same capacity which has no tandem. Or in other words, is this tandem for the purpose of weight computation to be used by the weight officer in entitling the truck owner to carry weight according to the rubber space created by the use of the said tandem."

One of the sections of the statute applicable to your question is found at subsection b of Section 7776, R. S. Missouri, 1929, which is as follows:

> "* * * * (b) No motor vehicle except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 28,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than

> 42,000 pounds, and no motor vehicle having a greater weight than 22,400 pounds on one axle, and no motor vehicle having a load of over 800 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and peneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load: Provided that in special cases motor vehicles whose weight, including loads, exceed those herein prescribed may be operated under special permits granted as hereinafter provided."

By the provisions of this section it will be seen that the limit of the load which may be carried on trucks or tractors and semi-trailer combination has been fixed.

The lawmakers have further restricted the load as it affects the highway by providing that the motor vehicle shall not have more than eight hundred pounds per inch width of tire upon any wheel concentrated upon the surface of the highway.

We also find in Laws of Missouri, 1931, page 265, Section 7787, another regulation of the truck load which has some application to your question. This section provides in part as follows:

> "No motor drawn or propelled vehicle shall be operated on the highways of this state the width of which, including load, is greater than 96 inches, or the height of which, including load, is greater than 12½ feet, or the length of which including load, is greater than 33 feet; and no combination of such vehicles coupled together of a total or combined length, including coupling, in excess of 40 feet shall be operated on said highways, and not to exceed two vehicles shall be operated in combination. * * *"

These two sections, when read together, reveal that the lawmakers have intended to regulate trucks in the following manner:

width of truck;
height of truck;
length of vehicle with couplings;
weight which may be transported on a truck or tractor and trailer;
number of pounds per inch of tire surface on the surface of the highway.

Nothing has been stated in the law as to the number of sets of wheels that may be used on a motor vehicle on the highway and having failed to limit the number, we think a person may use as many sets of wheels on a vehicle as he desires so long as he keeps the vehicle within the bounds of the regulations as to length, height and weight, and the weight on each wheel as provided by the foregoing sections.

CONCLUSION.

From the foregoing it is the opinion of this department that a person may, by the use of a tandem with extra wheels, have a right to load his truck according to the rubber space so created by the extra wheels so long as he keeps within the dimensions of the law as it applies to height, weight, length and breadth.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

FOREIGN JUDGMENTS: Foreign judgment must be sued on this state to establish a lien of same.

May 17, 1939

5-17

FILED
24

Mr. Raymond O. Douglas, Clerk
Circuit Court
St. Louis County
Clayton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the following statement of facts:

> "I have been requested to record and abstract a transcript judgment from the 92nd Judicial District Court of Hidalgo County, Texas, in the case of B. T. Tackett, vs M. M. Bradley, et al. This transcript was furnished by Weona Loan Company, 110 East Second Street, Weslaco, Texas, which was authenticated under the Acts of Congress.
>
> "I am of the opinion that it will be necessary in order to establish a lien against any real estate which the defendants may have in our County is for the plaintiff to sue upon this authenticated judgment in our State and to obtain a judgment in accordance therewith in our Circuit Court."

It seems from our research on this question that the answer to it will be controlled by the statutes of this state. Laws of Missouri, 1935, page 207, Sec-

tion 1142, provides as follows:

> "Judgments and decrees obtained in the Supreme Court or either court of appeals or any United States Court or any court of record in this State, shall, upon the filing of a transcript thereof in the office of the Clerk of the Circuit Court of any other county, be a lien upon the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed."

In Volume 34 C. J., page 1137, Section 1612, the general rule as to foreign judgments and the procedure is stated as follows:

> "Unless so provided by statute in the state where enforcement is sought, a judgment recovered in one state is not executory in any other state in the sense that final process for its enforcement could issue on merely filing or docketing the judgment, as in the case of a domestic judgment. The constitutional provision for giving 'full faith and credit' to such judgments relates only to their effect as evidence or as a bar to further litigation, and in order to proceed for the collection of a judgment recovered in another state, the creditor must first sue upon it in the state where he wishes to enforce it and recover a judgment upon it."

And on the question of the full faith and credit to be given to judgments of foreign jurisdiction we find the rule stated in 71 A. L. R. at page 1090 in the following language:

> "Also, in Carr v. Lewis Coal Co.

> (1888) 96 Mo. 149, 9 Am. St. Rep. 328, 8 S. W. 907 (affirming (1884) 15 Mo. App. 551), it was said that the full faith and credit clause has no bearing on the point as to whether a lis pendens in one state shall have extra-territorial effect. It was also said that 'the obvious meaning of that provision goes only to the operation such records shall have, when complete and subsequently offered in evidence, as establishing that certain facts have been adjudicated, and has no reference as to what shall be the incidental effect of a suit which results in such records being made.'"

In the case of Barney v. White, 46 Mo. 137, 139, on this same question the Missouri court said:

> "* * * * A foreign judgment is prima facie evidence of indebtedness at the time, and becomes conclusive unless impeached. Judgments rendered in other States are not treated as foreign, and though they are not so far domestic that they can be enforced without a new judgment, they are conclusive of everything except jurisdiction over the parties or the subject-matter. * * * * * * * * "

In Walter L. Lacy Company v. National Finance Corporation, 79 S. W. (2d) 1078, 1079, the court said:

> "The defendant says there are two questions in the case: (1) Was the defendant 'so engaged in doing business in the State of Kentucky as to submit itself to the juris-

> diction of the Kentucky courts?'
> (2) Was the service of summons sufficient to bring the appellant within the jurisdiction of the Kentucky court? In determining these questions, it must be borne in mind that if the judgment is valid in Kentucky, it is equally valid in Missouri (Hudson-Kimberly Pub. Co. v. Young, 90 Mo. App. 505), and that the authenticated copy of the judgment and judgment roll made a prima facie case in plaintiff's behalf (Severson v. Dickinson, 216 Mo. App. 572, 259 S. W. 518; Reis v. Epperson, 143 Mo. App. 90, 122 S. W. 353, 357.)"

So it will be noted from the foregoing text, authorities and rules of court that a judgment rendered in a foreign state does not establish a lien by being filed in this state but must be sued upon. However, such judgment, properly certified and authenticated, shall receive as prima facie evidence as the matter sued upon.

CONCLUSION.

From the foregoing it is the opinion of this department that in order to establish a lien on real estate by a foreign judgment such judgment must be sued upon in some court with proper jurisdiction in this state.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CONSERVATION COMMISSION: Statutes not inconsistent with the
GAME AND FISH: Conservation Amendment or rules of
the Commission remain in force.

May 26, 1939

531

FILED
24

Honorable Phil M. Donnelly
State Senator
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion on the following statement of facts:

> "I would appreciate an official opinion from your office as to whether or not the provisions of Section 8239 have been repealed by reason of the adoption of the Conservation Amendment to the Constitution of Missouri.
>
> "Also as to whether or not a person would be guilty of violating Section 8239, Revised Statutes of Missouri, 1929, if he sold fur pelts after February 10, 1939, as mentioned in said section."

The Conservation Amendment, which was Amendment Number Four at the General Election in 1936, is now found in Laws of Missouri, 1937, page 614, and provides as follows:

> "The control, management, restoration, conservation and regulation of the bird, fish, game, forestry and all

wild life resources of the State, including hatcheries, sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of the same, and the administration of the laws nor or hereafter pertaining thereto, shall be vested in a commission to be known as the Conservation Commission, to consist of four members to be appointed by the Governor, not more than two of whom shall be members of the same political party. The commissioners shall have knowledge of and interest in wild life conservation. Vacancies shall be filled by appointment by the Governor for the unexpired term within thirty days from the date of such vacancy; on failure of the Governor to fill the vacancy within thirty days, the remaining commissioners shall fill the vacancy for the unexpired term. The first members of said commission shall be appointed for terms, as follows: one for a term of two years, or until his or her successor is appointed and qualified; two for terms of four years, or until their respective successors are appointed and qualified; one for a term of six years, or until his or her successor is appointed and qualified. Upon the expiration of each of the foregoing terms of said commissioners, a successor shall be appointed by the Governor for a term of six years, or until his or her successor is appointed and qualified, which term of six years shall thereafter be the length of term of each member of said Commission. The

members of said Commission shall receive no salary or other compensation for their services as such. The members of the Commission shall receive their necessary traveling and other expenses incurred while actually engaged in the discharge of their official duties.

"Said Commission shall have the power to acquire by purchase, gift, eminent domain, or otherwise, all property necessary, useful or convenient for the use of the Commission, or the exercise of any of its powers hereunder, and in the event the right of eminent domain is exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission.

"A Director of Conservation shall be appointed by the Commission and such director shall, with the approval of the Commission, appoint such assistants and other employees as the Commission may deem necessary. The Commission shall determine the qualifications of the director, all assistants and employees and shall fix all salaries, except that no commissioner shall be eligible for such appointment or employment.

"The fees, monies, or funds arising from the operation and transactions of said Commission and from the application and the administration of the laws and regulations pertaining to the bird, fish, game, forestry and wild life resources of the State and from the sale of property used for said purposes, shall be expended and

used by said Commission for the control, management, restoration, conservation and regulation of the bird, fish, game, forestry and wild life resources of the State, including the purchase or other acquisition of property for said purposes, and for the administration of the laws pertaining thereto and for no other purpose.

"The general assembly may enact any laws in aid of but not inconsistent with the provisions of this amendment and all existing laws inconsistent herewith shall no longer remain in force or effect. This amendment shall be self-enforcing and go into effect July 1, 1937."

The section of the statute to which you inquire as to whether or not its provisions are repealed by the aforesaid amendment reads as follows:

"The state game and fish commissioner is hereby authorized to issue a license known as a dealer and shipper's license which is designed to permit the holder thereof to properly use fur pelts for commercial purposes in such manner as will not make difficult the enforcement of the legal requirements for protection of the state's resources of wild animals. Such license may be issued to applicants upon payment of the sum of five dollars to the state game and fish commissioner, in the usual manner as other licenses are issued upon application. The revenue derived therefrom shall be placed in the game protection fund. Dealer's and shipper's license shall authorize the holder thereof to purchase, sell, transport, possess, and commercialize in fur pelts when such pelts have been obtained legally in the state of Mis-

souri or elsewhere, and when such Missouri pelts are not in 'green' or undry condition at the time of receiving them, when shipped between January 31st and February 10th, of each year. Holders of such license may only secure such license upon the express condition that the officials of the state game and fish department shall have access, freely and untrammeled, to inspect the supply of fur animals or their pelts in the possession of the licensee, and during usual business hours. All licenses must be signed by the holder of said license. Holders of licenses must exhibit the same to any person authorized to enforce the game and fish laws, also to any person, firm or corporation, United States postal authorities, or agent, servant or employe connected with transportation of such pelts. Shipments, originating in Missouri, must be clearly and plainly marked with the name and address of the shipper, his or her license number and the date of shipment, also the words 'fur pelts.' Such shipment must be made only during the legal period for Missouri fur pelts, December 1st to the end of January, if the same be in undry or 'green' condition, but dry or cured pelts may be shipped during the following ten days, ending February 10th. Wolf, coyote and wild cat pelts may be shipped at any time in any condition. The person, firm or corporation to whom such shipment is offered for transportation, must sign his or her name, or the name of the firm or corporation he or she represents, upon the package offered for shipment before accepting such shipments made from any point within Missouri and may be sent to any place within or without the state.

> Nothing herein shall be construed to prevent shipments into Missouri, of pelts legally obtained from without this state and consigned direct to a licensed dealer. Each and every member of a firm or corporation, or any agent or employe, or any traveling representative of any firm or corporation as fur buyer or shipper, must be provided with a dealer's license in the same manner as an individual dealer or shipper is required to possess such license, but firms and corporations may secure one or more licenses in the name of the firm or corporation, which are valid when used by any employe, agent or representative if in his personal possession at the time and place where demand is made to see the same."

It will be noted that the Conservation Amendment provides for the control, management, restoration, conservation and regulation of fish and game, etc., by the Conservation Commission.

If the provisions of said Section 8239 are inconsistent with the purpose and intent, and the provisions of the aforesaid amendment or any rule made by the Conservation Commission for the purpose of carrying out the provisions of the amendment, then such statute is of no force or effect.

This department has no information as to whether or not the Conservation Commission has made any regulation or rule pertaining to the provisions of the aforesaid amendment which would be in conflict with the provisions of said Section 8239. Therefore, this opinion will have to be based on the question of whether or not said Section 8239 is in conflict with any of the provisions or is repealed by the Conservation Amendment.

This amendment was before the Supreme Court in Marsh v. Bartlett, 121 S. W. (2d) 737. If this Section 8239 is inconsistent with the provisions of the constitutional amendment, then it is repealed. In Marsh v. Bartlett,

supra, the court said at l. c. 744:

> "There can be no question but that the Amendment in express terms repealed all existing laws inconsistent therewith. * * * * * * * * * * "

And at l. c. 745, pars. 20 and 22, the court said:

> "The game and fish code, to which reference has been made, comprises more than one hundred sections. It is probable that among them, sections may be found here and there which were not inconsistent and not so repealed, and doubtless other sections that, with slight change, might readily be re-enacted. * * * * * * * * "

It will be noted that in the Marsh v. Bartlett case, supra, that the court held that one of the sections of the statute was in full force and effect. That was Section 8311, R. S. Missouri 1929, which provided for a penalty for a violation of the game and fish laws and the court in that case held that this section could also be used as the penalty for the violation of a rule or regulation of the Commission.

Following the same line of reasoning, if said Section 8239 is consistent with the provisions of the amendment and does conserve and regulate game and fish, then it has not been repealed.

CONCLUSION

Therefore, answering your first question and following the foregoing reasoning, it is the opinion of this department that the provisions of 8239, R. S. Missouri 1929, have not been repealed by the constitutional amendment and they are so consistent with the provisions of the amendment that they are in full force and effect until they are repealed or some rule or regulation of the Conservation Commission is made inconsistent with the pro-

visions of said section.

II.

Answering your second question on whether or not a person would be guilty of violating the provisions of said Section 8239, if he sold fur pelts after February 10, 1939.

After examining the various sections of the statutes referring to the protection of game and fish, we think that Section 8238 R. S. Missouri 1929 should be read in connection with Section 8239. This section provides in part as follows:

> "It shall be unlawful, for any person to kill any fur-bearing wild animals, or take, have in possession, offer for sale, sell, bargain for, transport or ship the same or any part thereof, or their pelts, at any time except during the period between November 15th and December 31st of each year, and January 1st to January 15th of the following year, except as is otherwise provided for in this article: * * * * * * * * * * * * * * "

Under Section 8238, supra, a person is limited in shipping, selling, etc., of fur pelts to the periods November 15th to December 31st and from January 1st to January 15th except as is otherwise provided in that article. The "otherwise provided" clause last above refers to the provisions of Section 8239, supra, permitting the dealer or shipper licensee to purchase, sell, transport, possess and commercialize in fur pelts which are not "green" or undry between January 31st and February 10th. This is just an extension of the time in which such acts may be done by virtue of the provisions of said Section 8238.

We note from the letters attached to your request that your correspondent has indicated that he questions the

constitutionality of these sections on the ground that he might be deprived of his property without due process.

While it is not the province of this department to pass upon the constitutionality of such statutes, we respectfully refer you to State v. Heger, 194 Mo. 707 which holds that sections relating to game and fish and similar to the provisions here under consideration are constitutional.

We also note from the statement of facts that if the party is guilty of violating the game and fish laws as is set out in your statement that it would work an undue hardship upon dealers and shippers. We think this is a matter that should be directed to the Conservation Commission for correction if the party is correct in his views of the law.

CONCLUSION

From the foregoing it is the opinion of this department that under the provisions of Sections 8238 and 8239, R. S. Missouri 1929, that no person, with or without license, is authorized to purchase, sell, transport, possess or commercialize in fur pelts after February 10th of any year which have been obtained legally in the State of Missouri and which are in "green" or undry condition at the time of receiving them.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

(Acting) Attorney General

TWB:DA

UNEMPLOYMENT COMPENSATION: "Notice of Lien" may be filed and not recorded by the Commission. County Court should furnish a number book for the purpose of checking an employer as to his liability under a "Notice of Lien".

August 28, 1939

9-1 FILED 24

Hon. Herbert H. Douglas
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of August 21st, 1939, which reads as follows:

> "Will you please let me have your opinion on the following:
>
> "Where will a 'Notice of Lien' under Unemployment Compensation Law as amended to become effective July 1, 1939, being subsection (g) of Section 15 of said Unemployment Compensation Law be recorded and in what record book. In other words, one of these Notices has been sent to the Recorder here in Newton County, and he tells me that he has no book in which to record them and does not know what to do with it."

Senate Bill 346 of the Sixtieth General Assembly which amended the original Unemployment Act of 1937, became effective on July 1st, 1939. Par. (g) of Sec. 15, thereof, reads as follows:

> "If any case in which any contribution, interest or penalty imposed under this Act is not paid when due, the Commission may file for record in the Recorder's Office of the county in which the employer owing said contribution, interest or penalty resides, or has his place of business, or any other county in which he has property, a

> notice of lien specifying the amount of the contribution, interest or penalty due and the name of the employer liable for the same. From the time of filing any such notice, the amount of the contribution specified in such notice shall have the force and effect of a lien of a judgment against the employer named in said notice of lien for the amount specified in such notice. Such lien may be released by filing for record in the office of the county recorder a release thereof executed by the Commission upon payment of the contribution, interest and penalties or upon receipt by the Commission of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously imposed."

It will be noticed that paragraph (g), supra, does not require the recording of the "Notice of Lien", but states "filed for record", and further states "from the time of filing any such notice * * *." It will also be noticed that no reference is made to the indexing of the "Notice of Lien", That can be accounted for because the "Notice of Lien" does not require a description of the real estate of the employer and for that reason does not need indexing.

You ask in which record the "Notice of Lien" should be recorded. Since the "Notice of Lien" should only be filed in the Recorder's office, the next query is how should the "Notice of Lien" be filed for record.

The"Notice of Lien" as set out and the contents thereof defined do not require the description of the property to be set out, but only states that it should contain the name of the employer, the amount of the contribution, and the interest or penalty due.

The next question is, does this "Notice of Lien" relate to the same procedure as a lis pendens. Section 3155 R. S. Missouri, 1929, reads as follows:

"In any civil action, based on any equitable

> right, claim or lien, affecting or designed to affect real estate, the plaintiff shall file for record, with the recorder of deeds of the county in which any such real estate is situated, a written notice of the pendency of the suit, stating the names of the parties, the style of the action and the term of the court to which such suit is brought, and a description of the real estate liable to be affected thereby; and the pendency of such suit shall be constructive notice to purchasers or encumbrancers, only from the time of filing such notice. The recorder shall note the time of receiving such notice, and shall record and index the same in like manner as deeds of real estate are required to be recorded and indexed."

It is very evident that since the "Notice of Lien" under paragraph (g) does not require a description of the real estate and does not require indexing, it is not considered the same as a lis pendens. A further reason that the "Notice of Lien" is not a lis pendens is the fact that the "Notice of Lien" may be filed before a suit is filed, after the Commission arrives at the amount that the employer owes the Commission. A lis pendens cannot be filed before an action is filed effecting real estate. A Recorder is not required to file a lis pendens unless it is presented in conformity with the statute. Under this situation it cannot be said that the "Notice of Lien" is a lis pendens and should be recorded and indexed in the regular land conveyance book as is done by a lis pendens.

The next question is whether or not the "Notice of Lien" could be held to be the same as a transcript of a judgment and be filed in the office of the Recorder of Deeds. Judgment liens, under the general law, are filed in the office of the Clerk of the Circuit Court, as provided under Section 1142, Laws of 1935, p. 207, but this must be a judgment of a court of record. The finding of the Commission is not a judgment, although the paragraph (g) describes the "Notice of Lien" as a judgment lien. In construing paragraph (g) to the effect that the holding of the Commission is not a judgment, one must read the last clause of the paragraph, which reads as follows:

" * * * or by final judgment holding such lien to be erroneously imposed."

In construing this sentence it will readily be seen that the holding of the Commission stating that an employer owes the Commission is not a judgment, but merely an order.

General judgments where the title to real estate is involved, are filed in the office of the Recorder of Deeds, as provided in Section 1134 and 1135 R. S. Missouri, 1929; but under the "Notice of Lien" under paragraph (g) the real estate is not a matter involved in the suit proper. Paragraph (g) of Section 15, Senate Bill No. 346, is a special law enacted this year for the purpose of enforcing the collection of contributions from the employer under the Unemployment Compensation Act, and is taken and patterned from the same procedure as set out in Section 29, of the Missouri Sales Tax Act. Both Section (g) of the Unemployment Act and Section 29 of the Missouri Sales Tax Act, specifically say that the "Notice of Lien" may be filed in the Recorder's office and does not mention the Circuit Clerk's office. Being a later and special act it takes precedent over the general law of judgment liens, which require the filing in the office of the Circuit Clerk. It is well settled that later and special statutes take precedent over a general act and was so held in State v. Brown, 68 S. W. 2d 55, l.c. 59, where the court said:

"It will be observed that section 4556, except the last proviso which is not pertinent to the matter here in controversy, relates to corporations in general, while section 5613 relates only to a particular class of corporations, to wit, building and loan associations. In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and

> where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' Tevis et al. v. Foley, 325 Mo. 1050, 30 S. W. (2d) 68, 69; State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 626, 247 S. W. 129; State ex inf. Barrett v. Imhoff, 291 Mo. 603, 617, 238 S. W. 122. If there be any repugnancy between these two statutes, the general statute, section 4556, must yield to the special statute, section 5613."

Section 11543 R. S. Missouri, 1929, partially reads as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * * "

Paragraph (g) of Section 15, should be considered as an amendment to that part of section 11543, supra, in that it does not require or set out any specific acknowledgment, but does authorize the filing of the "Notice of Lien", as set out in paragraph (g) by the Commission.

Filing for record means filing in a certain office to be kept on file and since paragraph (g) does not require that the "Notice of Lien" contain the description of the property in the notice or does not require that it be acknowledged in any manner, it clearly means filing the notice and leaving it in the possession of the Recorder until properly released as set out in paragraph (g).

In the case of Dawson v. Cross, 88 Mo. App. l.c. 299, the court said:

> "'File' meant at common law, a thread, string, wire, upon which writs and other exhibits of courts and offices were fastened or filed for the more safe keeping and ready turning the same. A paper is said to be filed when de-

> livered to the proper officer and received by him to be kept on file. This, which we take to be the present ordinary sense of the word 'filed,' would be presumed to be the legislative sense unless the contrary is made to appear which it does not. Gorham v. Summers, 25 Minn. 81. Jones v. Parker, 73 Maine 248, was where the agreed statement of facts showed that the mortgage, though left with the recorder to be recorded, was withdrawn by the mortgagee before it was actually recorded, and while away the creditor's attorney made proper examination of the records and, finding no mortgage on file or on record, made an attachment. The statute which was construed in the case above referred to is very similar to ours. * * "

Section 11527 R. S. Missouri, 1929, reads as follows:

> "The recorder shall keep his office at the seat of justice, and the county court shall provide the same with suitable books, in which the recorder shall record all instruments of writing authorized and required to be recorded. If there is no courthouse or other suitable county building at the seat of justice, the county court shall provide an office for the recorder at any other place in the county where there is a courthouse and courts of record are held."

Although this section only mentions suitable books in which to record instruments it can be construed to mean other books for the convenience of the public.

In the case of Ewing v. Vernon Co. 216 Mo. 681, l.c. 692, the court said:

> "Turning to the sections of the statutes regulating the office of recorder of deeds, we find them so meager as to cry out for help by construction. Their terms, then, must be read in the light of cognate sections and of the general policy of our laws. By Revised Statutes 1899, section 9055, it is or-

> dained that the recorder of deeds 'shall keep his office at the seat of justice in each county' and that he 'shall provide the same with suitable books;' by section 9061 it is ordained that the county court shall 'audit and settle the accounts of recorders for books for the use of their offices.' There is not a word in the chapter (chap. 147), relating to providing chairs, desks, pens, ink, stationery, stoves, racks, tables, spittoons, or other office paraphernalia. There is even no word relating to a room in which to keep his office or fuel to heat it. But when we read other provisions of the general statutes relating to building a courthouse and heed the underlying theory that county offices should be kept there, all questions relating to a room vanish; and when we read in section 9057 that the recorder of deeds must give a bond conditioned that he will deliver up to his successor among other things 'the furniture and apparatus belonging to the office, whole, safe, and undefaced,' we but gather (what we knew before) that the furniture and apparatus do not belong to the recorder, but to the county, and under Revised Statutes 1899, section 1777, are under the control and management of the county court. Turning to other cognate sections it becomes plain that unless the Legislature deliberately planned to legislate against recorders and in favor of other county officers (an unthinkable position), it becomes plain that the county is to furnish the necessaries in furniture, fixtures, etc., to preserve the county records and make them usable by and useful to the general public. No one reading statutes relating to clerks, probate judges, etc., can come to any other conclusion.
> * * * "

Under the holding in the above case the county court shall furnish suitable books and supplies which are meant for the convenience of the public and the officer.

Paragraph (g), of section 15, does not set out the procedure of filing a "Notice of Lien". Since the "Notice of Lien" cannot be recorded in the real estate record and the act does not provide for the indexing of the "Notice of Lien" and because the "Notice of Lien" does not contain a description of real estate it can

only be filed under a serial number. For the convenience of the public the county court should provide a book on unemployment compensation commission liens, which should contain a space for the filing number of the "Notice of Lien", with the name of the employer so that the public, or an abstracter can run the record on this newly enacted lien, through the number book, without referring to the original or copy of the "Notice of Lien".

CONCLUSION

In view of the above authorities it is the opinion of this department that a "Notice of Lien" under the Unemployment Compensation law, as amended by the Senate Bill 346 of the last general assembly, does not require recording, as the term is generally used, but all that is necessary for the Unemployment Commission to do, is to file and leave with the Recorder of Deeds the "Notice of Lien" containing all of the statutory information required under paragraph (g).

It is further the opinion of this department that the county court of each of the counties should furnish the Recorder of Deeds with a book in which to set out the serial number stamped upon the "Notice of Lien" as filed by the Commission, which book should be so prepared as to show the name of the employer owing the contribution to the Unemployment Commission. If such a book is not furnished by the county court, it would be necessary for the public, attorneys and abstracters, who are running the record of an employer to handle all of the original "Notices of Lien" in order to ascertain whether or not a lien has been filed against an employer.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

TAXATION: Collector's deed to trustee.

See supplementary letter of correction attached.

FILED
24

9-28

September 27, 1939

The State Tax Commission
Jefferson City, Missouri

Attention: Mr. W. N. Doss, Secretary

Gentlemen:

This is in reply to your request of recent date for this office to make up a form of deed to be used by the county collector when he sells lands for delinquent taxes to a trustee appointed by the county court for the purpose of purchasing such lands.

Pursuant to your request we submitted the following form:

"THIS INDENTURE made and entered into this ___ day of _____, 193__; WITNESSETH THAT:

"WHEREAS, the state and county taxes for the years ___, ___, ___; on the real estate last in this Indenture described were returned delinquent in the name of _____ on January 1, 193__; and,

"WHEREAS, said real estate had been recorded along with other tracts in the office of the Collector of Revenue of _____ County, as delinquent for the non-payment of taxes, costs and charges due for the aforesaid years; and,

"WHEREAS, _____ at the last mentioned date was the collector of

revenue of said county; and,

"WHEREAS, said real estate, after having been duly advertised, was offered for sale by said collector for non-payment of taxes, costs and charges for said years at the _____ door of the courthouse in the city of _____, County of _____, State of Missouri, on the first Monday in November, 193__; and,

"WHEREAS, at the aforesaid offering no person offered a sum therefor equal to the said delinquent taxes with interest, penalty and costs; and,

"WHEREAS, the state and county taxes for the years ___, ___, ___, ___,* on the real estate last in this Indenture described were returned delinquent in the name of _____ on January 1, 193__; and,

"WHEREAS, said real estate had been recorded along with other tracts in the office of the Collector of Revenue of said county, as delinquent for the non-payment of taxes, costs and charges due for the years last aforesaid; and,

"WHEREAS, said real estate, after having been duly advertised, was offered for sale by said collector for non-payment of taxes, costs and charges for said years at the ____ door of the courthouse in the city of _____, County of _____, State of Missouri, on the first Monday in November, 193__; and,

"WHEREAS, at said offering of said real estate for the aforesaid purposes, no person offered a sum therefor equal to

the delinquent taxes with interest, penalty and costs; and,

"WHEREAS, the state and county taxes for the years ___, ___, ___, ___, ___, on the real estate last in this Indenture described were returned delinquent in the name of _____ on January 1, 193__; and,

"WHEREAS, said real estate had been recorded along with other tracts in the office of the Collector of Revenue of said County, as delinquent for the non-payment of taxes, costs and charges due for the years last aforesaid; and,

"WHEREAS, said real estate, after having been duly advertised, was by said collector offered the third time for sale for the non-payment of taxes, costs and charges for said years at the _____ door of the courthouse in the city of _____, County of _____, State of Missouri, on the first Monday in November, 193__; and,

"WHEREAS, the said real estate, having been offered for sale as aforesaid for delinquent taxes with interest, penalty and costs, and at which sale the said collector having received the highest offer therefor, to-wit, the sum of _____, made by _____, who had been designated as trustee by the county court of _____ County, Missouri, as a suitable person to bid at the said sale; and who as trustee for the benefit of the funds entitled to participate in the taxes for which the lands herein are sold, was authorized by an order of the county court of said county, dated _____ 193__, to purchase at said sale any

or all of such real estate as may be necessary to protect all taxes due and owing thereon and to prevent their loss to the taxing authorities on account of inadequate bids; the said real estate was, therefore, sold for the said sum of _____ Dollars, to the said _____ trustee for the use and benefit of the following:

"FUNDS	AMOUNT
_____	_____
_____	_____
_____	_____
_____	_____

"WHEREAS, the said _____, trustee as aforesaid is not required to pay the amount of the bid but is authorized to take and hold title to the said real estate as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which the said real estate is sold as follows:

"FUNDS	AMOUNT OF TAX
_____	_____
_____	_____
_____	_____
_____	_____

"WHEREAS, the tract of land hereinafter described was the least quantity which would sell for the respective

amount due thereon for taxes, interest, costs and charges, and it further appearing from the records of said county collector's office that said lands were legally liable for taxation and have been duly assessed and properly charged on the tax books with the taxes for the years as hereinbefore stated.

"NOW, THEREFORE, I, _____, Collector of _____ County, Missouri, in consideration of the foregoing, do grant, bargain, sell and convey unto the said _____ as trustee for the use and benefit of the funds and in the proportion hereinbefore set out and to his successors and assigns forever the following tract or parcel of real estate lying and being in the County of _____, State of Missouri, described as follows, to-wit:

_____

_____

_____

_____

TO HAVE AND TO HOLD the said last mentioned tract or parcel of real estate with the appurtenances thereto belonging to the said party of the second part as trustee aforesaid and to his successors and assigns forever in as full and ample manner as the collector of said county is empowered by law.

"IN TESTIMONY WHEREOF, the said _____, Collector of said County of _____, has hereunto set his hand, and affixed his official seal, the day and year last above written.

"Witness:_____ _____ (L.S.)

Collector of _____ County.

STATE OF MISSOURI, _____ COUNTY, ss.

"Before me, the undersigned, _____, in and for said county, this day, personally came the above named, _____, Collector of said county, and acknowledged that he executed the foregoing deed for the uses and purposes therein mentioned.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal, this _____ day of _____, 193__.

_____ (L.S.)"

*The blank spaces in the deed showing the years for which the lands are delinquent and sold for taxes are for the convenience of the collector and are not directions as to the number of years for which the lands should be sold.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

_____
W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION: Trustee's deed.

November 21, 1939

11-27

FILED
24

The State Tax Commission
Jefferson City, Missouri

Attention: Mr. W. N. Doss, Secretary

Gentlemen:

This is in reply to your request of recent date for this office to make up a form of deed to be used by the trustee when he sells lands which he has purchased at tax sales.

Pursuant to your request, we submit the following form:

"THIS INDENTURE, Made and entered into this_____day of_____, 19___, by and between _____, trustee, for the use and benefit of the funds hereinafter mentioned, party of the first part, and _____ _____, of the County of_____, State of_____, part__of the second part; WITNESSETH THAT:

"WHEREAS, the county court of_____ County, Missouri, by an order of record dated the_____day of_____, 19___, a certified copy of which is on file in the office of the county collector of said county, did designate and appoint the party of the first part as a trustee for the benefit of all funds entitled to participate in the funds entitled to the taxes against the lands herein described; and,

"WHEREAS, the said party of the first part has accepted said appointment and is now the

duly appointed, qualified and acting trustee for the uses and purposes aforesaid; and,

"WHEREAS, the said party of the first part, by virtue of the aforesaid appointment, is now and was at all the times hereinafter stated authorized to bid at all sales of delinquent lands offered for taxes, interest, penalty and costs, by the collector of said county, which had been offered for sale for taxes for two successive years next prior thereto; and,

"WHEREAS, the said party of the first part is and was at all the times herein mentioned, authorized to purchase at such sales all lands or lots offered thereat, necessary to protect all taxes due and owing, and to prevent their loss to the taxing authorities involved from inadequate bids; and,

"WHEREAS, _____, Collector of _____County, Missouri, did on the _____day of_____, 19___, offer for sale for taxes for the third time, the lands hereinafter described, and at said sale no person having bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and the costs provided by law, _____, the undersigned trustee for the uses and purposes herein set forth and by virtue of the authority vested in him, did bid and purchase the lands hereinafter described at a price not in excess of a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, and the same were stricken off and sold to the said trustee for the use and benefit of the following funds entitled to the payment of the taxes for which the real estate hereinafter described was sold as follows:

FUNDS	AMOUNT
_____	_____
_____	_____

All of which proceedings are shown by deed from the Collector of said county to _____, trustee, dated the _____day of_____, 19___, and recorded in the office of the Recorder of Deeds of _____County, Missouri, in deed record number_____, at page number_____; and,

"WHEREAS, the said party of the first part has been offered the sum of_____ Dollars ($_____) by the said_____, part__of the second part, for the lands hereinafter described; and,

"WHEREAS, the county court, by order of record dated the_____day of_____, 19__, has ordered the undersigned to sell the hereinafter described lands to the said part__of the second part at that price and sum, and to execute and deliver a deed therefor.

"NOW, THIS INDENTURE, WITNESSETH, That the said party of the first part, under and acting by virtue and in pursuance of the powers in him vested as hereinbefore stated, in consideration of the sum of_____Dollars ($_____) to him in hand paid by the said _____, part__ of the second part, the receipt of which is hereby acknowledged, does by these presents, grant, bargain, sell and convey unto the said part___of the second part, the piece or parcel of land situated in the County of_____, State of Missouri, and described as follows:

_____

_____

_____

_____

_____

_____

_____

_____

_____

"TO HAVE AND TO HOLD the above described premises together with all and singular the hereditaments and appurtenances thereto belonging or in anywise appertaining unto the said part____of the second part, _____heirs and assigns forever.

"IN TESTIMONY WHEREOF, the said party of the first part has hereunto set his hand this _____day of_____, 19_____.

_____
Trustee.

STATE OF MISSOURI, _____COUNTY, SS.

"Before me, the undersigned, _____ in and for said County, this day, personally came the above named_____, trustee, described in the foregoing instrument, and acknowledged that he executed the same for the uses and purposes therein mentioned.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal, this_____day of_____, 19___.

_____
Notary Public
_____County, Missouri."

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

_____
W. J. BURKE
(Acting) Attorney General

TWB:HR

COUNTY COURT: In order for judge of county court of Newton County to be entitled to five dollars per day while the court is in session, he must actually be present on those days.

December 15, 1939

12-15
1

FILED
24

Hon. Herbert H. Douglas
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

We are in receipt of your request, under date of December 12, 1939, for an opinion, which reads as follows:

> "I write you for an opinion in regard to the following matter:
>
> "Can a member of the County Court collect his pay when a majority of the Court is in session but the member in question is not present on this particular day."

Section 2092 R. S. Missouri, 1929, repealed and reenacted in Laws of Missouri, 1939, page 332, reads in part as follows:

> "In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. * * "

Since the 1930 census shows Newton County has a population

of 26,959, the above provision set out would govern the compensation of the judges of the county court in your county.

We are not unaware of the general rule that the right to the compensation attached to a public office is an incident to the title to the office, and not to the exercise of the functions of the office. Currio v. Franklin County, 315 Mo. 405, 285 S. W. 1007; State v. Gordon 245 Mo. 12, 149 S. W. 638; King v. Riverland Levee Dist. 218 Mo. App. 490, 279 S. W. 195. To apply that rule in the present case, however, would fly into the face of the clear expression of Legislative intent expressed in Section 2092, supra. By its express provision, you will note, the county judges are to receive five dollars per day for each day necessarily engaged in holding court. A condition precedent to the right to receive payment is set forth by the words of the act, namely, the condition that the county judge be "necessarily engaged in holding court." There is no ambiguity. In the case of Fichtner v. Mohr, 16 S. W. (2d) 739, l.c. 741, the court said:

> "* * We are bound to ascertain and give effect to the intention of the Legislature as expressed in the statute, and, where the language used is plain, it must be given effect by the courts. Lincoln University v. Hackmann, 295 Mo. loc. cit. 125, 243 S. W. 320; DeHart v. School District, 214 Mo. App. loc. cit. 657, 263 S. W. 242. * * * "

CONCLUSION

In view of the above, it is the opinion of this Department that a judge of the county court of Newton County, is not entitled to compensation under Section

2092, supra, unless he is actually present on the day in question.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

COUNTY SURVEYOR: Duty of county court to furnish surveyor supplies and instruments.

March 23, 1939

4-6

FILED
23

Mr. David A. Dyer
Prosecuting Attorney
St. Charles County
St. Charles, Missouri

Dear Sir:

We have your request for an opinion, which in part is as follows:

> "The County Surveyor of St. Charles County has requested the County Court to furnish his office with various supplies at the cost of the county. These supplies include surveying equipment such as surveying transit, ranging poles, leveling rod, tape, etc., drawing supplies and office equipment, including typewriter and calculator. The County Court has asked me for my opinion as to whether it is the duty of the court to furnish his office with such supplies."

It is a strict rule of construction in this state, consistently adhered to by the courts, when dealing with compensation for special officials that an officer claiming compensation must be able to place his finger upon the statutory authority for same. An officer can recover compensation only when specifically authorized by statute. Williams vs. Chariton County 85 Mo. 645 (1885); State ex rel vs. Adams 172 Mo. 1 (1903); Hill vs. Butler County 195 Mo. 511 (1906). It is said that an officer in Missouri is presumed to render his services gratuitously unless some specific statutory authorization is found for the payment of such services. King vs. Riverland Levee District 279 S. W. 195, 196 (1926).

The courts have adopted and followed an entirely different rule with reference to the allowance of expenses; and items which could not reasonably have been foreseen by the Legislature, and which may vary from time to time depending upon the economic trend of the country. The general rule as to such matters is stated in 46 C. J. page 1018, Section 246 in the following language:

> "But where the law requires an officer to do that which necessitates an expenditure of money for which no provision is made to supply him with cash in hand, he may make the expenditure out of his own funds and have reimbursement therefor, and where a public duty is demanded of an officer without provision for any compensation, the expense must be borne by the public for whose benefit it is done."

This rule has been strictly adhered to in Missouri. County of Boone vs. Todd 3 Mo. 140 (1833); Hark Leader vs. Vernon County 216 Mo. 696 (1909); Buchanan vs. Ralls County 283 Mo. 10, 222 S. W. 1002 (1920).

In Ewing vs. Vernon County 216 Mo. 681, ~~694~~ 695, the court in commenting upon this difference made between "compensation" and "expenses" said:

> "Fees are the <u>income</u> of an office, Outlays inherently differ. An officer's pocket in no way resembles the widow's cruse of oil. Therefore those statutes relating to fees, to an income, and the decisions of this court strictly construing those statutes, have nothing to do with this case relating to outgo. Such, we take it, is the doctrine of the cases cited in the former paragraph of this opinion, and it comports with reason. Further, if the custom was to deliver a deed to the U. S. Government to be transmitted by mail, as seems to have been the case, then such

> delivery is reasonably well within the contemplation of the statutory duty to deliver 'to the party or his order.'
>
> It must not be expected that this court will throw down statutory safeguards for the protection of the treasuries of the counties of this State, or in any way countenance looseness in their business affairs. But, on the other hand we shall not construe our statutes so as to produce a harsh or ridiculous result and one not within the fair meaning of our laws.
>
> The conclusion we have come to comports with the general doctrine announced in 23 Am. and Eng. Ency. Law (2 Ed.), 388. 'Where,' say the editors of that standard work, 'the law requires an officer to do what necessitates an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.'"

We next pass to the question of whether or not the county surveyor is required by law to perform any duties which requires the use of surveying equipment such as surveying transit, ranging poles, leveling rod, tape, etc. We find that surveyors are dealt with in Chapter 75, R. S. Mo. 1929, in Sections 11571 to 11607, inclusive. He is elected to a public office for four years. He is required to take oath and give a bond, and in addition thereto, among other things, he willdeliver to the Recorder of Deeds all the records, books and papers, appertaining to his office. He is required to execute orders of the county court and re-survey any tract of land, the title of which is in dispute. Sections 11579 and 11580, R. S. 1929. He is required to keep certain records of surveys made by him and his deputies

in a well bound book with a convenient index, and is required to give the distances to points and required to measure the distance to houses standing in the immediate vicinity in surveying town lots, Section 11583 R. S. 1929. In the performance of his duties, he is required to use chainmen and the compensation is fixed by law, Sections 11586 and 11587, R. S. 1929. In subdividing a section of land, he is required to run a random line in the direction of the opposite corner to a point at right angles therefrom. Section 11593 R. S. 1929. In subdividing land into quarter sections, he is required to set a temporary post at every forty chains, Section 11594, R. S. 1929. In subdividing a section into eight parts, he is required to set posts at twenty chains, Section 11595, R. S. 1929. The use of a compass is required in the performance of some of his duties, Section 11602, R. S. 1929. The compensations of a surveyor is fixed in Section 11607.

Thus, from the above examination of the surveyors duties, it is apparent that he is called upon to perform, in his official capacity, certain technical feats, such as accurately measuring distance, running straight lines, locating corners of sections, all of which the law requires to be done with scientific apparatus; instruments which must be accurate because certified copies thereof are made competent evidence, Section 11592 R. S. 1929. There is no more duty on the surveyor to furnish a compass for the official discharge of his duties than there is upon any county officer to furnish a typewriter, or a seal.

It is, therefore, the opinion of this office that it is the duty of the county court to furnish the county surveyor with such surveying equipment as may be reasonable and necessary for the performance of his official duties as county surveyor.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

OFFICERS:
SALARIES AND FEES:
TREASURER OF THE
CITY OF ST. LOUIS:

The salary of the Treasurer of the City of St. Louis is fixed by Laws of Missouri, 1939, page 486, and was payable in accordance therewith when that act went into effect.

December 16, 1939

12-20

FILED
25

Honorable John J. Dwyer, Treasurer
City of St. Louis
St. Louis, Missouri

Dear Sir:

This is in reply to your request of recent date wherein you request an opinion from this department on the question of whether or not you are entitled to the salary as city treasurer as is provided by Laws of Missouri, 1939, page 486, or whether or not you shall be paid the compensation which was being paid at the time you were elected.

The General Assembly in 1939, by an act found at page 486, Laws of Missouri, 1939, passed an act especially applicable to cities in the class of the City of St. Louis pertaining to the city treasurer, his bond, duties, salary, deputies and with an emergency clause. Sections 1, 3, 4 and 7 of the act, which are pertinent to the question which you have submitted, are as follows:

> "In all cities in this state now or hereafter having six hundred thousand inhabitants or more, and in all cities in this state not within a county, but constituting both a political subdivision and a city in its corporate capacity, the city treasurer shall be commissioned by the mayor, and shall serve for the term or period in such commission fixed and thereafter until his successor is duly elected or appointed and qualified. In the event of a vacancy in the office of city treasurer, arising from any cause, such vacancy shall be filled by appointment by the

mayor, and the city treasurer so appointed shall serve until the first Monday in January next following the date of the election of his successor, and thereafter until his successor is qualified."

"Sec. 3. The city treasurer shall perform such duties as are, or may be, required of him by the general laws of this state, and such duties as are, or may be, required of him by any ordinance or ordinances of any such city not inconsistent, or in conflict with any such general law.

"Sec. 4. The salary of the city treasurer shall be Eight Thousand Dollars per annum. The salary of the city treasurer, and the salaries of his deputies, clerks, and assistants, shall be paid out of the city treasury, in equal semi-monthly installments.

"Sec. 7. There being no adequate law in this state applying to the election or appointment of and defining the duties of the city treasurer, providing for the appointment of his deputies, assistants, and clerks, and fixing their salaries and the manner of payment thereof, an emergency is declared to exist within the meaning of the Constitution, therefore this act shall take effect and be in force on and after it is approved by the Governor."

If you are correct in your contentions, your salary should be Eight Thousand Dollars per annum from and after the date the law went into effect which was May 22, 1939.

From the briefs which have been submitted by you and by the city, it appears that the only obstacle in your way of receiving this salary is Section 8 of Article XIV of the Constitution of Missouri which provides as follows:

> "The compensation or fees of no State, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

If new duties are added to an officer and compensation is paid therefor, then he may draw compensation for such duties and not be violating the provisions of the foregoing section of the Constitution. This statement is supported by a number of cases, among which are State ex rel. v. Walker, 97 Mo. 162 and State ex rel. v. Sheehan, 269 Mo. 421.

The briefs which have been submitted by you and by the city treat the question of whether or not new duties have been added to your office. We note from the memorandum brief, which you have submitted, that you cite certain provisions of the charter and city ordinances which require you to perform duties for the city which are duties in addition to those which the ordinary county treasurer performs under the old county treasurer's act. Since under the Act of 1939, the Treasurer of the City of St. Louis is not required to perform any more duties than he was under the old act, we do not think that you could draw the additional compensation on the ground that you have new duties imposed upon you. On that point we think that the

position that the city has taken in this matter is correct.

Another point which you have suggested in your memorandum is that the salary must be a fixed compensation, that is, the salary which is supposed to be raised by the new act must have been one that is fixed at a certain amount.

In Volume 46 Corpus Juris, page 1024 at Section 259, the rule is announced as follows:

> "If the prohibition is as to 'salary,' it does not affect one whose compensation is not definite and fixed, but is uncertain in amount and consists in fees or percentages. Where, however, the term 'emoluments' or 'compensation' is used, the limitation is wider in its effect, embracing all kinds of compensation such as fees, and per diem allowances, but not the privilege of appointing deputies. A prohibition against increasing or decreasing fees, percentages, or allowances of public officers during the term for which such officers are elected applies only to those irregular and uncertain modes of compensating public servants indicated by the words 'fees, percentages, or allowances,' and by terms of like meaning, and does not apply to the salaries of officers."

We think this same principle is followed in State ex rel. v. Gordon, 238 Mo. 168, wherein the Supreme Court held that the constitutional provision did not apply to the officer whose term was not fixed by the statute. For the same reason the constitutional provision against increase of salary during the term of office would not apply to the officer whose salary is not fixed. This

principle is also followed in State ex rel. Dietrich v. Daues et al., Judges, 287 S. W. 430, 431, wherein the court said:

> "It requires no citation of authority to show that the power to prescribe a salary as an incident to a public office is purely legislative in character. That power, as respects the office of county treasurer, the Legislature has delegated to the county court, the agency most familiar with the fiscal affairs and financial condition of the county, as well as the services required to be performed by the treasurer--which may vary in different counties and at different times in the same county. The only limitation upon the power is that the compensation allowed thereunder be such as may be deemed just and reasonable. What is just and reasonable in a given case is committed to the discretion of the county court and to it only. Its action in the exercise of that discretion is not subject to judicial review, for the simple reason that neither the statute which confers the discretion nor any other makes it so."

Prior to the ruling of the Supreme Court in State ex rel. McKittrick v. Dwyer, 124 S. W. (2d) 1173, it seems that the City of St. Louis took the position that the city treasurer was an appointive office appointed by the Mayor of the City under the provisions of Section 1 of Article VIII of the Charter of the City of St. Louis, found at page 1282 of the Revised Code of 1926. In addition to that provision of the charter by Section 24 of Article XV of the charter the salary of the city treasurer was fixed at Five Thousand Dollars per annum and his bond was fixed and his duties were set out in that section.

From your letter it also appears that by an ordinance in 1931 the municipal assembly fixed the salary of the city treasurer at Five Thousand Dollars per annum. It seems that all of these sections were adopted and passed under the belief that the office of the City Treasurer of the City of St. Louis was an appointive officer of the city. However, under the State ex rel. McKittrick v. Dwyer case, supra, the Supreme Court has held that that office is an elective office the same as the county treasurer under the general law pertaining to county treasurers in the state.

Since the salary of the treasurer which has heretofore been fixed by the charter and municipal assembly under the impression that the treasurer was an appointive officer of the mayor, there may be some question of whether or not that salary could be considered as the salary fixed for the person who was elected under the general county treasurer's act. In connection with this statement, we have in mind a rule stated in 46 Corpus Juris, page 1025, Section 262, which provides in part as follows:

> "A constitutional or statutory provision prohibiting a change of compensation after an election or appointment during the term of an officer does not apply where, prior to such time, no salary or compensation has been fixed for the office. So a statute fixing the salary of an officer does not increase the salary during the term, where the law fixing the compensation at the time of election was invalid. * * * * * * * "

In connection with this question, we note in the above case of State ex rel. McKittrick v. Dwyer that the City of St. Louis suggested to the court in its motion for rehearing that if the Treasurer of the City of St. Louis was an elective officer as contended by the Attorney General, then there was serious doubt whether there was any provision in the law for the bond, salary or the appointment of deputies are the duties of

the city treasurer and requested the court that if it still took the position that this was an elective office that it modify its opinion so as to point out to the city the way in which the treasurer might be commissioned and his bond and salary fixed, etc. In that case the court overruled the motion for rehearing without any comment on these questions. So evidently from that statement there was serious doubt on the part of the city of whether or not there was any law which fixed the salary of the City Treasurer of the City of St. Louis at that time.

From a reading of the Act of 1939 pertaining to the office of the City Treasurer of the City of St. Louis, it is quite apparent that the lawmakers, when this bill was under consideration, took the position that there was no provisions under the statutes for the salary of the City Treasurer of the City of St. Louis because in Section 7 of said Act, which was the emergency clause, they so stated. We must assume that the lawmakers had before them, at the time of the consideration and passage of this bill, the matters which were suggested in the Respondent's brief in the State ex rel. McKittrick v. Dwyer case.

There is a rule of law that the legislative construction of the old statute, as it applies to the St. Louis City Treasurer, is entitled to consider. In Morgan v. Jewell Const. Co., 91 S. W. (2d) 638, 641, the court announced this rule:

> "It is well established that a construction of a statute by the Legislature, as indicated by the language of other or subsequent enactments, is entitled to consideration as an aid to interpreting a statute. 59 C. J. p. 1033; State ex rel. v. Hackmann, 275 Mo. 47, 54, 204 S. W. 513; State ex inf. v. Long-Bell Lumber Co., 321 Mo. 461, 12 S. W. (2d) 64; Evans v. McLalin, 189 Mo. App. 310, 175 S. W. 294; State ex rel. v. Wilson,

> supra; Crohn v. Kansas City Home Telephone Co., 131 Mo. App. 313, 109 S. W. 1068. And where the controversy has arisen since the enactment of the subsequent statute or amendment wherein the Legislature has indicated that the statute should be taken to mean a certain thing, such legislative construction should be given great weight. * * * * * * * * * * * * * "

It will be noted also that the lawmakers passed the Act of 1939 with an emergency clause which clearly indicat s that they thought that the act should go into effect at once in order that the conditions as they existed pertaining to the city Treasurer of the City of St. Louis at that time could be corrected immediately.

While the courts are not bound by the construction placed upon an act by the lawmakers, yet such a construction under circumstances similar to those here, we think should be given great weight.

Section 12138, Laws of Missouri, 1937, at page 427, provides as follows:

> "Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

This is the general county treasurer's act section, but as stated in the McKittrick v. Dwyer case, supra, the provisions of the general county treasurer's act applied and where a duty is imposed on the county court to perform, then under Section 24 of the Scheme for the Separation and Reorganization of the Governments of the City of St. Louis, the authority of the county court is conferred

on the municipal assembly.

Section 14796, R. S. Missouri 1929, provides:

> "All acts and parts of acts which provide for the performance of any duty or trust by any county court in this state, shall also include the municipal assembly, and the mayor and comptroller of the city of St. Louis."

Section 12138, supra, was under consideration by our Supreme Court in the case of Givens v. Daviess Co., 107 Mo. 603. In that case the question of the salary of the county treasurer of Daviess County was under consideration. The effect of the ruling of the court in that case was that since the county court was authorized to allow the treasurer for his services such compensation as may be just and reasonable that it could raise or lower or change the compensation of the treasurer at any time during his term depending upon the duties imposed on that officer. While the court did not in the Givens v. Daviess County case, supra, definitely make such a statement, we note that in Dietrich v. Brickey, 277 S. W. 615, the St. Louis Court of Appeals, in considering a case in which a change of the salary of the treasurer of Jefferson County was being considered, and at l. c. 616 that court said:

> "Our Supreme Court has decided that the compensation of the county treasurer could be increased, changed, or diminished during the incumbency of that office. See Givens v. Daviess County, 107 Mo. 603, 17 S. W. 998. So then, in fixing or changing the compensation of the treasurer, the defendants were acting within the express jurisdiction conferred on them by law, and it requires the strongest, most cogent, and satisfactory evidence to warrant another

> judicial tribunal to adjudge the members of such court guilty of fraud and corruption in ofice."

In the Dietrich case it will be noted that the treasurer of Jefferson County was elected in 1920 for a term expiring in 1924, and at the time he was elected he was receiving a salary of Fifteen Hundred Dollars per annum. Before his term expired, the court, in 1923, reduced this salary to One Thousand Dollars. In making this order the court took the position that One Thousand Dollars was just and reasonable compensation for this officer's services at that time. The court held in that case that in the absence of fraud or corruption the county court had the authority to make that change in the officer's salary. This case was again before the St. Louis Court of Appeals in Dietrich v. Brickey, 48 S. W. (2d) at page 69, and the action of the county court in fixing the salary of the county treasurer was affirmed.

In Givens v. Daviess County, supra, l. c. 608, the court said:

> "A public officer is not entitled to compensation by virtue of a contract, express or implied. The right to compensation exists, when it exists at all, as a creation of law, and as an incident to the office. Gammon v. LaFayette Co., 76 Mo. 675; Koontz v. Franklin Co., 76 Pa. St. 154; Fitzsimmons v. Brooklyn, 102 N. Y. 536; Walker v. Cook, 129 Mass. 579; Knappen v. Supervisors, 46 Mich. 22; City Council v. Sweeney, 44 Ga. 465. In the absence of constitutional restrictions the compensation or salary of a public officer may be increased or diminished during his term of office, the manner of his payment may be changed, or his duties enlarged without the impairment of any vested right. State ex rel. v. Smith, 87 Mo. 158; City of Hoboken v.

Gear, 27 N. J. L. 278; United States v. Fisher, 109 U. S. 143.

"Owing doubtless to great difference in the wealth and revenues of the various counties, the legislature has delegated to the county courts of their respective counties the duty of determining and fixing the compensation of county treasurers by section 5405, Revised Statutes, 1879, which is as follows: 'Unless otherwise provided by law, the county court shall allow the treasurer, for his services under this article, such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor.' Under this section, according to the principles above enunciated, the county court of defendant county had the undoubted right, at least within the limits of reasonableness and justice, to determine the compensation plaintiff should receive for his services as treasurer, and to diminish the same during the term, if in its judgment circumstances demanded a reduction. * * * * * * * *"

Considering the Missouri cases cited above which have dealt with the county treasurer's salary, it seems that the courts have taken the view that the salary of the county treasurer which is fixed by the county court or municipal assembly, is not such a compensation that may not be increased or diminished during the term of the office of the incumbent. That being the case, the salary fixed by the county court, under the old county treasurer law, is not within the provisions of Section 8 of Article XIV of the Constitution of Missouri.

CONCLUSION.

From the foregoing it is the opinion of this

department that since the salary of the City Treasurer of the City of St. Louis, under the old county treasurer act, was not a fixed salary, and since it was subject to change by the county court or municipal assembly at any time during the term of the incumbent, that that office was not within the provisions of Section 8 of Article XIV of the Constitution. That being the case, it is the opinion of this department that the City Treasurer of the City of St. Louis, under the Act of the Legislature of 1939, page 486, would be authorized to receive the salary as city treasurer of Eight Thousand Dollars per annum, beginning on May 22, 1939, which was the date that the act was approved with the emergency clause.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. Burke
(Acting) Attorney General

TWB:DA

PENAL INSTITUTIONS: Conditional Commutation by Governor is forfeited when ?

January 30, 1939

FILED
2
26

Mr. Robert C. Edson
Director of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated December 16, which reads as follows:

"At the request of the Board of Probation and Parole I am submitting the following facts to you with the request that you render an opinion for this Board concerning the same;

Elmer Pettus was received at the Algoa Intermediate Reformatory and was registered as #2089. He was released on parole from this institution. The final and maximum date of his sentence was November 28, 1938. This was the maximum day of servitude for the penalty imposed by the Court. However, on November 14th, 1938 he pleaded guilty in Scott County on the charge of making a forged and counterfeit check, for which he received a three year sentence at the Missouri State Penitentiary. The Board of Probation and Parole did not receive a report of this violation and sentence until after November 28, 1938, which, as previously stated, was the maximum expiration date of his original sentence to Algoa Intermediate Reformatory. Now, the Board is desirous of obtaining an opinion from you as to whether, in spite of the fact that a violation of parole was committed prior to the final date of expiration, yet because no action was taken by the Board until the maximum date of expiration of sentence, do we now have authority to revoke the parole of t the said Elmer Pettus.

I trust that I have given you sufficient information so that an opinion may be rendered in this case. However, should you desire more information please be assured that we will do our best to furnish it to you."

In State vs. Asher 246 S. W. 911, l. c. 913, the Supreme Court said:

"Section 8, article 5, of our Constitution gives the Governor 'power to grant * * * pardons, after conviction * * * upon such condition and with such restrictions and limitations as he may think proper.'

Section 4144, R. S. 1919, provides that- -

'In all cases in which the Governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper.'

No provision is made either in the Constitution or the statute for 'paroles' by the Governor. The question therefore depends on the meaning of word 'parole', used in reference to dischagre of prisoners from the penitentiary. * * * * * * * * *

It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons."

In the case of Jacobs vs. Crawford, 308 Mo. 302, 272 S. W. 931, l.c. 933, the Supreme Court said:

"Petitioner was not entitled to a parole as a matter of right. The granting thereof was a matter of grace upon the part of the Governor. Petitioner accepted it, burdened with the condition that, if he did not keep his parole, it might be revoked,

and that he would be compelled to 'serve out the remainder of his sentence.' Such condition was neither illegal, immoral, nor impossible of performance. The condition was stated in the order granting the parole, and petitioner is bound thereby.

Having failed to observe the conditions of his parole, petitioner was arrested and returned to the penitentiary to serve out the remainder of his sentence. As the remainder of such sentence has not been served, because petitioner is not entitled to have the time that he was at large under his parole and prior to its revocation deducted from the remainder of his sentence, his imprisonment was legal when our writ was issued, and has not since become illegal."

46 Corpus Juris, page 1201, Section 56 reads in part:

"The conditions of a pardon may be such as to be operative for the period of time for which the convict was sentenced, or for some less period; and by the weight of authority a pardon is not illegal or impossible of performance because its conditions require observance for a period of time extending beyond that in which the sentence should have been served * * * *"

46 Corpus Juris, page 1202, Section 57 reads in part:

"A conditional pardon is a grant to the validity of which acceptance is essential. It may be rejected by the convict; and if rejected there is no power to force it upon him. When once accepted it follows that its conditions become binding * * * * * *"

46 Corpus Juris, page 1202, Section 61 reads in part:

"A breach of the condition of a pardon avoids and annuls it. Execution of the original sentence may then be enforced. This is true, although the term for which the convict was sentenced has expired unless the application of a different rule is required, by operation of a statute, or by the pardon itself, * * * * *"

46 Corpus Juris, page 1204, Section 63 reads in part:

"Where a convict is pardoned on condition that if after discharge, he should commit a felony, the commutation should be void, and, in addition to the penalty assessed for the subsequent felony, he should serve so much of his origianl conviction as he had not served at the time of the discharge, on a breach of the condition he may be detained by the warden. * * * * * * * *"

CONCLUSION

We are of the opinion that in Missouri, the Governor's conditional commutation on sentence of a convict, when executed under constitutional and statutory prerogative, by operation of the law, is in fact a conditional pardon.

In your request you have not favored us with copies of the provisions of the conditional commutation of convict Elmer Pettus, but have submitted us a form in blank which is usual in such cases, and containing the provisions and condition "that the said _____ shall not violate any law in Missouri, * * * * that if recipient fails in any respect to comply with the condition of commutation, then the commutation shall stand forfeited and the original sentence shall stand and remain in full force." We assume these conditions to be identical in the matter of convict Elmer Pettus, and we assume that the term fixed by the Governor in said conditional commutation did not end on a date prior to the maximum date of his sentence, that is November 28, 1938.

Under the facts which you have submitted, and the facts which we have assumed as above set out, we are of the opinion that convict Elmer Pettus' conditional commutation was in force at the time that

he committed his subsequent crime hence his conditional commutation was forfeited by his criminal act. This being true, it was proper for the Governor, on recommendation of the Parole Board, at the subsequent time that he discovered this forfeit conditional commutation, to direct the warden to apprehend the convict and imprison him on his original sentence. This power of the Governor is not abatted by the reason of the fact that his order to apprehend is made subsequent to the maximum date of expiration of sentence.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:WW

HIGHWAYS: Construction through municipalities having population of more than 2,500 according to last decennial census.

June 19, 1939

L-26

FILED
26

Honorable Howard Elliott
State Representative
St. Louis County
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of June 17, 1939, in regard to the building of State Highway No. 40 through the cities of Ladue, Brentwood, Clayton and Richmond Heights, all in St. Louis County, wherein you request an opinion concerning the interpretation of Section 8133, R. S. Mo. 1929.

Your first question is as follows: "Does the Section contemplate that the entire highway strip be measured and divided by the number of buildings actually existing at the time of the measurement so as to get a result in excess of 200 feet before the roadway can be placed in that locality?"

The only mention of Section 8133 which we are able to find in the cases is in State vs. State Highway Commission 42 S. W. (2nd), at pages 204-205 wherein it is said:

> "If this law is applicable to the state highway system, what becomes of section 8133, which has provided ever since its enactment in 1921 that any state highway routed through a municipality of less than 2,500 population may be constructed by the commission, and in municipalities of greater population may likewise be built where the abutting houses are not less than 200 feet apart on the

average?"

At the conclusion of the opinion in the above case, we find the following:

> "We are not to be understood, however, as holding even with reference to new construction that any of the present state highways do enter Kansas City so that they can be 'connected' by new roads built inside the city, or that, in any event, state highways under the '300 mile' provision may be built in violation of the provisions of section 8133, R. S. 1929, limiting such construction in municipalities of over 2500 population to places where the abutting houses average less than 200 feet apart."

The word "not" was apparently omitted between the words "average" and "less" in the last sentence by mistake. Any reference to Section 8133 in the above opinion was by way of dictum, and denotes only the apparent approval of the court as to the validity of the section. Section 8133 is apparently derived from the federal statute found in U.S.C.A., Title 23, Section 2, which defines a highway as follows:

> "The term 'highway' shall not include any highway or street in a municipality having a population of 2,500 or more as shown by the last available census, except that portion of any such highway or street along which, within a distance of one mile, the houses average more than 200 feet apart."

It will be seen that the Missouri and federal statutes are quite similar except that the distance of one mile is set as a standard in the federal statute and was omitted

in the Missouri statute, which was apparently intentional on the part of the legislature, and left us without a fixed distance for computing the average. Our Section 8133 reads as follows:

> "Any state highway which passes through a municipality having a population of less than twenty-five hundred according to the last United States census preceding such construction, shall be constructed through such municipality, and any highway which passes through a municipality having more than twenty-five hundred population, according to such census, shall be constructed through the portions of the municipality where the houses abutting such roadway are not less than two hundred feet apart on the average; provided, however, that in either case the state shall not pay for road surfacing wider or of a higher type of construction than the road as constructed up to the boundary of such municipality."

This section apparently applies only to cases in which a highway shall pass "through" a municipality having more than 2,500 population. The word "through" is defined in Webster's International Dictionary as follows:

> "From end to end of, or from side to side of; from one surface or limit to the opposite."

Since the standard measure of one mile was omitted, it seems plain that the entire length of the highway to be constructed, which lies within the city limits of the municipality, is a standard upon which the average number of houses is to be computed. As a practical matter, we can readily see that in thickly populated communities, the average in the business district would be so high as to require the building of the highway somewhat in the suburbs.

It is our conclusion, therefore, that the entire highway strip lying within the city limits shall be measured and divided by the number of buildings abutting the right-of-way.

As to your second question, we believe it is answered by the conclusion of the above in which we pointed out that the average along the entire length of the highway must govern, and that the Commission would not be required to detour any thickly settled area if the average was within the statute.

Your third question is as follows:

> "Does the subdividing and platting of the ground abutting the whole or any portion of the highway into building lots less than 200 feet apart comply sufficiently with the terms of the statute as to prohibiting the building of the roadway in view of the fact that there are being constructed and it is contemplated immediately to construct houses less than 200 feet apart, many or most of which would be in existence immediately prior to or immediately after conclusion of the building of the highway."

We do not believe that the subdividing and platting of the ground abutting a portion of the highway into building lots less than 200 feet apart would comply with the words of the statute "where the houses abutting such roadway are not less than 200 feet apart on the average."

We believe that the survey and purchase of the right-of-way constitute the beginning of "construction" as set out in the statute and that subsequent development would be the logical sequence of such construction. In fixing the number of houses, all occupied buildings on both sides of the street, which face the street and the occupants of which would naturally use the proposed highway, should be counted.

It is also apparent that a short portion of a highway

which did not go through a municipality would not be affected by Section 8133.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:RT

PARDONS AND
PAROLES: Special trial judge has no authority to parole a defendant, and the successor of the judge in the judicial circuit where the case was tried still maintains jurisdiction.

September 14, 1939

9-19

FILED
26

Mr. Robert C. Edson, Director
Board of Probation and Parole
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 9th, 1939, which reads as follows:

"Porter Newman was charged with attempted arson and was tried by jury in the Circuit Court of Gentry County. Honorable Thomas A. Cummings, Judge of Judicial Circuit No. 4, was disqualified in the case. Honorable Rex Moore, then Judge of Judicial Circuit No. 3, was called in by Judge Cummings, and did, on September 21, 1937, preside at the said cause in the Circuit Court of Gentry County. The jury returned a verdict of guilty, to which they affixed a separate recommendation on the part of the jury that the defendant be paroled. In compliance with the recommendation of the jury the defendant was sentenced by Judge Moore to two years in the penitentiary and then was paroled.

"Since that time Judge Cummings has died. Honorable Ellis Beavers has been elected and is now serving as Judge of Judicial Circuit No. 4. Judge Moore has been relieved of his duties by mandate of the people, and the Honorable V. C. Rose is now serving as Judge of Judicial Circuit No. 3.

"Judge Moore states that he was called in this case as Judge of the Third Judicial Circuit to serve as a Special Judge under the statute. He further states that he was not recommended as a member of the Bar as a Special Judge of the case.

"The question we would like to determine is--does Judge Beavers, as Judge of Judicial Circuit No. 4, in which the defendant was tried, maintain his jurisdiction, or does Judge Rose, the successor of Judge Moore, the Special Judge and also Trial Judge, maintain jurisdiction or does jurisdiction remain with Judge Moore as a member of the Bar?

Section 3648 R. S. Missouri, 1929, reads as follows:

"When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

Section 3651, R. S. Missouri, 1929, partially reads as follows:

> "If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 3648, and no person to try the case will serve when elected as such special judge, the judge of said court shall in either case set the case down for trial on some day of the term, or on some day as early as practicable in vacation, and notify and request another circuit or criminal judge to try the case; * * * * "

Section 3651, supra, in 1919 was known as Sec. 3994, R. S. Missouri. This section was passed upon in the case of State v. Kelly, 274 S. W. 731, l. c. 733, par. 3, where the court said:

> " * * * Was Judge Ing such judge on the day he attempted to grant the paroles? When he appeared and assumed the duties of trial judge in the case of State v. Morgan and Burnett he thereupon became invested with the power of which the regular judge had been deprived by the filing of the disqualifying affidavits by the defendants. That power is defined and delimited by sections 3991 and 3994 (R. S. 1919) of the change of venue statute. The applicatory parts of those sections are as follows: Section 3991:
>
> "' When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause * * * when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial.'

"Section 3994:

"'If, in any case, the judge shall be incompetent to sit, for any of the causes mentioned in section 3991, * * * the judge of said court shall * * * set the case down for trial * * * and notify and request another circuit or criminal judge to try the case; and it shall be the duty of the judge so requested to appear and hold the court at the time appointed for the trial of said case; and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court.'

"The first divests the regular judge of the power 'to hear and try said cause'; the second confers upon the judge called in 'all the powers * * * of the judge at a regular term of said court,' 'during the trial of said case.' In other words, the special judge is invested with all the powers of a trial judge which are necessary or adequate for the judicial ascertainment of the fact of defendant's guilt or innocence. When that fact is so determined, his power ipso facto ceases. State v. Shea, 95 Mo. 85, 8 S. W. 409; Ex parte Clay, 98 Mo. 578, 11 S. W. 998; State v. Wofford, 111 Mo. 526, 20 S. W. 236.

"Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes

> the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

Under the holding of the above case the court made no distinction between a special judge elected under Section 3649 R. S. Missouri, 1929, or a judge requested to serve under Section 3651, supra. In the Kelly case the court held that a special judge or a requested judge did not have power to parole, even though they sat as a trial judge in the trial of a case, but they did hold that the special judge, or requested judge, had the authority to pass upon motions for new trials, granting of an appeal and the signing up of bills of exception. Under the ruling of this case Judge Rex Moore, then Judge of Judicial Circuit No. 3, and acting as a special or requested judge of Judicial Circuit No. 4, was not authorized in the paroling of the defendant after the sentence in conformity with the jury verdict. In that event the jurisdiction of the defendant still remained with the Judge of the Judicial Circuit No. 4, who was at that time the Honorable Thomas A. Cummings.

In your request you state that Judge Cummings has died and the Honorable Ellis Beavers has been elected and is now serving as Judge of Judicial Circuit No. 4, There is no question but the present Judge of Judicial Circuit No. 4 has jurisdiction over the defendant for the reason that he is a successor to all of the powers and duties inherent to Judicial Circuit No. 4. It was so held in the case of State v. Messino, 30 S. W. 2d 750, l. c. 756, par. 4, where the court said:

> "We have found no case in which the authority of the successor of the trial judge to determine on its merits a motion for new trial or to settle and sign a bill of exceptions was denied on the ground that it would be a denial or abridgement of the constitutional right to trial by jury. While there are a number of early cases denying the authority, where no statute conferred it, for reasons given in Bass v. Swingley and U.S. v. Harding et al., supra, the tendency of later decisions in both federal and state jurisdictions is to recognize it, especially since stenography has come into general use as a means of preserving the evidence and incidents of the trial. As said in People v. McConnell, 155 Ill. 192, 40 N. E. 608, 610: 'Every facility possessed by the trial judge, except that of a personal recollection, is within the power of his successor in office. * * * "

In this case a conviction was had and the death penalty assessed, but before a motion for new trial was heard the trial judge died, and the court held the new successor had the authority to pass upon the motion for new trial, although he had not heard the evidence in the case. In the case of Kelly, supra, the cause was tried by Special Judge Ing, who, after conviction, paroled the defendant, but the regular Judge, Frank Kelly, ordered the issuance of a capias execution for the collection of the fines and costs which had been adjudged

against the defendants in the cause. The writs directed the sheriff of Cape Girardeau County to collect the fines and costs on May 21st, 1923, and on August 31st, 1923, Judge Ing, the Special Judge made an order paroling the defendants from the fine and jail sentence. On a writ of prohibition, at the relation of the sheriff, who, on account of the parole issued by Judge Ing, refused to serve the execution, the writ of prohibition was dismissed for the reason that Judge Ing had no authority to parole defendants.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Judge Rex Moore, then Judge of Judicial Circuit No. 3, and later acting as a special judge, or requested judge, of Judicial Circuit No. 4, was not authorized to parole defendant convicted in the trial of the cause where he was the trial judge.

It is further the opinion of this department that the jurisdiction of the defendant tried by Judge Rex Moore, as special judge or requested judge, still remained in the Judge of the Judicial Circuit No. 4, as to parole matters.

It is further the opinion of this department that since Judge Thomas A. Cummings has been succeeded by Judge Beavers, as Judge of Judicial Circuit No. 4, the jurisdiction of the parolee remains with Judge Beavers.

It is further the opinion of this department that since Judge Rex Moore, as acting and requested judge of Judicial Circuit No. 4, was not authorized to issue a parole under the Kelly case, his successor Judge Rose, now Judge of Judicial Circuit No. 3, cannot maintain jurisdiction of the defendant or have an execution issued thereunder.

In rendering the above opinion we are not unmindful of the case of Ex parte J. Sherwood Smith, 232 Mo. App. 521; the opinion in which was rendered in March, 1938. This case is in direct conflict with the case of

State v. Kelly, 274 S. W. 2d 731. In the Smith case the Springfield Court of Appeals has held that a special judge may parole, by reason of certain laws enacted in 1937, page 403, We are still compelled to rely on the Supreme Court decision until the Court of Appeals' decision is finally adjudicated. The issues in the Court of Appeal case are now pending in the Supreme Court of the State of Missouri, by way of a Writ of Prohibition, which case is set to be heard en banc on October 4th, 1939. The case in the Supreme Court is listed as State ex rel Wilkerson v. Kelly, J.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WJB:RW

TAXATION: The liability for the payment of a corporation franchise tax of domestic corporations attaches as soon as a certificate of authority to do business is granted.

January 5, 1939.

1-17

FILED
27

State Tax Commission
Jefferson City, Missouri

Attention: Clarence Evans, Chairman

Gentlemen:

This is to acknowledge receipt of your request for an opinion reading as follows:

> "Will you kindly furnish this Commission an opinion as to liability for corporation franchise tax under the following conditions:
>
> "A corporation is organized and commences business in Missouri after January 1, 1939. Is such corporation liable for a franchise tax for the year 1939?"

The solution to your request for an opinion depends on a construction of Section 4641 of R. S. Missouri 1929. We set forth that part of the statute which imposes the tax. It reads as follows:

> "For the taxable year of 1929 and thereafter <u>every corporation organized under the laws of this state shall</u>, in addition to all other fees and taxes now required or paid, pay an annual franchise tax to the state of Missouri equal to one-twentieth of one percent of the par value of its outstanding capital stock and surplus, or if the capital stock of such corporation or any part thereof con-

> sists of no par value stock, then in that event, for the purposes herein contained such stock shall be considered a s having a value of $5.00 per share unless the actual value of such shares should exceed $5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus."

Other provisions of the section relate to the method and manner of the levy of the tax, where the corporations transacts business within and without the state and the levy of a tax on foreign corporations doing business within this state.

In the earliest case construing the Franchise Tax Law of this state, the Supreme Court had before it the above quoted statute and in passing upon this statute, in the case of State ex rel. Marquette vs. State Tax Commission, 282 Mo. 213, 220 (1920), said:

> "It clearly appears, by reference to Sections 1 and 2, that the fundamental idea in the mind of the Legislature was that a corporation doing business wholly in this State should be taxed under the provisions of this act upon two things, first, upon the amount of its outstanding capital stock, regardless of the value of its assets, whether moreor less than the amount of the outstanding capital stock, and, second, upon any surplus property employed in its business in this State. <u>The tax is levied</u> not upon the property itself, but <u>upon the right of the corporation to transact business in this State.</u>"

Then again the Court, so as not to be misunderstood with respect to the levying of the tax upon the

right of the corporation to transact business in this state, said, at page 225:

> "It is upon the franchise, we reiterate, that the statute here in question levies a tax."

Again in 1927, the Supreme Court reaffirmed the object and purpose for which the tax was imposed, in the case of State vs. Pierce Petroleum Corp. 318 Mo. 1020, and said:

> "The tax is not a property tax, but an excise levied upon the privilege of transacting business in this State as a corporation."

In the case of Missouri Athletic Asso. vs. Delk Investment Corp. 20 S. W. (2d) 51-55 1929, our Supreme Court again reaffirmed the rule, that the franchise tax law of this state was an excise levied upon the privilege of transacting business in this state as a corporation. To the same effect was the ruling in the case of Ozark Pipe Line Corp. vs. Monier, 266 U. S. 537, 69 L. Ed. 439.

From these considerations it will be noticed that our franchise tax act imposes a tax upon a corporation because of its existence and of its right to do business within this state. Since the tax is directed at the existence of the right, rather than the exercise of the right, then it would seem to follow that a corporation becomes liable for the payment of the tax, as soon as it has received its license to do business within this state. This interpretation, it is believed, fully expresses the purpose of the act. To further substantiate this view, it will be noted that the statute further provides:

> "Every corporation, not organized under the laws of this state, and

> engaged in business in this state, shall pay an annual franchise tax * * *."

From this portion of the statute it will be noticed that foreign corporations only have to pay a tax in the event they are engaged in business within this state.

This leads us to a consideration of your precise question as to whether or not a corporation that is organized and commences business after January 1, 1939, is liable for a franchise tax for the year 1939.

In the case of New York vs. Jersawit, 263 U. S. 493, 68 L. Ed. 405, the Supreme Court of the United States had before it, for consideration, a franchise tax that was assessed under the laws of the State of New York. The act provided that for the privilege of exercising its franchise of the state, that every domestic corporation should annually pay a tax in advance, for the year beginning November 1st, to be computed upon the business of its entire income for its preceding year. The company was adjudicated a bankrupt on December 22, 1920. Thereafter, the state filed a claim for a tax, for the year between November 1, 1920 and October 31, 1921. Mr. Justice Holmes, in ruling the case, said:

> "We are of opinion that the tax is a tax upon the right conferred, not upon the actual exercise of it; that, it was due when the petition in bankrupt was filed (cases cited), and that the claim of the state for the whole sum should have been allowed." (Underscoring ours).

In the case of Michigan vs. Michigan Trust Company, 286 U. S. 334, 76 L. Ed. 1136, the Supreme Court of the United States had before it, for consideration, the franchise tax of the state of Michigan, and in discussing the Franchise Tax Law of the State of Michigan, which is very similar to our Franchise Tax Law, Mr. Justice Cordozo, said:

> "These privilege fees were charges of the nature there described. Taxes owing to the Government, whether due at the beginning of a receivership or subsequently accruing, are the price that business has to pay for protection and security."

In the case of State vs. Pierce Petroleum Corp., supra, the court, in speaking of the privilege and burden imposed upon the corporation, said:

> "In accepting the privilege granted, such a corporation voluntarily assumes the burden imposed."

The court, in making the above statement, was speaking with reference to a non-resident corporation that had been licensed to do business within this state. We think that, in analogy, the above statement is equally true as respects the organization of domestic companies.

In an opinion directed to your department under date of March 21, 1938, we said that:

> "When the taxes provided for have been paid that the receipt made out for such taxes shall recite that the corporation, paying the tax, has paid its annual franchise tax for the year ending the 31st day of the following December. The amount of taxes to be paid annually by every corporation, is determined by the amount of their outstanding capital stock and surplus as of December 31st of each year. This date is but the "yardstick" for determining the amount of tax. Section 4642 of R. S. Mo. 1929.
>
> "If a corporation is organized and

existing under the laws of this state, it is required to file a report, as provided for in Section 4642, supra, on or before the 1st day of March of each year. Thereafter, on the 20th day of March on each year, it is the duty of the State Tax Commission to assess the amount of franchise tax based upon the report filed."

CONCLUSION

In view of the above, it is the opinion of this department that a corporation that is organized after January 1, 1939, is liable for the payment of a franchise tax for the year 1939.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED:

(Acting) Attorney General

RCS:JMW

ROADS AND BRIDGES: When County Court may change boundaries of road districts in counties not under township organization.

January 21st, 1939.

1-28

FILED
27

Hon. Melvin Englehart,
Prosecuting Attorney,
Madison County,
Fredericktown, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of January 13th, 1939, requesting an opinion concerning the provisions of Section 7868 and 7870, R. S. Mo., 1929.

The questions are: (1) May the County Court of Madison County disregard the provisions of Section 7868 R. S. Mo., 1929, and redivide the county into suitable size road districts at any time said court so desires, and (2) May said court refuse to appoint overseers for said districts as is provided for under the terms of Section 7870 R. S. Mo., 1929?

Section 7868, supra, is as follows:

> "The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

The terms of the statute are clear beyond doubt, in that the county court, in counties not under township organization, were authorized and directed, in January 1918, to divide their counties into road districts. It is equally clear that said statute authorizes the court biennially thereafter, in the month of January, to change the boundaries of any such district so created.

Whether or not the court must follow the terms of this statue, in the latter respect, depends on whether said statute is mandatory or directory. In 59 C. J. p. 1078, Section 634, the general rule to follow as a guide to determine whether this type of statute is mandatory or directory is stated, as follows:

> "A statute specifying a time within which a public officer is to perform an official act regarding the rights and duties of others, and made with a view to the proper, orderly, and prompt conduct of business, is usually directory, unless the phraseology of the statute, or the nature of the act to be performed and the consequences of doing or failing to do it as such time, is such that the designation of time must be considered a limitation on the power of the officer. So a statute requiring a public body, merely for the orderly transaction of business, to fix the time for the performance of certain acts which may as effectually be done at any other time is usually regarded as directory."

This statement has been approved by the Supreme Court of Missouri in numerous cases. See: Schlafly v. Baumann, 108 S. W. (2d) 363; Mead v. Jasper County, 18 S. W. (2d) 464; State ex rel inf. Gentry v. Lamar, 291 S. W. 457; St. Louis County Court v. Sparks 10 Mo. 117.

In the Schlafly case it is held that the provision of the "Jones-Munger" Act (Sec. 9952-a, Laws 1933, p. 430), requiring tax sales to be held "on the first Monday of November of each year", were mandatory. This, because

such provision was not for the convenience of the officials or the dispatch of their duties, but rather for the benefit and protection of the landowner.

Such a similar situation does not exist in the instant case. There is nothing pertaining to the formation of these road districts that affects the rights of the citizens residing therein. The county court levies a general road tax, county wide, at a single rate, and not a different levy for each district, (Sec. 7890 R. S. Mo., 1929). The same is also true as to the special road tax authorized by Section 7891 R. S. Mo., 1929. However, the funds raised under both these levies must be paid over to the road district from which it was collected. Rolla Special Road District, Phelps County v. Phelps County, 116 S. W. (2d) 61; Hawkins v. Cox, 66 S. W. (2d) 539. In other words, the road district is guaranteed that all taxes collected from it will be spent on its roads.

The fact does not militate against the contention that Section 7868, supra, is directory, because after abolition of a district, by boundary changes, the taxes previously levied but not collected can be spent, when collected, on the roads of the former district from which collected, until all taxes levied on the property in the area comprising said district, prior to its abolition, have been collected and expended.

Another thing which supports us in saying this statute is directory and the fact that the abolished road district is entitled to the taxes collected from it, do not make it otherwise is the very provision about which we are concerned. The legislature in express terms authorized boundary changes every two years. They, of course, presumably knew that such a change in boundaries might result in a district being abolished and that when that occurred, there would be in many instances taxes which had been levied while a district was in existence and not collected until after January in the even numbered years, when they authorized the court to change boundaries.

CONCLUSION

Therefore, it is the opinion of this department that the provisions of Section 7868, R. S. Mo., 1929, as to when the County court may change the boundaries of road districts are directory only, and in doing so, the court is not expressly bound to follow said provisions.

As to your second question, we are enclosing a copy of an opinion rendered to W. W. Crockett on January 25, 1935, which holds the county court may, by alteration of boundaries, make the county as a whole comprise a single road district and refuse to appoint a road overseer for such district.

APPROVED

Respectively submitted,

(Covell R. Hewitt)
Acting Attorney General.

LAWRENCE L. BRADLEY,
Assistant Attorney General.

LLB:RV

TAXATION:
CREDIT UNIONS: The owners of the shares of stock in a credit union who have no money borrowed on such stock for the purpose of reporting the value of such stock to the assessor shall take into consideration the entire assets of such credit union and deduct therefrom the liabilities of such union and this amount shall be the basis upon which the value of the stock is fixed for taxation purposes.

January 31, 1939



Mr. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date which was accompanied by a letter from the Missouri Mutual Credit League requesting an opinion from this department on the manner in which credit unions were taxed.

The law by which credit unions were authorized to operate in this state was enacted in 1927 and is now in the Laws of Missouri, 1929, at Article XV, chapter 22.

The powers of credit unions are set out in Section 5082, R. S. Missouri, 1929, which is as follows:

> "A credit union shall have the following powers:
>
> "(1) It may receive the savings of its members in payment for shares.
>
> "(2) It may make loans to members, through the credit committee and on deposit in the way and manner hereinafter provided.
>
> "(3) It may invest, through its board of directors, in the bonds of the United States, or of any state thereof or of any municipality, the bonds of which municipality are legal investments for savings banks in the state of Missouri. It may deposit its funds in savings

> banks, state banks, trust companies and national banks. The funds of the credit unions shall be used first, however, for loans to members in the way and manner hereinafter provided and preference shall be given to the smaller loan in the event the available funds do not permit all loans which have passed the credit committee to be made."

From a reading of the statute pertaining to credit unions it seems that the purpose of the law authorizing their existence was to provide a convenient means for the members of particular groups to save their money and lend it to themselves. Only the members of such groups may pay into or receive any moneys from such credit unions. The business of the credit union is carried on by a board of directors selected by virtue of the provisions of Section 5087, R. S. Missouri, 1929. The credit unions obtains its capital and revenue by virtue of the provisions of Section 5090, R. S. Missouri, 1929, which is as follows:

> "The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on shares. A credit union shall have a lien on the shares of any member and on the dividends payable thereon for, and to the extent of any loan made to him and of any dues and fines payable by him. A credit union may, upon the resignation or expulsion of a member, cancel the shares of such member and apply the withdrawal value of such shares towards the liquidation of said member's indebtedness. A credit union may charge an entrance fee, as may be provided in the by-laws which shall, however, not exceed twenty-five cents. Fully paid up shares of a credit union may be transferred to any person upon election to membership, upon such terms as the by-laws may provide and upon the

> payment of a transfer fee which shall not exceed twenty-five cents."

Section 5092, R. S. Missouri, 1929, authorizes the credit union to loan money to its members and charge a reasonable rate of interest. Section 5095, R. S. Missouri, 1929, provides as follows:

> "All entrance fees, transfer fees and charges shall, after the payment of the organization expenses, be known as reserve income, and shall be added to the reserve fund of the credit union. At the close of the fiscal year there shall be set apart to the reserve fund twenty per cent of the net income of the credit union, which has accumulated during the year. The members, at an annual meeting, may increase the proportion of the profits which is required by this section to be set apart to the reserve fund, or to decrease it when it equals the paid in capital of the credit union. The reserve fund shall belong to the credit union and shall be held to meet contingencies and shall not be distributed to the members except upon dissolution of the credit union."

From this section it will be seen that receipts may come into the treasury of the credit union in other ways than by sale of stock to its members, namely: interest, entrance fees, transfer fees, and any other charges the board may be permitted to make. These moneys may be termed as earnings of the union. As they accumulate they would naturally enhance the value of the certificates which such union has issued to its members. Section 1, Laws of Missouri, 1933, page 467, provides as follows:

> "All parties holding stock or shares as owners or in trust in any Credit Union in this state on which no loan has been obtained from such association,

> shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June of each year, and the tax shall be levied upon such shares, and collected from such holder or depositor of the same, as taxes on other personal property; and any failure on the part of such owner, holder or depositor of such shares shall subject such holder to the same penalties now provided for failure to give to the assessor a true list of all taxable property verified by affidavit."

From a reading of the original credit union act passed in 1927, it will be seen that the lawmakers did not provide for taxation of such unions and the 1933 act, supra, evidently was enacted for that purpose. By this 1933 law, if a member of a credit union owns a certificate in the union, if he has not obtained a loan upon such certificate, then he should report it, with its true value, to the assessor when he makes his return for the assessment. There is no doubt but that such certificates which have been reported by their owners to the assessor could not again be taxed against the credit union if there was a law authorizing such unions to be taxed. If such certificates were again taxed to the credit union that would be a double taxation and in violation of the provisions of Sections 3 and 4 of Article X of the Constitution of Missouri.

The lawmakers have provided only one way in which to tax credit unions, that is, by the 1933 law hereinbefore referred to and the taxing officials must follow that course. This rule is stated in the case of State v. Gehner, 8 S. W. (2d) 1068, l.c. 1070, in the following language:

> "In the taxation of the property of corporations in this state, different methods have been employed. Such taxation has been effected by taxing the property, by taxing the capital

> stock, and by taxing the shares of stock. When the Legislature has selected one mode, with respect to a designated class of corporations, there is no presumption, in the absence of an express provision, that it intended that taxes should be levied in accordance with either of the other two; this because such additional levies would result in double taxation. * * * * * * * * * "

By a comparison of the law taxing credit unions with the law taxing building and loan associations, it appears that the lawmakers have used the same provision in both acts which provides that only the shareholders who do not have money borrowed on their shares shall report their stock to the assessor for taxing purposes. We find that in the case of Kansas City v. Building and Loan Association, 145 Mo. 50, 52, where the court had under consideration the taxing of shares of a building and loan association, and it said:

> "The property of building and loan associations is excepted from assessment and taxation by State law; that law providing for the assessment and taxation of such corporations by assessing the shareholders on their shares, and from them collecting the tax. * * "

It will be noted that from Section 9768, R. S. Missouri, 1929, that the borrowing member of the building and loan association is not required to report his stock to the assessor, that is, the stock upon which he has money borrowed. In discussing this particular provision of the building and loan section the court, in the Kansas City v. Building and Loan cases, supra, said at l.c. 53:

> "And it does not matter that the legislation in question does not reach the

> borrowing members of the association, because such an omission can not be supplied by the courts. It is true that the Constitution, section 7, of article X, declares that 'all laws exempting property from taxation ..... shall be void; ' but this section evidently refers to affirmative exemptions, not to those which do not in terms exempt certain property, not to mere casual omissions.
>
> "While it is the clear duty of the legislature to see that no class of property in this State shall escape taxation, still unless the legislature exercises its legitimate functions and subjects certain property to taxation, it is evident that the constitutional provision above noted, can not, because of such lack of legislation, become self enforcive. * * * "

Applying the same rule to the owner of shares of stock in the trade union if he has money borrowed on his stock, under the statute he is not required to report it to the assessor, that is, report on stock upon which he has money borrowed.

CONCLUSION

From the foregoing it is the opinion of this department that the only way in which trade unions may be taxed is by the tax paid by the stockholders. The stockholder who has no money borrowed on his stock is required to report such stock to the assessor when he makes his return for his assessment, but the stockholder who does have a loan on his stock is not required to include in his return for assessment the stock upon which he has a loan.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTY COURTS: School Fund Mortgage. County Courts have no authority to accept a deed to lands, on which there is a mortgage with bond, in full satisfaction of such mortgage and bond.

March 4, 1939.

3-6 FILED 27

Honorable Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Englehart:

This office is in receipt of your request for an opinion, which is as follows:

> "It is provided in Section 9254 R. S. Mo. 1929, Page 7103 Ann. St. that, 'whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the County Court may make an order to the Sheriff, reciting the deed and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described in said Mortgage'.
>
> "It is further provided under Section 9256 above, that the County Court may appoint an agent to become a bidder at a foreclosure sale of property under school fund mortgage. Does the County Court have authority to accept the property described in a school fund mortgage, by deed from the mortgagor in complete and final satisfaction of the indebtedness, without a sale as provided in Section 9254 above?
>
> "As the County Court is a creature of the statute and all authority which it may exercise must be given by the statute, I can find no authority for a County Court

> to accept a deed for property described in a school fund mortgage, in complete and final satisfaction of the mortgage.
>
> "The County Court of this County will convene on March 6, 1939, and I would appreciate an answer from you in reply to this inquiry on or before said date."

Section 9251 R. S. Mo. 1929 provides that, when any moneys belonging to the Capital of the school fund of any township shall be loaned by the County Court of the County wherein such township is located, such Court shall cause the same to be secured:

> " * * * by a mortgage in fee on real estate within the county, free from all liens and encumbrances, of the value of double the amount of the loan, with a bond, and may, if they deem it necessary, also require personal security on such bond; * * * "

Section 9252 R. S. Mo. 1929, providing the form of mortgage and notice of sale of such lands is as follows:

> "Every mortgage taken under the provisions of this chapter shall be in the the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county,

> if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Section 9254 R. S. Mo. 1929 providing for the County Court to make an order of sale when the debt becomes due and payable, is as follows:

> "Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

Section 9256 R. S. Mo. 1929 providing that the County Court has authority to repossess the property by purchase whenever the same is sold under and by virtue of court order or "by virtue of any power in such conveyance in trust or mortgage contained", is as follows:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

Therefore, the County Court as trustee for such fund

has the statutory power to purchase such lands under foreclosure proceedings, but we find no statutory provision expressly empowering said trustees to accept a deed to lands, on which there is a school fund mortgage with bond, in satisfaction of such mortgage and bond.

In the case of Morrow vs. Pike County, 189 Mo. 622, the court held:

> " * * * It is a trust fund, and the County Court is merely a trustee to carry out the policy defined by the lawmaking power in relation to the fund * * * "

In the case of Montgomery County vs. Auchley, 103 Mo. l. c. 505, on the question of what constitutes payment on a school fund bond, the court says:

> " * * * If a note is taken in payment of such loan, the security must be approved by the County Court, and must conform to the statutory requirements, before it can operate as a payment. Here there is no pretense that any real estate security was taken for the note * * * * " (Underscoring ours)

In the case of Lafayette County vs. Hixon, 69 Mo. 581, 582, after stating the powers and duties of a County Court as to the school fund, holds that the County Court may substitute a new mortgage upon the following condition:

> " * * * We see no reason, however, why one security may not be substituted for another, when the convenience of the parties may require it and the change can be made without detriment to the school fund. * * * " (Underscoring ours)

The County Court in your case is assuming to satisfy a school fund mortgage by acceptance of a deed to the mortgage land.

The question arises, is the land worth the amount due under the mortgage and bond together with interest thereon. When the loan was made the land should have been worth twice the amount of the loan.

If the land were sold under the statutory procedure and brought less than the amount of principal and interest due, could anything be realized on the bond? Would the bondsmen, although insolvent at the time of the sale of the land, not become solvent within the time of limitation of such bond?

This fund is designated by many decisions as a sacred trust fund and every effort should be made by the County Court to prevent its dissipation.

On the question of a release of such fund in the case of Saline County vs. Thorpe, 88 S. W. (2d), 183, 186, the court says:

> " * * * The purpose of requiring a bond and personal security is, of course, to make it possible to collect the debt even if the land, securing the loan, decreases in value. The county court has no authority to give any right of the county to collect either principal or interest due (Veal v. Chariton County Court, 15 Mo. 412), or to dispense with either the bond, with its personal obligation to repay the money, or the mortgage conveying clear land as security. Lafayette County v. Hixon, 69 Mo. 581. Neither does it have authority to release a surety from his liability upon the bond or to take in payment of the amount due or any part thereof, upon a school fund bond and mortgage, a note which does not conform to the statutory requirements. Montgomery County v. Auchley, 103 Mo. 492, 15 S. W. 626. Why should it have any authority to release one who borrowed from this fund from his obligation to repay it? Equity will

> even act in advance by injunction to prevent the illegal application of public money by public officers; why should it not act to prevent the loss of a sacred trust fund, under the circumstances here? If a county court could release the obligation to repay school fund loans, at its own whim or pleasure, for any statute to safeguard the public school funds by requiring double security of unencumbered land, in every loan, would be nullified. School funds could be rapidly dissipated by excessive loans, from the payment of which the persons who obtained the funds, or agreed to be security for them, would be released by accepting conveyances of land worth less than the amount loaned. Certainly this would result if such releases were made in consideration of the conveyance of land subject to other encumbrances. The county court should not be permitted to accomplish by indirection something which it is prohibited from doing directly."

CONCLUSION

It is the conclusion of this department that the County Courts, as to Capital school funds of this state, are mere trustees and, as such, have no authority to accept a deed to lands on which there is a school fund mortgage with bond, in full satisfaction of such mortgage and bond.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

SVM:LB

ELECTIONS: City primary election is legal holiday.

March 9, 1939

3-9

FILED
27

Mr. John P. English
Recorder of Deeds
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 8, 1939, requesting an opinion as follows:

> "I will thank you for an immediate opinion as to whether Section 33, Page 257 of the 1937 Laws of Missouri, make it possible for the Recorder of Deeds Office to close on Primary Day Friday March 10th, 1939."

Section 33, Laws of 1937, page 257, pertains to elections in cities having 600,000 or more inhabitants, which includes St. Louis City. This section provides:

> "The days upon which the general, state, county or primary elections shall hereafter be held in such city shall be legal holidays, and shall for all purposes whatever as regards presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, and as regards days of grace upon commercial paper, be treated and considered as is the first day of the week, commonly called Sunday."

In Cummings vs. Kansas City Public Service Company 66 S. W. (2nd) l.c. 931, the court said with reference to construing statutes:

> "It is, of course, fundamental that where the language of the statute is plain and admits of but one meaning, there is no room for construction."

This, we think, is true of Section 33, supra, and that said section means just what it says - that the days on which the general state or primary elections are held in such city shall be legal holidays.

Therefore, it is our opinion that the day on which the primary election is held in the City of St. Louis is a legal holiday.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
LLB:RT

TAXPAYER: Person paying merchant's tax is a taxpaying citizen within meaning of Section 27, Laws of Mo. 1935, page 277.

April 6, 1939

4-13

FILED
27

Mr. Sam T. Evans
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

We acknowledge your request for an opinion under date of April 4th, as follows:

> "I should like to have an opinion from your office concerning Sec. 27, Laws of Missouri, 1935, at Page 277.
>
> A young man from Richmond, Missouri, has made application for license to operate a retail liquor store at Jamesport, Missouri. He is not now qualified, not being a legal voter.
>
> After he has resided within this county and becomes a legal voter and possesses all other qualifications entitling him to a license, what is the requirement as to being 'a taxpaying citizen of the county, town, city or village', as set forth in section 27. Must he have paid a state and county tax to become a 'taxpaying citizen' or is the payment of a merchant's tax sufficient."

Your question is whether a person who pays a merchant's tax can be considered a taxpayer within the meaning of Section 27, supra, other qualifications as to citizenship, etc., being present. By merchant's tax, we assume you mean an ad valorem tax required of merchants based on the amount of merchandise possessed or under their control between certain dates, and not an occupation tax on the privilege of doing business.

Cooley on Taxation, Vol. I, 4th Ed., Section 17, page 78, defines the term "taxpayer" thus:

> "A taxpayer, as the term is generally used, is one who owns property within the state or taxing district and who pays a tax or is subject to and liable for a tax."

In the case of Castilo v. State Highway Commission 279 S. W. 673, l.c. 675, 312 Mo. 244, the term is defined as follows:

> "In Black's Law Dictionary a taxpayer is defined as 'a person chargeable with a tax.' In State ex rel. Sutton v. Fasse (Mo. App.) 71 S. W. 745, Judge Goode, speaking for the St. Louis Court of Appeals, defines a taxpayer as 'a person owning property in the state subject to taxation, and on which he regularly pays taxes.' This definition is adopted in Pope's Legal Definitions."

And, in the case of State vs. Clements, 264 S. W. 984, l.c. 986, 305 Mo. 297, the court defines the term as follows:

> "In State ex inf. Sutton v. Fasse, 189 Mo. loc. cit. 536, 88 S. W. 2, a taxpayer is defined as 'a person owning property in the state subject to taxation, and on which he regularly pays taxes.' Such definition appears to be a very satisfactory one."

It is to be noted that the court does not specify the type of property required to be owned, whether real or personal.

The court, in the case of State ex rel vs. Tracy, 6 S. W.

(2nd) 709, 94 Mo. 217, l.c. 224, 225, in holding that a merchant's license tax was a personal property tax, said:

> "The Board of President and Directors of the St. Louis Schools has authority, as has been seen, to levy a tax upon 'all real and personal property;' and the final question in this case is, whether a merchant's license tax is a personal property tax. Merchandise is not listed for taxation as other personal property; but instead of this, the merchant must apply for a license to trade as such, and without which he subjects himself to a forfeiture to be recovered by indictment. He must give bond conditioned for the payment of the tax. The further provision is, merchants shall pay an advalorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares, and merchandise which they may have in their possession at any time between the first Monday of March and the first Monday of June in each year. It is this amount, furnished by a verified statement, that forms the basis upon which the various taxes are levied. The license, when issued, gives the merchant the right to engage in a mercantile pursuit; for that he pays a nominal sum, fifty cents to the clerk for issuing the license, and twenty-five cents to the collector for approving the bond. The tax which the merchant is required to pay is another and a different thing. It is perfectly clear, from the provisions of the statute in question, that the tax is one upon the stock in trade, not upon the occupation. If a tax upon the stock in trade, it must be a personal property tax."

And, in 103 A.L.R., page 34, we find an annotation of

the Missouri cases holding that a merchant's license tax is a personal property tax:

> "The so-called merchant's license tax imposed by a statute requiring the merchant to apply for a license to trade as such, to give a bond conditioned for the payment of the tax, and pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares, and merchandise which they may have in their possession at any time between certain dates, is a tax upon the stock in trade as personal property, and not upon the occupation. State ex rel. St. Louis Pub. Schools v. Tracy (1887) 94 Mo. 217, 6 S. W. 709; Aurora v. McGannon (1897) 138 Mo. 38, 39 S. W. 469; State ex rel. Carleton Dry Goods Co. v. Alt (1909) 224 Mo. 493, 123 S. W. 882; American Mfg. Co. v. St. Louis (1917) 270 Mo. 40, 192 S. W. 402.
>
> A 'merchant's license' tax imposed by a municipal ordinance requiring any person desiring to take out a license, to make out and deliver to the city collector a sworn statement of the cash value of the greatest amount of goods, wares, and merchandise on hand, or intended to be kept on hand for sale during the year for which the license was applied for, and pay 1 per cent per annum upon the cash value of such goods, is not an occupation or privilege tax, but a property tax, which is in excess of the authorized tax rate allowed to the municipality, and in violation of the constitutional provision requiring uniformity. Brookfield v. Tooey (1897) 141 Mo. 619, 43 S. W. 387.
>
> And a tax imposed by a municipal ordinance requiring merchants to pay an ad valorem

> tax equal to that which is levied upon real estate, on the largest amount of all goods, wares, and merchandise which they may have in their possession, or under their control, whether owned by them or consigned to them for sale, at any time between certain dates named, is an ad valorem property tax on the goods of merchants and not a license tax. Troy v. Harris (1903) 102 Mo. App. 51, 76 S. W. 662."

A merchant's license tax, being a tax on personal property, we are of the opinion that a person who pays such tax to a county, town, city or village is a taxpaying citizen within the meaning of Section 27, Laws of Missouri 1935, page 277, other qualifications as to citizenship, etc., being present.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

TAXATION: Buildings erected on leased land shall be assessed as real estate at the situs of the property.

April 19th, 1939

5-2

FILED
27

Mr. Clarence Evans, Chairman,
State Tax Commission of Missouri,
Jefferson City, Missouri.

Dear Mr. Evans:

We wish to acknowledge your request for an opinion under date of April 12th, as follows:

> "We are writing you for an opinion concerning the following matter:
>
> Should a building erected on leased land be assessed as real estate at the situs of the property or as personal property at the domicile of the owner of the building?
>
> There are considerable buildings of like nature along various lakes and streams owned by residents of cities and we have several requests concerning same.
>
> As the time is drawing near for our general Assessors' meeting and our visits to township organization counties, we will appreciate a reply at your early convenience."

Section 9742, Revised Statutes of Missouri, 1929, provides as follows:

> "For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9977 of Article 11, Chapter 59, Revised Statutes of Missouri, 1929, which relates to taxes and revenue provides in part as follows:

> "The term 'real property,' 'real estate,' 'land' or 'lot,' wherever used in this chapter, shall be held to mean and include not only the land itself, whether laid out in town or city lots or otherwise, with all things contained therein, but also all buildings, structures and improvements and other permanent fixtures, of whatsoever kind thereon.* * * * * *."

Section 9779, Revised Statutes of Missouri, 1929, provides

> "Real estate shall be assessed at the assessment which shall commence on the first day of June, 1893, and shall be required to be assessed every year thereafter."

Section 9780, Revised Statutes of Missouri, 1929, reads in part as follows:

> "In all counties, except in the city of St. Louis, the assessor's books shall be arranged or divided into two parts only, part first to be known and denominated 'the land list,' which shall contain all lands by him assessed, arranged, as nearly as may be, in numerical order of range, township, section and parts of sections, lots or parcels, by the least legal subdivisions, when sections are so divided into parts, lots or parcels; and all lots or parcels of land in cities, towns and villages shall be arranged according to the number of block, lot or parcel; and all lands designated by number, surveys or parts of surveys, and all lands that can be described by numerical order, shall be placed in the 'land list,' with the owner's name*****"

The only Missouri case we have been able to find on the subject is that decided by the Supreme Court in the case of State ex rel. Ziegenhein v. Mission Free School, 162 Mo. 332, 62 S. W. 998, wherein the right to tax as realty a building which was owned by a person other than the one who owned the land was upheld. The court said:

> "It is thus evident that, as between the said Mission School and said Thompson, Thompson is the owner of the leasehold and building, and is liable for the taxes thereon * * * * *"* * * * * * * * *
> **
> All property except such as is specifically exempted by the constitution and the statute made in

> pursuance thereof is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building, any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the state is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it, just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. People v. Board, 93 N. Y. 308; People v. Commissioners, 82 N. Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayor, etc., of City of New York, 68 N. Y. 552."

Although the court pointed out that it was not passing on the question whether the interest of the lessee under the lease was real or personal property, yet it said (l. c. 999):

> "In most states the interest of Thompson under a lease like this is real estate, and as our statute provides that the words 'real estate' shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4907, 4916, Rev. St. 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate."

61 C. J. page 518, provides that:

> "* * * * * real property and interest therein, including incorporeal hereditaments, usually should be taxed in the taxing district unit where actually situated, and not elsewhere, * * * * *"

Taking the above statute and case into consideration, we find that all real property must be assessed and taxed (sections 9742 and 9779), in the name of the owner (section 9780). Real property is defined as land with all buildings of whatsoever kind thereon (section 9977), and taxable at the situs of the property (61 C. J. 518).

CONCLUSION

From the foregoing we are of the opinion that buildings erected on leased land shall be assessed as real estate at the situs of the property.

Respectfully submitted,

APPROVED:

MAX WASSERMAN,
Assistant Attorney General.

HARRY H. KAY
(Acting) Attorney General

MW:RV

SCHOOLS: COUNTY SUPERINTENDENT OF SCHOOLS: County need not furnish office to one not properly qualified to hold office.

July 14, 1939

7-14

FILED
27

Mr. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We acknowledge your letter of July 12th as follows:

> "I have received your letter of July 7, 1939 containing a copy of the opinion written February 5, 1935 to Honorable T. Ansel Faucett, Prosecuting Attorney of Callaway County, Mo. I had previously received a copy of this opinion from Mr. J. E. Taylor of your Office on an occasion when I was discussing the matter with him in April, 1939.
>
> I am especially interested in the inquiries under the last paragraph of Page 2 of my letter of June 30, 1939, to-wit:
>
> Is the County Court of Madison County, Missouri required to furnish the elected superintendent, Mr. King, an office after he, Mr. King, has been commissioned, filed his bond and has qualified himself to hold the position as required in Sections 9455 and 9456 RS MO 1929? In other words, if the County Court can deny the office, they are passing upon the matter of qualifications of the candidate.
>
> I am merely trying to get your opinion so as to better advise the court."

Section 9454, R. S. Mo. 1929, provides that county superintendents of public schools:

> "Shall hold said office for a term of four years from and after the first Monday in July following their election, or until their successor is elected and qualified * * *."

You state that Mr. King has been commissioned, filed his bond, and has qualified himself to hold the position.

In an opinion rendered by this department under date of February 5, 1935, to the Honorable T. Ansel Faucett, Prosecuting Attorney of Callaway County, a copy of which was furnished you, we held that "if such person does not have these necessary qualifications, then such person is not qualified to be superintendent of schools".

Mr. King, not having a state certificate or diploma from one of the state teachers' colleges or state university, as required by Section 9454, R. S. Mo. 1929, could not qualify for office, and hence the present encumbent, Mr. M. D. Robbins, would hold over until his successor is elected and qualified.

Section 9456, R. S. Mo. 1929, provides that the county superintendent shall "at the expiration of his term of office" turn over the same to his successor.

> "Before entering upon the duties of his office, the county superintendent shall take and subscribe an oath to discharge faithfully and impartially the duties of his office; he shall give bond in double the amount of his salary, conditioned upon the faithful performance of his official duties, and the proper application and care of all moneys, books, records, papers, furniture and other property in his possession or under his control, with two or more sureties, who are resident freeholders and accepted by the county court or by the county clerk in vacation. He shall keep his office at the county seat, or at some other place in the county where a court of record is held and the county court, by order of record, shall designate where the superintendent

> shall keep his office, and for this purpose the county shall supply him with a suitable room, properly furnished, wherein all records, books, papers, furniture and other property thereto belonging shall be securely kept; and at the expiration of his term of office he shall turn the same over to his successor in good condition; and said county court shall supply the superintendent with all necessary record books, stationery and postage stamps for properly conducting the business of his office, and shall allow all necessary printing of notices and circulars of information, the same to be paid for by warrant drawn upon the county treasurer."

The county superintendent of schools is not required to turn over his office until the expiration of his term, and the county is not required to furnish an office to the county superintendent of schools until he be elected and qualified.

From the above it is our opinion that Mr. King, having failed to qualify himself as county superintendent of public schools, the county court is not required to furnish him an office.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

SCHOOLS: Section 11202 R. S. Missouri, 1929 is the proper section to remove a county Superintendent of Schools for cause.

July 20, 1939 7/22

FILE 27

Hon. Melvin Englehart
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 13th, 1939, which reads as follows:

"I am preparing to file in the Circuit Court of this County an action to remove a County Superintendent of Schools under the provisions of the above mentioned article. Before filing the petition, I would like to secure your opinion as to whether or not the provisions of the above mentioned article, especially Section 11202, applies to County Superintendent of Schools.

"You will note that the section reads, 'Any person elected or appointed to any county, city, town or township office in this state', except as to officers subject to removal by impeachment. It is my opinion that the words, 'any person' would apply to a County Superintendent of Schools. However, I would like to have your opinion in regard to this matter.

"I am quite sure that you have prepared briefs in this matter in regard to the case of State ex rel McKittrick vs. Wymore and State ex rel vs. Graves, and I would like to secure any information possible as to whether or not a hearing under the above mentioned article would be a matter for trial by jury or whether it is exclusively

a hearing before the court without the service of a jury.

"It is provided in Section 11207 Ann. St. 6145 that, 'All actions and proceedings under this article shall be in the nature of civil actions and tried as such."

Section 11202 R. S. Missouri, 1929, reads as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Section 11203 R. S. Missouri, 1929, reads as follows:

"When any person has knowledge that any official mentioned in section 11202 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the

> execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if, in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit."

It will be noticed under the above section that the prosecuting attorney is given the power to remove by proper procedure any person elected or appointed to any county, city, town or township office. It will be specifically noticed that this power does not extend to state offices, and the exception is made as to such officers that may be subject to removal by impeachment.

Section 9454 R. S. Missouri, 1929, partially reads as follows:

> "There is hereby created the office of county superintendent of public schools in each and every county in the state; the qualified voters of the county shall elect said county superintendent at the annual district school meeting held on the first Tuesday in April, 1923, and every four years thereafter; * * "

Section 11202, supra, is not ambiguous and does not need a construction as to the intention of the legislature, although it will be noticed that the section only applies to any officer elected or appointed to any county, city, town or township office in this state. It does not apply to state or district offices which are subject to impeachment. Under section 9454, supra, the county superintendent of schools is elected by the qualified voters of the county at the annual district school meeting.

In the case of State ex rel Cobb v. Thompson, 5 S. W. 2d 57, l.c. 59, the Court said:

> "The rule is well stated, as follows:
>
> 'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' 25 R. C. L. 957; Trefny v. Eichenseer et al, 262 Mo. 436, 171 S.W. loc. cit. 932; Grier v. Ry., 286 Mo. 523, loc. cit. 534, 228 S. W. 454; State ex rel. Brown v. Board of Education, 294 Mo. 106, loc. cit. 115, 242 S. W. 85; R. S. 1919, section 7058."

And the court further said in the same case:

> "A standard text states the rule as follows:
>
> 'If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the

> sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.' Lewis-Sutherland Stat. Const. vo. 2 (2d Ed.) p. 698."

The office of county superintendent is a county office, and the officer is not a state officer. All of his duties are confined to the county alone, and under such circumstances, can only be classed as a county office.

In the case of Hasting v. Jasper County, 282 S. W. 700, l.c. 701, par. 3, the court said:

> "Nor can it be said that probation officers are state officers. We have held that the words 'state officers' as used in the Constitution refer to such officers whose official duties and functions are coextensive with the government of the state. Following this rule, we have held that a sheriff, deputy sheriff, and a clerk of a circuit court are not state officers, for the reason that their jurisdiction is confined to a county. State ex rel. Walker v. Bus, 36 S. W. 636, 135 Mo. 325, 33 L. R. A. 616; State ex rel Holmes v. Dillon, 2 S. W. 417, 90 Mo. 229; State ex rel. Bender v. Spencer, 3 S. W. 410, 91 Mo. 206; State ex rel. Conway v. Hiller, 180 S. W. 538, 266 Mo. 242, loc. cit. 262."

CONCLUSION

In view of the above authorities, it is the opinion of this department that section 11202, R. S. Missouri, 1929, is the proper section under which a prosecuting attorney may proceed to remove a county superintendent of schools.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General.

WJB:RW

MOTOR VEHICLES: Section 3097A only applies to filing of chattel mortgages and not recording, and is directory and not mandatory that the mortgagee or assignee shall have the certificate of title stamped or sealed.

9/18

September 1, 1939

FILED
27

Mr. John P. English
Recorder of Deeds
City of St. Louis
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 30th, 1939, which reads as follows:

"In reference to House Bill No. 546:

'To amend Article 3, Chapter 22, Revised Statutes of Missouri, 1929, relating to chattel mortgages, by adding a new section to said article, to be known as Section 3097A, providing for the proper certification and release of chattel mortgage, by the recorder of deeds, on the certificate of title to the mortgaged motor vehicle, establishing a fee for such service, providing certain exemptions, and declaring that the General Assembly determines this Act to be a Revision Act, within the meaning of Section 41, Article IV of the Constitution of Missouri.'

"We wish to be advised as to whether we can make it mandatory to present the certificate of title to automobiles for certification by the Recorder as to mortgages filed, and as to what effect the law would have on chattel mortgages recorded, or whether it should be optional on behalf of the mortgagee or his assignee in each case.

"Also advise us as to what form of stamp to use or if we should use our own judgment."

Section 3097 R. S. Missouri, 1929, reads as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a non-resident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

It will be noticed under this section that if chattel mortgage is filed, according to this section, that it shall henceforth be notice of the contents thereof to all of the world. House Bill No. 546, which is designated as Section 3097A, reads as follows:

"It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. For services herein provided the recorder shall receive a fee of twenty cents (20Cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

This section, which is a new section to Article 3, Chapter 22, does not mention 3097, supra. There is a conflicting clause in House Bill No. 546, which reads as follows:

"A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided."

This is a direct conflict as set out in Section 3097, supra. Under the rule of conflicting statutes, which cannot be read together, in order to set out the intention of the legislature, and where the conflict is directly set out, the latter section of the statute, or act, is the governing law.

In the case of Stiers v. Vrooman, 115 S. W. 2d 84, 1. c. 88, par. 10, the court said:

> "We appreciate the rule of statutory construction that in the case of irreconcilable conflict between two different parts of the same act, the last in order of position will control 'unless there is some special reason for holding to the contrary.' State ex rel. v. Gideon, 273 Mo. 79, 199 S. W. 948, 949. However, as is aptly said in 59 C. J. 1000, this rule is purely artificial and arbitrary, and is to be resorted to only where there is clearly an irreconcilable conflict, and all other means of interpretation have been exhausted. * * * "

There is no dispute, in our opinion, that the two statutes 3097, supra, and 3097A, are conflicting in this respect. As to the intention of the legislature in passing House Bill No. 546, they could have said that they were repealing Section 3097, but they made the provision about the notice to the whole world, which is in conflict with 3097. Under 3097A and under 3097, a chattel mortgage on an automobile, which is secured by a certificate of title, which, when lawfully filed, is not notice to the world unless a stamp or seal of the recorder of deeds is attached to the certificate of title. But the chattel mortgage in itself will be notice to the mortgagor or to anyone who could be shown had notice of said mortgage.

In your request you ask if Section 3097A, House Bill No. 546, is mandatory, in regard to the stamping or sealing of the certificate of title secured by the chattel mortgage.

It will be noticed that under Section 3097A it is stated "on request of the mortgagee or his assignee." This section should be considered as a permissive statute, and not a mandatory, but includes a directory statute.

In the case of State v. City of Maplewood, 99 S. W. 2d, 138, l. c. 142, par. 5-7, 231 Mo. App. 739, the court said:

> "The general rule with respect to the use of permissive words in a statute is stated in 59 C. J. section 633, pp. 1077 and 1078, as follows:
>
> 'On the other hand, where statutes are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do , and no public interests in private rights are involved, they will be construed as permissive. Generally, statutes, directing the mode of proceeding by public officers, designed to promote method, system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith. * * *
>
> "Permissive words in a statute in respect of officers or courts will not be construed as mandatory where such construction would create a new public obligation; and it has been held that even mandatory words or provisions in a statute defining the duties of administrative officers may be construed as directory only, unless something in the body of the statute indicates the contrary.'"

Also, in the case of State v. Brown, 33 S. W. 2d 105, l. c. 107, par. 2-6, 326 Mo. 627, 25 R. C. L. par. 14, the court said:

> "'A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while

> a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' 25 R. C. L. sec. 14 pp. 766, 767."

If it had been the intention to make the procedure of stamping the certificate of title on all chattel mortgages mandatory, the legislature could have said so in so many words, and not say, "It shall be the duty of the recorder of deeds on request of the mortgagee or assignee to certify on the certificate of title etc., * * * ."

The new section 3097A, under its title, did not amend or repeal section 3097, supra, but only gave the right of the mortgagee, or his assignee, to have the certificate of title stamped or sealed by the recorder of deeds, so that in case the certificate of title was assigned to an innocent purchaser, the mortgagee, or his assignee, would have double security, and the purchaser of the automobile, which is represented by the certificate of title, would have double notice that there was a mortgage against the automobile.

Also, in your request you asked whether we can make it mandatory to present the certificate of title to automobiles for certification by the recorder as to mortgages filed. Under section 3097A it is specifically stated "on request of the mortgagee or his assignee." In other words, it is directory and not mandatory that the certificate of title be stamped or sealed by the recorder of deeds, when a chattel mortgage is filed.

Ordinarily, when the phrase "filed" is used in a statute it means the filing of an instrument by leaving the instrument in the office of the recorder, and does not mean the recording of the instrument. In House Bill No. 546, designated as Section 3097A, the section also says:" A mortgage on a motor vehicle shall not be notice, etc *." Taking this sentence in connection with the whole section, it shows that it is the intention of the legislature that mortgages filed and mortgages that are recorded may have the certificate of title of the vehicle stamped as to mortgages outstanding against the car. The section shows that it is the intention of the legislature to include under that section not only chattel mortgages, on automobiles, filed for record, but also chattel mortgages on automobiles filed for recording.

CONCLUSION.

In view of the above authorities it is the opinion of this department that section 3097A, House Bill No. 546, in reference to the certification of the recorder of deeds on the certificate of title on an automobile is permissive and directory and not mandatory, but on the request of the mortgagee, or his assignee, it is mandatory on the part of the recorder of deeds to so seal or stamp the certificate of title for the reason that section 3097A reads: "It shall be the duty * * *."

It is also the opinion of this department that although House Bill No. 546 does not describe the form of stamp to be used, it is necessary that the stamp should contain information showing that the mortgage has been filed, also the date, the amount of the mortgage, and the name of the payee. Under the general real estate

law in the filing of a deed of trust or mortgage the note secured by the mortgage may be identified by means of a stamp which shows the date and the record index of the recording of the deed of trust or mortgage. I would suggest the same sort of a stamp except that it should contain the information above set out.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

WJB:RW

TAXATION:
COMPROMISE AND SETTLEMENT OF TAXES BY THE COUNTY COURT:

County court may compromise taxes at any time before payment of same provided, however, such compromise is subject to the provisions of the Constitution as to valuation.
County court may not compromise taxes for which lands have been sold under the Jones-Munger Act.

December 8, 1939

FILED
27

Honorable Sam T. Evans
Prosecuting Attorney
Daviess County
Gallatin, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following matters:

"1. Can the County Court make a compromise settlement of delinquent taxes on land held by a bondholders' protective committee of a drainage district?

"2. Can such blanket compromise be made for several successive years?

"3. Can lands having been sold under the Jones-Munger Law for delinquent taxes, where the certificate of purchase has been issued, be included in such compromise?

"4. Can current taxes be included in such compromise?

"5. If such a compromise is illegal, what is the proper procedure to set same aside?"

On your questions numbered one and two I find that this department, by an opinion dated February 15, 1933, to Senator J. C. McDowell and prepared by Honorable Carl C. Abington, Assistant Attorney General, covered the question of the right of the county court

to compromise taxes. I am enclosing a copy of this opinion for your use.

On your fourth question you ask whether or not current taxes could be included in such a compromise.

The authority to compromise taxes is set out in Section 9950, Laws of Missouri, 1933, page 427, and it seemed that the lawmakers intended that the only taxes which the county court could compromise were those which were in the "back tax book." Since the authority to compromise taxes is purely statutory, and since Section 9950, supra, does not permit the county court to compromise current taxes, then it is the opinion of this department that the county court, by virtue of the provisions of said Section 9950, would not be authorized to compromise the current taxes.

In your fifth question you ask what the proper procedure would be in case the compromise is illegal.

It seems from the opinion which we are enclosing, as stated on page seven thereof, that the collector would be personally liable if he issued a receipt for taxes which had been compromised by the county court in violation of Section 9950, supra.

CONCLUSION.

We are, therefore, of the opinion that the proper procedure, in case an illegal compromise was entered into by the county court and taxes were paid pursuant to such compromise, would be an action against the collector.

II.

Your third question on the question of whether or not lands having been sold under the Jones-Munger Law for delinquent taxes where the certificate of purchase has been issued may be included in such compromise.

Section 9956a, Laws of Missouri, 1933, at page 437, insofar as it applies to redeeming of lands which have been sold for taxes and on which there is an outstanding certificate of purchase provides as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration

> of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

The Act of 1933, pertaining to sale of delinquent property for taxes, is a special Act for that purpose.

After the lands have been published and sold for taxes under what is known as the Jones-Munger Act of the 19.3 Legislature, a certificate of purchase is issued to the purchaser, then we think those lands, insofar as being classed as delinquent lands or being on the "back tax book", are different to those which have not been sold. When a certificate of purchase is issued for lands which were sold for delinquent taxes, then the interest of the certificate holder enters into the transaction and then we think it is beyond the power of the county court to compromise these taxes under authority of Section 9950, Laws of Missouri, 1933. Said Section 9956a provides that these lands may be redeemed under certain conditions and we think that that is the procedure which the redemptor would be required to follow in order to get his lands released from the taxes for which they were sold. In other words, we do not think the county court, under the provisions of said Section 9950, would be authorized to compromise taxes after a certificate of purchase had been issued by the collector for lands sold for such taxes.

CONCLUSION.

It is, therefore, the opinion of this department that lands which have been sold under the Jones-Munger Act, Laws of Missouri, 1933 at page 425, for delinquent taxes and for which a certificate of purchase is outstanding, cannot be included in a compromise settlement, but that the owner must follow the provisions of said Section 9956a, Laws of Missouri, 1933 at page 437, in in order to relieve his land from the lien for the taxes sold thereunder.

APPROVED:

Respectfully submitted

W. J. BURKE
(Acting) Attorney General

TYRE W. BURTON
Assistant Attorney General

TWB:DA

ELECTIONS: Voting bonds for court house and jail- duties of officers with respect to furnishing election supplies and compensation therefor.

Exemptions: May claim under both 1160 and 1163 when -

February 25, 1939

3-✓

FILED
28

Mr. Charles Farrell
Sheriff of Oregon County
P. O. Box 442
Alton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 18th, 1939, requesting an opinion as follows:

> "Recently we had a Special Election to vote bonds for a new court house and jail. The law provides that the poll books and supplies be delivered to the judges of the election by the Sheriff, his deputy, or by the constables of the townships, and a fair compensation be allowed therefor.
>
> "In this instance they were mailed to some, delivered by some of the constables appointed for that purpose and deliveries made before their filing bonds etc., and the county court has failed or refused to pay any one for this service.
>
> "Another question is this: Is it possible for the head of a family to claim exemptions under section 1160, in part, and then under section 1163., which sets out a value of $300.00."

1.

On the first question it is necessary first to determine what duties are placed on the various officers with respect to bond elections and their compensation as

allowed by statute.

Article 5, Chapter 15, R. S. Missouri, 1929, pertains to elections to vote bonds for the construction of a court house and jail.

Section 2908 of this article and chapter, provides that such bond elections shall be held and conducted in the same manner as elections for state and county officers.

Under the laws appearing in the Revised Statutes of Missouri, 1929, pertaining to elections for state and county officers:

Section 10195 provides:

> "Poll books for each district or election precinct shall be made and furnished to the judges of election therein, in the same manner as hereafter provided in respect to poll books for each township, * * * * "

This statute in the same language goes back to R. S. Missouri, 1855, page 699, section 10. At that time sections 14 and 15 R. S. Missouri, 1855, page 699, provided how the poll books for each township were to be delivered, that was, by the sheriff. Sections 14 and 15 were subsequently repealed and do not appear in any subsequent revision of the statutes, even though for eighty-four years the Legislature has continued to use the language employed in section 10195. However, under rules of statutory construction sections 14 and 15, supra, are as much a part of section 10195, supra, as if copied in the said section.

In State v. Williams, 237 Missouri, 178, l. c. 182, the rule is stated as follows:

> "The rule of construction where one statute adopts another, is that, if the

> adopting statute specifically designates the title or date of the statute adopted, then the repeal or amendment of the statute thus adopted will not affect the adopting statute. (Culver v. People, 161 Ill. 89)"

While section 10195 does not specifically refer to the title and date of the enactment of sections 14 and 15, supra, it does refer to the same in such express terms that there can be no mistake as to the acts meant and we think this rule applies here.

Section 10196 makes it the duty of county sheriffs, at county expense, to provide two ballot boxes for each precinct, and leave them with the constable of the township in which the precinct is located, who shall have the same available for use in all elections.

Section 10212 R. S. Missouri, 1929, makes it the duty of the county clerk to send one copy of the election laws as furnished by the secretary of state, along with the poll books for use at any election.

Section 10305 makes it the duty of the county clerk to furnish the ballots to be voted; these to be delivered by the sheriff, a deputy or constable "who shall be allowed a reasonable compensation for his services to be provided by the county court."

Section 10307 R. S. Missouri, 1929, makes it the duty of all officers whose duty it is to designate polling places, to provide voting booths and such supplies which make for the voters' convenience.

Section 10308 R. S. Missouri, 1929, requires the county clerk to supply election judges with large cards having instructions printed thereon for the guidance of the voters. These are to be furnished "at the same time and in the same manner as the printed ballots".

Thus we find that the sheriff is to deliver the pool books, copies of the election laws, and furnish ballot boxes. It is the duty of the sheriff, a deputy or constable to deliver the ballots and instructions for

the election. It is the duty of all officers who are authorized to designate polling places to provide booths and other supplies.

The officers who designate polling places are the county court (Sections 10189, 10190 R. S. Missouri, 1929). If the court fails to do so then it is the sheriff's duty. (See 10191 R. S. Missouri, 1929).

The compensation of the sheriff and constable for the performance of the above duties is: For delivering the ballots and instructions "a reasonable compensation for his services to be provided by the county court". (Section 10305 R. S. Missouri, 1929); for delivering the poll books and copy of election laws we find no statutes providing any compensation; for furnishing ballot boxes, section 10196, supra, provides it shall be done at county expense; and for the county court, or sheriff, in providing booths and other supplies we find no statute allowing compensation. However, section 11777 R. S. Missouri, 1929, allows the constable "for each day or part thereof required in erecting the booths, taking them down, and attending any election in his township, when required to do so by the judges of election, per day .....$3.00".

With respect to those duties enjoined on either the county court, sheriff or constable, for which no compensation is allowed, we refer you to the case of State ex rel v. Brown, 146 Mo.401, l. c. 406, where it is said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When

> the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

And, to the case of State ex rel v. Hackman, 265 S. W. l.c. 535 (Mo.) where is is said:

> "Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty."

Therefore, on your first question, it is our opinion that for delivering the ballots and instructions, the officer upon whom that duty is imposed is entitled to only such reasonable compensation as the county court may fix; for delivering the poll books, copies of election laws, and in providing voting booths, the officer who has such duty is entitled to no compensation; that ballot boxes are to be furnished at county expense and that the delivery thereof is an essential expense to the furnishing of said ballot boxes to be paid for in such sums as the county court may deem reasonable. That the constable for erecting the voting booths and attending any election in his township when the election judges require his attendance, is entitled to three dollars per day. The officers above concerned are entitled to the compensation mentioned and the county court should allow them the fees if the officer performed the services.

11.

Your second question concerns the interpretation to be placed on sections 1160 and 1163, R. S. Missouri, 1929.

Section 1160 R. S. Missouri, 1929, sets out in eleven parts the property exempt from attachment and execution when owned by the head of a family.

Section 1163, R. S. Missouri, 1929, is as follows:

> "Each head of a family, at his election, in lieu of the property mentioned in t he first and second subdivision of section 1160 may select and hold, exempt from execution, any other property, real, personal or mixed, or debts and wages, not exceeding in value the amount of three hundred dollars, except ten per cent of any debt, income, salary or wages due such head of a family."

This latter section and its effects on section 1160 has been considered by the court in Mahan v. Scruggs, 29 Missouri, 282, where it is held that the head of a family may claim exemptions under both sections when he does not own, or have, all the property made exempt by the first and second parts of section 1160, R. S. Missouri, 1929. For example: The person might only have five head of hogs, when he is entitled to claim ten as exempt. This deficiency then could be made up by claiming under section 1163, R. S. Missouri, 1929, other property not to exceed $300.00 in value.

Therefore, upon your second question it is our opinion that the had of a family may claim exemptions under both section 1160 and 1163 R. S. Missouri, 1929, when the claim under section 1163 R. S. Missouri, 1929, is made to make up a deficiency in the articles made exempt by parts one and two of section 1160, R. S. Missouri, 1929.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

LLB:RW

TAXATION:
CHAIN STORES: Section 3 of House Bill No. 34 for the Sixtieth General Assembly is constitutional.

March 1, 1939

3/2

FILED
28

Honorable J. W. Farley
Representative
Platts County
Jefferson City, Missouri

Dear Sir:

This is in response to yours of the first requesting an opinion from this department on the question of whether or not section 3, on page two, of House Bill No. 34 is constitutional. This section is as follows:

> "The license tax for said business described in this act levied upon the store or stores operated in the State of Missouri shall be based on the number of stores or mercantile establishments included under the same general management, supervision, ownership or control, whether operated in this state or not, and shall be fixed and graded as follows, to-wit:
>
> "(1) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of not more than ten stores, the annual license shall be ten dollars for each such store operated in this state.
>
> "(2) Upon stores or mercnatile establishments operated in this state and belonging to a chain or group having a total of more than ten stores, but not

more than thirty-five stores, the annual license shall be fifteen dollars for each such store operated in this state.

"(3) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than thirty-five stores but not more than fifty stores, the annual license shall be twenty dollars for each such store operated in this state.

"(4) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than fifty stores but not more than seventy-five stores, the annual license shall be twenty-five dollars for each such store operated in this state.

"(5) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than seventy-five stores but not more than one hundred stores, the annual license shall be thirty dollars for each such store operated in this state.

"(6) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than one hundred stores but not more than one hundred twenty-five stores, the annual license shall be fifty dollars for each such store operated in this state.

"(7) Upon stores or mercantile establishments operated in this state and

belonging to a chain or group having a total of more than one hundred twenty-five stores but not more than one hundred fifty stores, the annual license shall be one hundred dollars for each such store operated in this state.

"(8) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than one hundred fifty stores but not more than one hundred seventy-five stores, the annual license shall be one hundred fifty dollars for each such store operated in this state.

"(9) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than one hundred seventy-five stores but not more than two hundred stores, the annual license shall be two hundred dollars for each such store operated in this state.

"(10) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than two hundred stores, but not more than two hundred twenty-five stores, the annual license shall be two hundred fifty dollars for each such store operated in this state.

"(11) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than two hundred twenty-five stores but not more than two hundred fifty stores, the annual license shall be three hundred dollars for each such store operated in this state.

"(12) Upon stores or mercantile establishments operated in this state and

belonging to a chain or group having a total of more than two hundred fifty stores but not more than two hundred seventy-five stores, the annual license shall be three hundred fifty dollars for each such store operated in this state.

"(13) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than two hundred seventy-five stores but not more than three hundred stores, the annual license shall be four hundred dollars for each such store operated in this state.

"(14) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than three hundred stores but not more than four hundred stores, the annual license shall be four hundred fifty dollars for each such store operated in this state.

"(15) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than four hundred stores but not more than five hundred stores, the annual license shall be five hundred dollars for each such store operated in this state.

"(16) Upon stores or mercantile establishments operated in this state and belonging to a chain or group having a total of more than five hundred stores, the annual license shall be five hundred fifty dollars for each such store operated in this state."

In your letter you state that this bill is a copy from the chain store law of the State of Louisiana. We do not find where the Missouri courts have passed on a similar act, but we find that the Supreme Court of the United States in the case of Great Atlantic and Pacific Tea Company v. Grosjean, 301 U. S. 410-412, and 81 L. ed. 1193 held as follows as to the constitutionality of such an act:

> "A state statute which imposes a chain store tax graduated upon the basis of the number of stores included under the same general management or ownership, whether operated in the state or not, does not arbitrarily and unreasonably discriminate in favor of local as against national chains."
>
> "A state statute which imposes a chain store tax graduated upon the basis of the number of stores included under the same general management or ownership, whether operated in the state or not, does not contravene the constitutional requirement of due process by imposing a tax upon property or privileges possessed or enjoyed by the taxpayer beyond the borders of the state."
>
> "In the exercise of its police power the state may forbid, as inimical to the public welfare, the prosecution of a particular type of business or regulate a business in such manner as to abate evils deemed to arise from its pursuit."
>
> "Whatever a state may forbid or regulate it may permit on condition that a fee be paid in return for the privilege, and such a fee may be exacted

to discourage the prosecution of a business or to adjust competitive or economic inequalities."

Since House Bill No. 34 proposes the same legislation as the Louisiana Bill which has been passed on by the United States Supreme Court, then this department is of the opinion that the provisions of the bill to which you refer in your request are constitutional.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:DA

COUNTY COLLECTORS: County Collector of Jasper County may not establish and maintain a branch office at Joplin under the provisions of Section 9899 R. S. Mo. 1929.

August 2, 1939.

83

FILED
28

Mr. Harold Fenix
Collector of Revenue
Jasper County

Dear Mr. Fenix:

We desire to acknowledge receipt of your letter of June 14, 1939 requesting an opinion of this office, which is as follows:

> "In regard to our conversation on Jones-Munger Law with Mr. Stone; I would appreciate all opinions that you may have on this subject, especially where one may redeem by paying bid and subsequent tax.
>
> "I would also appreciate an opinion on opening an office, at Joplin, Missouri, as this comes under section 9899, with the exception that the Court House at Joplin is rented and not owned by the County.
>
> "Thanking you for the courtesy extended by your Deputy, Mr. Stone, on our recent visit to your office."

Please find enclosed a group of opinions rendered by this office on the question of redemption, one of which is upon the question as to what sums the certificate holder is entitled to receive in case of redemption .

Section 9899 R. S. Mo. 1929 is as follows:

> "In all counties in this state that may now or hereafter have a population of 25,000 and less than 40,000, and in which there is a city of over 15,000 population, more than ten miles distant from the county seat, and in which said city there is a courthouse owned by the county, and in which said courthouse there is held regular and legally established terms of a court of common pleas, it shall be the duty of the collector of the revenues of such county to maintain in addition to his office at the county seat a branch office in the courthouse located in the said city of 15,000 population or more, for the convenience of the taxpayers of said county living within the jurisdiction of said court of common pleas."

Under the provisions of the above statute there are the following precedent conditions to the establishment and maintenance of a branch office by the collector of any county of this state:

1. Counties in this state that may now or hereafter have a population of 25,000 and less than 40,000 and in which there is a city of more than 15,000 population more than ten miles distant from the county seat.

2. In which city there is a court house owned by the county.

3. In which court house there is held regular and legally established terms of a court of common pleas.

The purpose of the establishment of said branch office as expressed by said statute is

> "for the convenience of the taxpayers of said county living within the jurisdiction of said court of common pleas."

The laws of Missouri have provided for only four Courts of Common Pleas to-wit: Cape Girardeau, Hannibal, Louisiana and Sturgeon.

CONCLUSION

Therefore, it is the opinion of this department that the County Collector of Jasper County, Missouri may not, under the provisions of Section 9899 R. S. Mo. 1929, establish and maintain a branch office at Joplin.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

BLIND PENSION: Recipient of a blind pension cannot be stricken from the rolls until he has been given reasonable notice and such fact certified to the State Auditor.

July 8, 1939

FILED
29

Miss Marie M. Finan
Pension Secretary
Missouri Commission for the Blind
3630 Grandel Square
St. Louis, Missouri

Re: Joseph L. Loyd Pension

Dear Miss Finan:

This will acknowledge receipt of your request for an official opinion under date of July 6, 1939, which reads as follows:

> "The above blind pensioner is employed in the Broom Shop in St. Louis, Missouri. His salary for the twelve month period prior to March 31, 1939 amounts to $554.40. We have now been advised by the Metropolitan Life Insurance Company that in February, 1939 he received $228.50 settlement on an insurance policy which provided that in the event of blindness the insured was to receive that amount in settlement of payment and a paid up policy. Therefore, his income for the year prior to March 31, 1939 amounts to $782.90, which is greater than the limit of $600.00 allowed by the blind pension law.
>
> "We have advised Mr. Loyd that he is now ineligible to receive the blind pension and will not be eligible to receive same until at the end of a twelve month period during which time his income is not greater than $600.00 or more. However, we will appreciate if you will advise if whether or not in striking his name from the roll, we can make this retroactive, that is can we at this time strike

> him effective as of March 31, 1939, or, since we did not check his case until June, 1939, and did not know until that time that his income was in excess of the limit allowed by the law, and did not notify him until June 24, 1939 that he would be removed from the roll, will it be necessary for us to make the strike effective as of June 30, 1939?"

Unquestionably, under the facts stated in your letter, this recipient became ineligible when he received the settlement of $228.50 from an insurance policy.

Section 8893, R. S. Mo. 1929, provides that when any person has an income, or is the recipient, of $600.00 or more per annum from any source whatsoever, he is ineligible to receive a blind pension. Section 8893, supra, in part, reads as follows:

> " * * * provided, that no such person shall be entitled to a pension under this article who has an income, or is the recipient, of six hundred ($600.00) dollars or more per annum from any source whatsoever."

Therefore, as stated in your letter, this pensioner was the recipient of $782.90 for the twelve months just prior to March 31, 1939, and for this reason he is no longer eligible to receive a blind pension.

Now, you inquire as to when the recipient shall be stricken from the roll. Under Section 8896, R. S. Mo. 1929, the Commission for the Blind is authorized, upon finding anyone ineligible, to mail the recipient reasonable notice and then certify such fact to the State Auditor, who shall strike him from the roll. Section 8896, in part, reads as follows:

> " * * * And whenever it shall become known to the commission that any person whose name is on the blind pension roll is no longer qualified to receive a pension, after reasonable notice mailed to

> such person at his or her last known residence address, such fact shall be certified to the state auditor and the name of such person shall be stricken from the blind pension roll. * * *"

Therefore, notwithstanding the fact that this recipient was ineligible for a short time while he was receiving a blind pension, the statute specifically requires that he shall not be stricken from the roll until reasonable notice has been given him.

It is the opinion of this department that this recipient cannot be stricken from the roll until after the notice was mailed on June 24, 1939. We consider from June 24 to June 30, 1939, a sufficient time to constitute reasonable notice. Therefore, this recipient should be stricken from the roll as of June 30, 1939.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

ARH:HR

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CERTIFIED PUBLIC ACCOUNTANT: A lawfully registered C.P.A. cannot be prosecuted criminally under Section 13716, R. S. Missouri, 1929.

August 31, 1939

9-5

FILED
29

Hon. James P. Finnegan
Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of August 28th, 1939, which reads as follows:

"On October 13, 1938, you addressed an opinion to Mr. David W. Fitzgibbon, who was then an Associate Prosecuting Attorney in our office, relative to the right of a Certified Public Accountant to use a fictitious name. Your opinion held that a Certified Public Accountant could not legally use a fictitious name. With your opinion I fully agree.

"We have now the question relative to the above matter, as to whether such accountant or accountants using a fictitious name (for which a registration has been obtained from the Secretary of State), may be prosecuted as having violated Section 13716 of R. S. Mo. 1929?

"You will note that the wording of the state is, 'If any person represents himself.' Here then is a situation where the accountant does not falsely represent himself to be a certified public accountant, for the reason that he is in fact a certified public accountant; but he does represent that the firm (whose members are deceased and whose names they are continuing to use) is a certified public accountant or accountants.

"For example, A. B. and C. are certified public accountants, they are doing business as Haskin & Sells, certified public accountants. Both Haskin and Sells are deceased. Can A. B. and C. be prosecuted under Sec. 13716?"

I have checked the record of the issuance of a permit for a fictitious name, under Section 14342, R. S. Missouri, 1929, in reference to the fictitious name of Haskin & Sells. I find that they were granted permission to use the fictitious name of Haskin & Sells and the members applying for the name are as follows:

J. Harvey O'Connell,	60 Crestwood Drive Claverack Park Clayton, Missouri	20%
John M. Neumayer,	Hotel President Kansas City, Missouri	5%
J. Adrian Padon,	9 Woodland Drive Oakview Estates Tulsa, Oklahoma	10%
Arthur H. Carter,	Dublin Road Greenwich, Conn.	40%
William H. Bell,	30 Porter Place Montclair, N. J.	25%

Their principal places of business are 418 Olive Street, St. Louis, Missouri, and Grand Avenue Temple, Kansas City, Missouri. I am presuming that all of the above named parties are properly registered C. P. As.

Our opinion rendered October 13th, 1938, to David W. Fitzgibbon, Associate Prosecuting Attorney, in the city of St. Louis, held that a person styling himself as

a C. P. A. is a personal privilege granted under Chapter 110 R. S. Missouri, 1929, and cannot be used to style non-resident partners or non-resident firms or individuals.

It is true that we also held that it was unlawful for a firm, or individual, operating a branch office in Missouri, to hold themselves out as certified public accountants, the partners being certified public accountants of other states, but not holding Missouri degrees, but the resident partners or managers being Missouri certified public accountants. We also held that a firm or partnership cannot style itself as certified public accountants under a lawfully registered fictitious name. In that opinion we set out decisions in this state and other states on provisions analagous to that of accountancy. We also set out cases regarding certified public accountants which arose in other states. The question as to certified public accountants has not been passed upon in this state. In the case we set out, the criminal statutes were not involved, but were mainly on the question of revocation of the certified public accountant's registration. The cases arose either in the matter of the revocation of the certified public accountant's permit, or by way of injunction restraining members of the board from revoking the registration permits, or by way of ouster proceedings against corporations who have been practicing accountancy, optometry, dentistry and other professions by an employee who is a regularly registered optometrist, dentist, accountant or some other profession. The cases cited also arose by way of disbarment proceedings against lawyers who were practicing law under a corporation name.

In all the cases cited in the opinion and in the holding of this department on that question, we have not cited or cannot find a case in this state where the state has prosecuted any of the above named professions by way of a criminal action.

Section 13716 R. S. Missouri, 1929, reads as follows:

"If any person represents himself to the public as having received a certificate as pro-

> vided in this chapter, or shall assume to practice as a certified public accountant, or use the abbreviation C. P. A., or any similar words or letters, to indicate that the person using the same is a certified public accountant, without having received such certified public accountant certificate, or without having received a registration certificate, as provided in this chapter; or if any person having received a certificate as provided in this chapter, and having thereafter been deprived of such certificate by revocation, as herein provided, shall continue to practice and hold himself out as a certified public accountant, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined a sum not less than fifty dollars nor more than five hundred dollars for each offense, and each day such person shall so offend shall be deemed a separate offense. Nothing in this chapter shall be construed to prohibit any person from practicing as a public or expert accountant in this state, but said chapter shall only apply to such persons as practice and hold themselves out to be certified public accountants."

Under the above section in order that there can be a criminal prosecution, the person prosecuted must not have a certificate of a certified public accountant but uses that certificate unlawfully. According to your recent request you say that the members of the firm are certified public accountants, but that the names mentioned in the fictitious title of the firm are names of persons who are now deceased, and it is the opinion of this department that lawfully registered certified public accountants cannot be prosecuted under Section 13716, R. S. Missouri, 1929. As stated before the questions under which we based our previous opinion to David W. Fitzgibbon arose mainly on the action of revocation by the respective boards who have jurisdiction and control over the respective professions.

Section 13711 R. S. Missouri, 1929, reads as follows:

"The governor shall, within thirty days after the taking effect of this chapter, appoint five persons, who shall constitute the board of accountancy, each member of which shall have been engaged in the reputable practice as a public accountant for a continuous period of three years immediately preceding the passage of this chapter, one of which shall have been in the state of Missouri. The persons first appointed shall hold office for one, two, three, four and five years, respectively. Upon the expiration of each of said terms, a member, who shall be a holder of a certificate issued under this chapter, shall be appointed for a term of five years."

Section 13715, R. S. Missouri, 1929, reads as follows:

"The board may revoke or cancel the registration of any certificate issued under this chapter for unprofessional conduct of the holder or other sufficient cause: Provided, that written notice shall have been mailed to the holder of such certificate at least twenty days before any hearing thereon, stating the cause of such contemplated action, and appointing a day for full hearing thereon by the board; and provided further, that no certificate issued under this chapter shall be revoked until such hearing shall have been held or the opportunity for such afforded the person charged. In the event of the revocation, cancellation or suspension of any such certificate, the board shall notify the secretary of state of its action in the premises, and the secretary of state shall note such order of the board upon the records kept in his office."

Under Section 13715, supra, the board may revoke or cancel the registration or certificate issued under

this chapter for unprofessional conduct of the holder, or other sufficient cause.

In view of our opinion heretofore rendered to David W. Fitzgibbon, which held that a C. P. A., registration is a personal privilege, and cannot be used to style non-resident partners or non-resident firms, or individuals, we are of the opinion that any action taken against any lawfully registered C. P. A. in the State of Missouri, must be taken by way of the State Board of Accountancy in the matter of revocation as set out in Section 13715, supra.

For your convenience, we are herein setting out the citations upon which we based our opinion to David W. Fitzgibbon, as hereinbefore set out.

Curry v. Inland Revenue Commission, (1921) 2 K. B. 352;

In re Ellis, 124 Fed. l.c. 643;

State ex inf. McKittrick, Attorney General v. Gate City Optical Co., 97 S. W. (2d) 89;

State ex rel Beck v. Goldman Jewelry Co., 142 Kan. 881, 51 P. (2d) 995, 102 A. L. R. 334, l.c. 337;

Winslow v. Kansas State Board of Dental Examiners, 115 Kan. 450, 223 P. 308;

In Re Co-operative Law Company, 198 N. Y. 479, 92 N. E. 15, 32 L. R. A. (N. S.) 55, 139 Am. St. Rep. 839, 19 Ann. Cas. 879;

In Re Otterness, 181 Minn. 254, 232 N. W. 318, 73 A. L. R. 1319

State v. Kindy Optical Co., 216 Iowa, 1157, 248 N. W. 332, 335;

Stern v. Flynn, 154 Misc. 609, 278 N. Y. S. 598, 599;

Funk Jewelry Co. v. State (1935), 50 P. (2d) 945;

McMurdo v. Getter, 10 N. E. (2d) 139, (Mass.);

People v. Marlowe, (1923), 203 N. Y. S. 474;

43 A. L. R. 1095 refers to Frazier v. Shelton, 320 Ill. 253, 150 N. E. 696, 43 A. L. R. 1086;

Henry v. State, 97 Tex. Crim. Rep. 67, 260 S. W. 190;

Crowe v. State, 97 Tex. Crim. Rep. 98, 260 S. W. 573;

People v. National Association C. P. A., 204 App. Div. 288, 197 N. Y. S. 775;

Davis v. Sexton, 211 App. Div. 233, 207 N. Y. S. 377;

State v. De Verges (La.), 95 So. 805, 27 A. L. R. 1526;

Lehman v. State Board of Public Accountancy, 208 Ala. 185, 94 So. 94.

CONCLUSION

In view of the above authorities, it is the opinion of this department that lawfully registered certified public accountants who are employed by a corporation, partnership or firm operating under a fictitious name cannot be prosecuted under Section 13716 R. S. Missouri, 1929, but are subject to having their registered certificate revoked by the State Board of Accountancy.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

SCHOOLS: Public schools not within the scope of statutes requiring fire escapes and which provide criminal liability for failure to so provide.

September 18, 1939 9/18

FILED
29

Honorable James P. Finnegan
Prosecuting Attorney
City of St. Louis
St. Louis, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion, which reads as follows:

> "I would appreciate it very much if you would render me your opinion on Sections 13757 and 13760 of the Revised Statutes of Missouri, 1929, as they affect the public school buildings of the City of St. Louis."

Section 13757, R. S. Mo. 1929, provides as follows:

> "It shall be the duty of the owner, proprietor, lessee, trustee, or keeper of every hotel, boarding and lodging house, tenement house, schoolhouse, opera house, theater, music hall, factory, office building, except fireproof office buildings in which all structural parts are wholly of brick, stone, tile, concrete, reinforced concrete, iron, steel or incombustible material, and which are not used for lodging purposes in the state of Missouri, and every building therein where people congregate or which is used for a business place or for public or private assemblages, which has a height of three or more stories, to provide said structure with iron or

steel stair fire escapes attached to the exterior of said building and by staircases located in the interior of said building. The fire escapes shall extend from the upper story to the ground, pavement or sidewalk with iron or steel ladder from the upper story to the roof; Provided, however, that such fire escapes, if not continued to the ground, pavement or sidewalk, shall be equipped with a counter-balance device attachment, appliance or apparatus which shall extend from the floor level of the second story to the ground, pavement or sidewalk. School buildings, opera houses, theaters and church buildings, also hospitals, blind and lunatic asylums and seminaries, shall each have a stair fire escape built solid to the ground. In no case shall a fire escape run past a window where it is practicable to avoid it. All fire escapes required by this article, except as hereinbefore provided, must be of the kind known as stationary fire escapes. All buildings heretofore erected shall be made to conform to the provisions of this article."

Section 13759, R. S. Mo. 1929, reads as follows:

"The number of fire escapes to be attached to any one building, as required in this article, shall, when the building is located within a city, be determined by the commissioner or superintendent of public buildings within such city, and if there be no such officer in such city, then by the chief of the fire department of such city: Provided, however, that all buildings of non-fireproof construction three or more stories in height, used for manufacturing purposes, hotels, dormitories, school, seminaries, hospitals or asylums, shall have not less than one fire escape for every fifty persons or fraction thereof, for whom working, sleeping or living accommodations are provided above the second

story, and all public halls which provide seating room above the first or ground story, shall have such number of fire escapes as shall not be less than one fire escape for every one hundred persons, calculated on the seating capacity of the hall, unless a different number is authorized in writing by the commissioner, or superintendent of buildings, or the chief of the fire department, or the sheriff of the county, as the case may be."

Section 13760, R. S. Mo. 1929, is as follows:

"All buildings of three and not exceeding four stories in height, hereafter erected or altered, in this state, which are used, or intended to be used for any of the purposes mentioned in article 1, chapter 113, R. S. 1929, shall be provided with exterior stationary stair fire escapes, or at the option of the owner may be provided with interior fireproof fire escapes, and all such buildings, exceeding four stories in height shall be provided with interior fireproof fire escapes. All interior fire escapes shall be installed in fireproof shafts constructed of brick or concrete, and shall extend from the ground to the top of the building, with an exterior entrance thereto at each story and shall have no openings of any kind leading to or from the interior of the building. The doors on the ground floor of every such shaft shall open directly into a street, alley, yard, or outer court or directly into an enclosed fireproof corridor or passageway, constructed of brick or concrete, and leading directly to and opening into a street, alley, yard or outer court. All buildings coming within the provisions of this section, and not exceeding four stories in height, shall be provided with such a number of exterior stationary stair fire escapes as are required by section 13759, R. S. 1929: Provided, that number are so located that no

> part of the floor area of any floor above the first story will be more than one hundred feet distant from a fire escape, or if such building be provided with interior fire escapes, there shall be one for every two hundred persons or fractional part thereof for whom working, sleeping or living accommodations are provided for above the second story. There shall be a sufficient number of fire escapes, so located that no part of any floor space above the first story will be more than one hundred feet from a fire escape, whether they are interior or exterior fire escapes."

In considering statutes in regard to the construction of buildings with respect to the health and safety of the public, a rule of strict construction should be followed, which is best expressed in 29 C. J. 260, Section 62, as follows:

> "The legislature may * * * * provide for regulations to remedy unhealthful or unsafe conditions of buildings or structures; * * *. These statutes * * * should be strictly construed and should receive the same construction whether involved in a strictly penal proceeding or not."

The question presented in consideration of the above statutes is - Was it the intention of the Legislature that these statutes should apply to public school buildings?

It is well settled in Missouri that school districts are subdivisions of the State and exercise functions of sovereignty. As was said in the case of City of Edina, etc. v. School Dist. et al., 305 Mo. 452, 267 S. W. 112, l. c. 115:

> "Under the Constitution of 1875, the public schools have been intrenched as a part of the state government and it is thoroughly established that they are an arm of that government and perform a public or governmental function and not a special corporate or administrative duty. They are purely public corporations, as has

always been held of counties in this state, * * * * *.

"So that public school grounds occupy the same legal statutes as strictly public property as county courthouses, and are as necessary to the normal functioning of the state government."

We first look to the powers and duties of the Board of Education of the City of St. Louis. The statutes are collected and so clearly stated in the case of Board of Education of the City of St. Louis v. City of St. Louis, 267 Mo. 356, that we will quote at length therefrom. In that case it is said:

"It was in obedience to this constitutional mandate that the Act of 1897 (as amended by the Act of May 28, 1909) under which the public schools of the City of St. Louis have ever since been operated was enacted. It provided that 'every city in this State now having or which may hereafter have five hundred thousand inhabitants or over, together with the territory now within its limits, or which may in the future be included by any change thereof, shall be and constitute a single school district, shall be a body corporate, and the supervision and government of public schools and public school property therein shall be vested in a board of twelve members, to be called and known as the 'Board of Education of . . .' ' (R. S. 1909, sec. 11030.)

"The powers and duties of this board were highly specialized in the act, and included the general and supervising control, governing and management of the public schools, and public school property in such city; the power to appoint such officers, agents and employees as it may deem necessary and proper; to make, amend and repeal rules and by-laws for the government, regulation

> and management of the public schools and school property in such city and exercise generally all powers in the administration of the public school system therein; and have all the powers of other school districts under the laws of the State except as herein provided. Particularising further, it provides for the appointment by the Board of Education of a commissioner of school buildings who 'shall be charged with the care of the public school buildings of such city, and with the responsibility for the ventilation, warming, sanitary condition and proper repair thereof,' and 'shall prepare, or cause to be prepared, all specifications and drawings required, and shall superintend all the construction and repair of all such buildings.' (R. S. 1909, sec. 11036.) In the performance of these duties he was required to appoint such assistants as should be authorized by the Board of Education, one of whom 'shall be a trained and educated engineer, qualified to design and construct the heating, lighting, ventilating and sanitary machinery and apparatus connected with the public school buildings.' (R. S. 1909, sec. 11037.)"

The question presented in the St. Louis Board of Education Case, supra, was whether the City of St. Louis could direct a school district as to the manner in which its sanitary appliances should be maintained. The court held that the statute gave "the board of education plenary power with reference to the construction, maintenance and care of the public school buildings of the city." ("Plenary" is defined by Webster as "full, entire, complete, absolute and unqualified.") The court further said:

> "We think it is peculiarly appropriate that those charged with the custody and control of the pupils while in the building should also be charged with the protection of their health while engaged in their studies. The Legislature seems to have taken this view of the matter, and has, in our opinion, in unmistakable terms, placed that responsibility upon the board."

For like reasons the Board of Education would have control over the safety of the pupils since health and safety are synonymous, and the object of both goes to the well-being of the pupils.

Therefore, it will be seen that the Legislature has vested in the board of education absolute control and discretion in the maintenance of public school buildings and has given them absolute supervision over the health and safety of the pupils. We do not believe that this absolute grant of power is to be qualified by a doubtful construction of another statute.

Section 13758, R. S. Mo. 1929, provides that the construction and inspection of the fire escapes are to be under the supervision of and subject to the approval of the commissioner or superintendent of public buildings within such city. To hold that the sections providing for fire escapes apply to public schools, would take a part of the control of such school buildings away from the board of education to whom it has been given absolutely, and place it under a municipal officer.

We would then have the anomalous situation of the health and safety of the pupils, which, of their very nature, are interrelated and closely connected, being under the supervision and control of different officers when it is apparent that it is necessary for one body to have complete authority in the carrying out of such functions. The Commissioner or Superintendent of Public Buildings in the City of St. Louis is a municipal officer and to give him supervisory powers with respect to the public schools, which are a branch of the executive power, would be clearly opposed to the established rule in this state. Board of Education v. City of St. Louis, supra.

The general rule in regard to the application of general legislation to state and political subdivisions is best expressed in 59 C. J. 1103, and is as follows:

> "The state and its agencies are not to be considered as within the purview of a statute, however general and

> comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with especial force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."

Also in Morris v. State, 88 Okla. 189, we find the following:

> "The presumption obtains that it is the legislative intent to exclude the state from the operation of a statute for the reason that the laws are ordinarily made for the government of citizens and not the state."

This position is also sustained by Inhabitants of Whiting v. Inhabitants of Lubec, 121 Maine 121; State Highway Department v. Mitchell's Heirs, 216 S. W. 336.

It will be noted that in Sections 13757 and 13759, supra, that only "school houses," "school buildings," and "school" are included within the requirement of the statute. Applying the above rule that legislation does not include state subdivisions unless specifically made so, the Legislature did not expressly include therein public schools or public school buildings. When constitutional provisions and statutes have been intended to apply to public school or public school buildings, they have expressly so stated. Sections 1, 2, 3, 4, 6, 7, 8 and 9 of Article XI, of the Constitution of Missouri, specifically designate "public schools."

Sections 13757 and 13760, as stated in your letter of request, are found in Article 1, Chapter 113, R. S. Mo. 1929, which chapter deals with public safety. Section 13769,

which is found in Article 2 of Chapter 113, provides for the hanging of doors in certain buildings. It states,

> "All the doors for ingress and egress to and from all public schoolhouses and all other public buildings, and also of all theaters, assembly rooms, halls, churches, factories with more than twenty employes, and of all other buildings or places of public resort whatever, where people are wont to assemble, * * *"

shall be so hung so as to open outwardly. The Legislature in this section specifically includes public school houses in its provisions as to doors but in the prior section as to fire escapes it only says "schoolhouses."

Therefore, since a political subdivision is not to be included within the scope of a statute by inference but must be specifically brought within the purview, and since the Legislature in the very same chapter has in a different statute expressly included "public schoolhouses," we believe that "school" and "school building" in Sections 13757 and 13760 do not include public schools or public school buildings. We are further strengthened in this contention by a reference to Section 9208, R. S. Mo. 1929, which deals with contagious diseases among pupils and which is a measure for the protection of children attending schools. It provides in part as follows:

> "It shall be unlawful for any child to attend any of the public schools of this state while afflicted with any contagious or infectious disease, * * * * * *."

It will be noted that courthouses, which are the most public of all buildings, and where large numbers of citizens frequently congregate, where courts of justice are held and where valuable records are kept, are conspicuously absent from the statute, which confirms our belief that only privately owned public buildings were intended to be regulated.

Furthermore, the wording and scope of the statute providing a penalty for failure to comply with the fire escape

statute indicates that public school buildings were not included within its provisions. Section 13761, R. S. Mo. 1929, provides as follows:

> "The owner, proprietor, lessee or manager of a building which, under the terms of this article, is required to have one or more fire escapes, who shall neglect or refuse for the period of sixty days after this article takes effect to comply with its provisions, shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than fifty nor more than two hundred dollars, or by imprisonment in the county or city jail not more than three months, or by both fine and imprisonment, and each day shall be deemed a separate offense."

It will be noted that this section uses the words "owner, proprietor, lessee or manager" and does not include the Board of Education or the Commissioner of School Buildings which were established long prior to the enactment of Section 13761. Such failure is apparent proof that the Legislature did not intend the section to apply to the school buildings in the City of St. Louis.

This is strengthened by a reference to Section 13770, which provides the penalty for failure to hang doors on public school houses in the manner set out above. This penalty section is more specific and uses the words "architect, superintendent or other person or persons or body corporate, who may have charge of the erection, or may have the control or custody of any of the said buildings" thereby manifesting a clear intent to include school districts, which are bodies corporate.

It is a well established principle of law that school officers are presumed to do their duty. School officers, intent on the public good, having the entire resources of the school district at their disposal, would use all means within their power to construct the buildings which are to house children

of the district as safely as they know how. The reason for compelling a private individual to add these safety devices does not exist in the case of a school district. A private individual is intent primarily with the pecuniary gain or saving which enures from his possession of a building. A private school carried on for profit might neglect to provide adequate safety facilities for its pupils due to the expense of construction.

At this point several final questions present themselves. Assuming that the statutes did apply to public schools, how could the Board of Education avail itself of additional funds to construct fire escapes, if no surplus was on hand, except by vote of the entire district? Furthermore, if five of the twelve members voted to install fire escapes but were overruled by the majority vote of seven, they, too, would be guilty of a crime. Also, since the statute makes each day in which there is a failure to comply, a separate offense, a person elected to the Board of Education, upon learning of the violation of the law his first day in office, could resign, but would still be criminally liable. We do not believe that the Legislature intended such injustices should be perpetrated under the guise of promoting public safety.

Conclusion

It is, therefore, the opinion of this Department that Sections 13757 and 13760, R. S. Mo. 1929, do not apply to the public schools of the City of St. Louis.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney-General

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

ROY McKITTRICK
Attorney-General

AO'K/RLH/EG

MOTOR VEHICLES: It is an offense to operate motor vehicles as chauffeur without a chauffeur's license.

September 22, 1939

9-25

FILED
29

Honorable James P. Finnegan
Prosecuting Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 7, 1939, enclosing a form information, and asking our opinion on the following questions:

(1) Is it an offense to operate a commercial vehicle or automobile without first having obtained a chauffeur's license?

(2) Will a demurrer lie to the enclosed information?

We take your second question to mean, will a demurrer lie on the ground that the information states no offense known to the law, rather than asking our opinion on the phraseology there used, or necessary technical allegations. This understanding of said question makes one conclusion answer both.

Section 7759 R. S. Mo. 1929, defines "chauffeur" as:

> "An operator (a) who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare, or (b) who as owner or employee operates a motor vehicle carrying passengers or property for hire."

Said section defines "commercial motor vehicle" as:

> "A motor vehicle designed or regularly used in carrying (a) freight or merchandise, or (b) more than eight passengers."

Section 7765 R. S. Mo. 1929, provides that every person desiring to operate a motor vehicle as a chauffeur shall make a certain application to the commissioner of motor vehicles and if found of good character and competent, the commissioner, upon payment of a fee, shall assign the applicant a number and issue to him a chauffeur's license.

Section 7786, R. S. Mo. 1929, after fixing penalties for certain offenses, none of which affect the instant question, provides:

> "Any person who violates any of the other provisions of this article shall upon conviction thereof, be punished by a fine of not less than five dollars ($5.00) or more than five hundred dollars ($500.00) or by imprisonment in the county jail for a term not exceeding two years, or by both such fine and imprisonment."

We have carefully examined all parts of Article 1, Chapter 41, R. S. Mo. 1929, and find no express provision therein to the effect that "no person shall operate a commercial vehicle without first obtaining a chauffeur's license". The substance of the above sections is that a person desiring to operate a motor vehicle as a chauffeur shall make application for and obtain a license as such, but there is no provision expressly prohibiting the operation of a commercial vehicle unless the operator has a chauffeur's license. Neither is there any provision expressly stating the consequences if a person does operate a commercial vehicle without first obtaining a license as a chauffeur.

A rule which must be observed in reaching our conclu-

sion appears in State v. Huber 263 S. W. l.c. 96 (Mo. Sup.) where it is said, "Criminal statutes are to be construed strictly; liberally in favor of the defendant, and strictly against the state, both as to the charge and the proof. No one is to be made subject to such statutes by implication. Where one class of persons is designated as subject to its penalties all others not mentioned are exonerated. (Cases cited). Such statutes are not to be 'extended or enlarged by judicial construction, so as to embrace offenses or persons not plainly (written) within their terms'. 'The reason of the rule is found in the tenderness of the law for individuals, and on the plain principle that the power of punishment is vested in the Legislature, and not in the judicial department.'" Further it appears, "this rule affords no warrant for a construction out of harmony with the manifest purpose and intent of the statute." (State v. Schwartzman Service 40 S. W. (2nd) l.c. 480 Mo. App).

An offense or crime is "an act committed, or omitted, in violation of a public law either forbidding or commanding it." (16 C.J. Sec. 2, p. 50). In the instant case, we have a law commanding that a chauffeur's license be obtained if a person desires to operate a motor vehicle as a chauffeur and a law providing a penalty for violation of any provision of the act. It therefore seems the failure to obey the command to obtain a chauffeur's license is comprehended within the penalty for any violation of the act. While it is true there is no express provision prohibiting the operation of a motor vehicle as a chauffeur without a chauffeur's license, the penalty provided implies the prohibition. In Wood v. Krepps 143 P. l.c. 692 (Cal.) it is stated:

> "The general doctrine now well settled by the authorities is that when the object of the statute * * * in requiring a license for the privilege of carrying on a certain business is to prevent improper persons from engaging in that particular business or is for the purpose of regulating it for the protection of public morals, health or police, the imposition of the penalty amounts to a prohibition against doing the business without a license, * * * * * ."

Section 7765, supra, requires the commissioner to find the applicant for a chauffeur's license to be competent. Thus, one purpose of the license is to prevent improper persons from acting as chauffeurs. It has been repeatedly held that our laws regulating operation and use of motor vehicles on public highways are police regulations enacted by the state under its police powers for the safety of its citizens. (State ex rel v. Conn. 268 S. W. 87, 90 (Mo Sup); Platner v. Bourne 275 S. W. 590, 591 (Mo App); McGill v. City of St. Joseph 38 S. W. (2nd) 725, 729 (Mo App); State v. Swagerty 203 Mo. 517, 524). Thus, another purpose of the license is protection and safety for the public.

As reviewed in the foregoing paragraph, it is clear that the laws of this state come within the general doctrine expressed in the Wood case, supra, and that the terms of Section 7786, supra, impliedly prohibit the operation of a motor vehicle in this state as a chauffeur without first obtaining a chauffeur's license. While it is true this construction makes a criminal statute apply to one by implication, as pointed out above such rule will not serve to defeat the "manifest purpose and intent" of the legislature.

Whether the penalty attaches for failure to obey the command to obtain, or for operating the motor vehicle as a chauffeur without a license need not be determined. Under either construction it is an offense.

CONCLUSION

Therefore, it is our opinion that it is an offense against the laws of this state to operate a commercial motor vehicle as a chauffeur without first obtaining a chauffeur's license.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

LLB:RT

TRADE-MARKS:
INFRINGEMENTS:

The use of the word "Blind-Kraft" by Missouri residents not an infringement on the trade name "Blindcraft" adopted by residents of the State of California.

December 15, 1939

12-20

FILED
29

Missouri Commission for the Blind
103 State Capitol
Jefferson City, Missouri

Attention: Miss Marie M. Finan,
Acting Executive Director

Gentlemen:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the use of the trade-mark "Blind-Kraft" by the assignee of the Missouri Commission for the Blind is an infringement on the trade-mark of the name "Blindcraft" used by the San Francisco Association for the Blind. You also state in your request that while the Missouri Commission for the Blind was using the trade-mark "Blind-Kraft" that on this trade-mark the great seal of Missouri was attached. You ask the question that since the Missouri Commission for the Blind has assigned this trade-mark to the Industrial Aid for the Blind, Inc., a St. Louis organization, would that organization be authorized to use the trade-mark with the great seal of the State of Missouri attached thereto.

It appears from your letter that the Missouri Commission for the Blind registered this trade-mark on February 25, 1937, in the Office of the Secretary of State of Missouri by virtue of the provisions of Chapter 136, Revised Statutes of Missouri 1929. The California trade-mark has not been registered in the State of Missouri, so the question involved here is one of interstate character. Your correspondence also indicates that the San Francisco Association for the Blind owns four registrations registered in the United States Patent Office, and that they have used

the trade-mark since 1916.

In connection with this opinion, we acknowledge receipt of the copy of the opinion of the Legal Department of the State of California.

One of the first questions to be considered in this matter is whether or not the Missouri Commission for the Blind can assign this trade-mark. We think the rule is stated in Volume 63 Corpus Juris, page 511, Section 212:

> "Trade-marks and trade-names must always tell the truth and always tell the same truth, and from this it follows that they cannot be assigned except for use in the same sense as originally conveyed by the use of the name or mark. Unless use by the assignee will truthfully indicate the same origin or ownership of the same goods or business, the name or mark is not assignable."

Since the Missouri Commission's assignee is using the trade-mark in the same sense as it was originally intended, then we think that the Commission may properly assign its trade-mark.

Since the question involved here is a federal question, we must look to the federal statutes for the law that is applicable hereto. Title 15, Section 81, page 5 of the United States Code Annotated, provides as follows:

> "The owner of a trade-mark used in commerce with foreign nations, or among the several States, or with Indian tribes, provided such owner shall be domiciled within the territory of the United States, or resides in or is located in any foreign country which, by treaty,

convention, or law, affords similar privileges to the citizens of the United States, may obtain registration for such trade-mark by complying with the following requirements: First, by filing in the Patent Office an application therefor, in writing, addressed to the Commissioner of Patents, signed by the applicant, specifying his name, domicile, location, and citizenship; the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated; a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trade-mark has been used; a description of the trade-mark itself shall be included, if desired by the applicant or required by the commissioner, provided such description is of a character to meet the approval of the commissioner. With this statement shall be filed a drawing of the trade-mark, signed by the applicant o his attorney, and such number of specimens of the trade-mark as actually used as may be required by the Commissioner of Patents. Second, by paying into the Treasury of the United States the sum of $15, and otherwise complying with the requirements of this subdivision of this chapter and such regulations as may be prescribed by the Commissioner of Patents."

From your correspondence it appears that the Missouri Commission has not obtained the federal trade-mark as provided by the foregoing section but that the California Association has. Title 15, Section 85, page 35 of the United States Code Annotated, provides as follows:

> "No mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark--
>
> * * * * * * * * * * *
>
> "(b) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, * * * * "

It, therefore, appears from this section that the organization which now holds the Missouri trade-mark as assignee thereof would not be authorized to have this trade-mark registered in the United States Patent Office because it contains the great seal of this State. As to this particular part of your inquiry, we would, therefore, suggest that the trade-mark be deleted to the extent that the coat of arms of the State of Missouri be removed therefrom.

The term "Blind-Kraft" or "Blindcraft" has a definite meaning. These trade-mark names are made up from the words "blind" and "craft" and to the average person they mean articles made by the blind people. The word "blind" does not need any definition. It is known generally to all people who hear it. The word "craft" according to Webster's Dictionary, means skill or art; a manual art; a trade or occupation or employment requiring art or skill. It is also defined as a suffix denoting art, skill, trade. So the word "craft" added to the word "blind", according to the foregoing definitions would denote the skill or trade of the blind people indicating that such articles were made by the blind. In connection with this definition, we think the rule announced in Volume 63 Corpus Juris, page 364, Section 66, would be applicable here because we think that the words "Blind-Kraft" and "Blindcraft" are descriptive of the articles which are sold. The

rule in Corpus Juris is as follows:

> "The generic name of an article is descriptive of such article, and therefore cannot be exclusively appropriated as a trade-mark. Even words which were not originally or of their own meaning descriptive terms, but which, by use, association, and acceptation, have come to be the generic name for a particular kind or class of goods, and indicate that only, and not origin or ownership, are not valid trade-marks. * * * * "

In the same Volume of Corpus Juris, Section 43, page 346, the rule is further announced:

> "It is a fundamental rule that a term or mark merely descriptive of the subject to which it is applied cannot be a technical trade-mark or trade-name. Thus no word or combination of words can be exclusively appropriated if it is merely descriptive of the particular business, or of the quality, style, character, grade, or class of the goods, or if it merely indicates the composition of the product or the ingredients therein, or the process of manufacture or method of production. * * * * * * * * "

At Section 45, page 351 of the same Volume, the requirements of a valid trade-mark are stated as follows:

> "An exclusive trade-mark must consist of some arbitrary or fanciful term, figure, or device, and words or phrases, to constitute a trade-mark, must be used in a purely

> arbitrary or fanciful way as applied to the goods in question. * * * * * * * * * * * * * * * * * * "

The only similarity of these two trade-marks is in the sound. It will be noted that the California trade-mark is composed of one word in one line, while the Missouri trade-mark is composed of the word "Blind" then under that word a dash and the word "Kraft." So as far as these two trade-marks appear to be similar in looks, they could not be said to be similar.

In 63 Corpus Juris, page 373, Section 76, the rule on similarity of trade-marks, so as to cause deception, is stated as follows:

> "Whether or not an imitation which is not an exact copy constitutes an infringement depends upon whether the resemblance is sufficiently close to deceive purchasers and so pass off the goods of one man as being those of another and, in considering the deceptive tendency of defendant's mark, the court is not restricted to a comparison of the registered marks, but must take into consideration all the surrounding circumstances. Where one mark could not reasonably be mistaken for the other, and deception is improbable or impossible, there is no infringement, even though the two trade-marks suggest similar qualities in the product. * * * * * * * * "

The standard of determining infringement on account of similarity is stated in the rule announced in said Corpus Juris, Section 77, page 376, as follows:

> "In determining whether an alleged infringing trade-mark is sufficiently similar to plaintiff's trade-mark

> to be deceptive, and therefore an infringement, ordinary purchasers, buying under the usual conditions prevailing in the trade, and giving such attention as such purchasers usually give in buying that class of goods, are the standard. If such a purchaser would probably be deceived into purchasing one article thinking it was the other, there is an infringement, otherwise not. * * * * * * * * * * * * * * "

In connection with the question of similarity of the trade-marks of the two associations, we have examined the labels which are used in connection with the Blind-Kraft goods. The label used by the Missouri Assodation is on an orange background with the trade-mark in white letters. The labels used by the California Association do not seem to have any standard of color. The distinguishing mark of the trade-mark label used by the California Association is that the word "Blindcraft" is in one line in white letters with a dark background and with a plant at each end of the label. So as far as the average observer is concerned, it can be determined at once that the trade-marks have not enough similarity in looks that they could be mistaken one for the other.

On the question of the name used in the trade-mark being descriptive, Mr. Justice McKenna in Standard Paint Co. v. Trinidad Ashphalt Mfg. Co., 55 L. Ed. at page 536, l. c. 540, stated the rule as follows:

> "' * * * A public right in rubberroid and a private monopoly of rubberroid cannot coexist.' The court expressed the determined and settled rule to be 'that no one can appropriate as a trademark a generic name or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth.'

> For this cases were cited and many illustrations were given, which we need not repeat. The defintion of a trademark has been given by this court and the extent of its use described. It was said by the chief justice, speaking for the court, that 'the term (trademark) has been in use from a very early date; and, generally speaking, means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol or in any form of words; but as its office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trademark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose.' Elgin Nat. Watch Co v. Illinois Watch Case Co. 179 U. S. 665, 673, 45 L. ed. 365, 378, 21 Sup. Ct. Rep. 270. There is no doubt, therefore, of the rule. * * * * * * * "

In Oakes v. Candy Co., 146 Mo. 391, 396, the Supreme Court, in discussing the requirements of a trademark, said:

> "This court in Liggett & Meyers Tobacco Co. v. Sam Reid Tobacco Co., 104 Mo. loc. cit. 60, said: 'The general principles of law concerning trademarks are well settled. A person has a right to the exclusive use of marks, forms or symbols, appropriated by him for the purpose of pointing

out the true origin or ownership of the article manufactured by him. The limitation upon this right is that such designs or words may not be used for the simple purpose of naming or describing the quality of the goods; for to permit that would be to foster a monopoly, while the great purpose of the law of trade-marks is to protect the owner in the exclusive use of his device which distinguishes his product from other similar articles.'

"The office of a trade-mark is to point out distinctly the origin or ownership of the article and unless it does so indicate the ownership or origin, neither the person who has adopted the mark or device can be injured by its appropriation by others, nor can the public be deceived. Canal Co. v. Clark, 13 Wall. 311.

* * * * * * * * *

"As well said by Judge DUER in Fetridge v. Wells, 13 Howard's Prac. loc. cit. 387. 'When a new preparation or compound is offered for sale, a distinctive and specific name must necessarily be given to it. The name thus given to it, no matter when or by whom imposed, becomes by use its proper appellation and passes as such in our common language. Hence, all who have an equal right to manufacture and sell the article, have an equal right to designate and sell it by its appropriate name, the name by which it alone is distinguished and known, provided each person is careful to sell the article as prepared and manufactured by himself and not by another.

> When this caution is used, there is no deception of which a rival manufacturer by whom the distinctive name was first invented or adopted can justly complain * * * In short, an exclusive right to use on a label or other trade-mark the appropriate name of a manufactured article exists only in those who have an exclusive property in the article itself.'"

In connection with your question, we are enclosing copy of an opinion dated January 30, 1936, written to the Honorable Dwight H. Brown, Secretary of State, by Honorable William Orr Sawyers, holding that descriptive terms in English or foreign languages are not subject to registration under a trade-mark law. We are also enclosing three other opinions touching on trade-mark law by Mr. Sawyers to the Secretary of State, dated April 22, September 24 and October 1, 1936, respectively.

In United States Code Annotated, Title 15, page 94, Section 85, Note 137, it is stated:

> "It is the settled rule that no one can appropriate as a trade-mark a generic name, or one descriptive of an article of trade, its qualities, ingredients, or characteristics, or any sign, word, or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth." citing cases

The rule is further announced in Drive It Yourself Co. v. North, 148 Md. 609, as follows:

> "The true test in determining whether a particular name or phrase is descriptive is not whether words are exhaustively descriptive of article designated, but whether in themselves, and, as they are commonly used by

> those who understand their meaning, they are reasonably indicative and descriptive of thing intended."

In said Title 15, United States Code Annotated, pages 96 and 97, a number of cases are given in which it was held that words were descriptive and were not subject to be appropriated in trade-marks. Some of these words were: "Air brush," "Air-cell," "Ball bearing," "Be Sure and Work the Horse," "Borax Soap," "Breathing Back," "Certified-Perfect Diamonds," "Chicken of the Sea," "Desiccated Codfish," "Dry Ice," etc.

In Franklin Knitting Mills, Inc. v. Fashionit Sweater Mills, Inc., 297 F. at 247, the word "Fashionit," as applied to knitted articles of clothing was held descriptive and not a valid trade-mark, as it only means "knit in fashion" or "fashionably knit."

In the case of In re Federal Cement Tile Co., 58 F. (2d) 457, the word "featherweight" as a trademark for use on concrete roof slabs was held descriptive and not registerable.

There seems to be an exception to the rule of the use of descriptive words in a trade-mark and that is announced in Barton v. Rex-Oil Co., 2 F. (2d) 402, and cited in 40 A. L. R. at 424, l. c. 429, which rule is as follows:

> "But a descriptive name, though not originally capable of exclusive appropriation, may, by use and association with a commodity, obtain a secondary signification denoting that goods bearing it come from one source, and thus a superior right to its use may be acquired by the person who first adopted it. * * * * "

Then on page 431, on the question of whether or not the words used in a trade-mark have required a secondary meaning, the court said:

> "* * * This is a rule of experience rather than a rule of law for in most of the cases reported, and in all cited by the respondent, the time in acquiring a secondary meaning figured largely and in some cases exclusively in determining whether such meaning had been acquired. Time is the usual standard because a natural one but it is not the exclusive standard. The test of secondary meaning is whether the trade-mark has become broadly known to the public as denoting a product of certain origin. Therefore, in looking for a secondary meaning this court is controlled by the fact that such a meaning has been acquired in the mind of the public rather than by the time it has taken for that fact to become established. * * * "

In connection with the trade name of the California Association for the Blind, even though they have had the trade-mark since 1916, we have not enough information before us to say that the product has become so nationally known that the "secondary meaning" rule would apply. That would depend solely on the facts which are offered in each particular case. In the annotation in the Barton v. Rex-Oil Co. case, supra, page 433 of 40 A. L. R., the rule on "secondary meaning" as it is announced in 26 R. C. L. under title of "Trademarks," section 61, page 886, is as follows:

> "'Even though a word or a combination of words is incapable of becoming a valid trade-mark, yet if it has by a sufficiently long and exclusive use acquired such a secondary meaning as to indicate in the trade that the goods to which it is applied are made by a particular manufacturer, or are put on the market by a particular

> vendor, its use by another on similar goods in such a way as to be likely to deceive purchasers will be restrained as unfair competition; and its use, even in its primary meaning, will be so limited as to prevent the working of a probable deception by passing off the goods of one maker as those of another. And some cases even have referred to a name which has acquired such a meaning, as in the case of a geographical name, as a valid trade-mark.'"

CONCLUSION.

From the foregoing it is the opinion of this department that the use of the trade-mark "Blind-Kraft" by the Missouri Association is not an infringement on the registered trade-mark "Blindcraft" owned by the San Francisco Association for the Blind because the words "Blind-Kraft" and "Blindcraft" are descriptive words and are not words which may be used and monopolized by any individual or association.

We are further of the opinion that the Industrial Aid for the Blind Inc., in St. Louis, if it continues to use the label which the Missouri Commission for the Blind has assigned to them, which purports to be a trade-mark, should delete the trade-mark to the extent of removing from it the great seal of the State of Missouri.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

COSTS: CRIMINAL CASES: Prosecuting Witness liable in certain cases for costs on acquittal of defendants. Court must make order taxing same against prosecutor.

June 7th, 1939.

6-8

FILED
31

Hon. Arkley Frieze,
Prosecuting Attorney,
Dade County,
Greenfield, Missouri.

Dear Sir:

We have your request for an opinion, which in part is as follows:

> "The Prosecuting Attorney (my predecessor) filed an information against a defendant, charging him with disturbing the peace, the information was based upon an affidavit made by the complainant. After three trials of this case the State through the Prosecuting Attorney entered a Nolle. No judgment was rendered against the complaining witness for the costs.
>
> "My questions are as follows: Is the complaining witness liable for these costs under the above conditions without a judgment having been rendered against him? If he is not liable, for what part, if any is the county liable? If he, the complaining witness, is liable, what is the most advisable method to employ for the collection of the same?"

In the case outlined by you, the answer to your first question is that the complaining witness is not liable for the costs in the absence of a judgment against him. In the case of State v. Leidy, 115 Mo. App. page 62, the court held that an execution could not issue for costs unless there had been a judgment for costs rendered.

As to your second question, Section 3828 R. S. Mo., 1929, reads as follows:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found of information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

You will see, therefore, that the county is liable for costs in all cases in which the defendant may be discharged, exept when the prosecutor shall be <u>adjudged</u> to pay them, or it shall be otherwise provided by law.

As to your third question, Sections 3444, 3510 and 3833 R. S. Mo., 1929, provide for the liability of the prosecuting witness for costs in the event the prosecution fails. Also the case of State v. Jablousky 169 Mo. App. page 238, construes this provision as making it the duty of the court to tax the costs against the prosecuting witness. The case of State v. Hobbs, 279 S. W. page 200, provides that a Justice of the Peace cannot make a nunc pro tunc entry. If, therefore, the matter which you set out was before a Justice of the Peace, he cannot now enter a judgment for costs against the prosecuting witness.

If the matter was in the Circuit Court, it appears that the proper procedure would be to file a motion to tax costs, serving the prosecuting witness with a notice that same is to be filed. The case of Cairo Brewing Co. v. Hogg, 125 S. W. page 831, states that a motion to tax costs may be filed after the term at which the case was disposed of.

Respectfully submitted,

ROBERT L. HYDER,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:RV

COUNTY WARRANTS: Under section 12173, after lapse of five years county warrants may not be paid.

October 7, 1939

10-14

FILED
31

Hon. C. G. Fremon
Presiding Judge
County Court
Schuyler County
Lancaster, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated October 3rd, 1939, which reads as follows:

"An opinion of your department on the following matter is hereby requested.

"The evidence offered in support of a written application filed before us establishes that during the year of 1919 one William H. Lansdale served as road overseer in Road District # 26 in this County. In that year, in payment of services duly rendered by him, the bill for which was duly allowed, the County Court of this county issued to him a warrant in due form for the sum of $100.00. It appears that at that time the fund against which the warrant was drawn was short, and the members of the Court orally requested Mr. Lansdale to hold up the warrant for a short time until that fund was replenished. The request was made at the time the warrant was drawn and delivered to Mr. Lansdale, and he agreed to it. It further appears that he took the warrant home without presenting it for payment, but after having duly endorsed it, and laid it away among his papers where it was forgotten.

"A few weeks ago Mr. William H. Lansdale died.

His son and heir-at-law has presented to us for payment that old, original warrant, properly endorsed as aforesaid. With it the son has filed the aforementioned application, in which he freely admits that collection of the warrant is barred by operation of the Statutes of Limitation, but in which he asserts that the debt was lawfully incurred, and that payment thereof has never been made.

"We are satisfied with the proof to the effect that the warrant was regularly issued for a lawful debt which has never been paid, and which, morally at least, constitutes an obligation against this County. We are disposed to make payment in full of the warrant, provided we can lawfully waive the defense of limitations which is available to us in this case without incurring any liability by reason of such waiver.

"We might also point out that Road District #26 has since, by proper steps, been consolidated with several other districts in this county into a new district now known as district # 25. Of course no funds remain to the credit of the old district # 26

"We desire your opinion on these two questions which are presented by the above statement of facts:

"1st: Can this Court waive the defense of limitations now available to us, and lawfully make a voluntary payment of the 1919 warrant at this late date, without incurring any legal liability therefor?

"2nd: If payment can lawfully be made at this date, out of what funds shall it be made?

Section 12173 R. S. Mo., 1929, reads as follows:

"Whenever any warrant drawn on any county treasur-

> er shall have remained in the possession of the county clerk for five years, unclaimed or not called for by the person in whose favor it shall have been drawn, or his or her legal representatives, the county court shall, by proper order, entered of record, annul and cancel the same; and whenever any such warrant, being delivered, shall not be presented to the county treasurer for payment within five years after the date thereof, or, being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment thereof, such warrant shall be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues."

In Wilson v. Knox County, 34 S. W. 45, 132 Mo. 387 it was held that the provision of Revised Statutes, 1889, Section 3195 (now Section 12173 R. S. Mo., 1929), that a county warrant that shall not be presented within five years, or, having been presented and not paid for want of funds, shall not be again presented for five years, shall be barred, is a limitation of actions on warrants, as well as a direction to the county officers, and governs such actions, to the exclusion of the general statute of limitations. But Section 12173, supra, goes further than that. By its provisions, the action is not only barred, but also the debt. Notice the term used in that section, "and shall not be paid". The foregoing term is mandatory, not directory.

In State ex rel Stevens v. Wurdeman, 246 S. W. 189, 295 Mo. 566, it is said:

> "Usually the word 'shall' indicates a mandate, and, unless there are other things in a statute, it indicates a mandatory statute."

CONCLUSION

Following from the above, it is the opinion of this Department that these twenty year old warrants cannot be paid. The answer in the negative to the first question disposes of the second.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

RPCW:RW

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General.

LIQUOR CONTROL: Upon granting of permanent injunction under the Liquor Control Act, all costs must be paid by the defendant owner of the property or the defendant in the cause.

November 20, 1939

11-21

FILED
31

Honorable Arkley Frieze
Prosecuting Attorney
Dade County
Greenfield, Missouri

Dear Sir:

We acknowledge receipt of your request for an opinion dated November 16, 1939, which reads as follows:

> "I would appreciate very much an opinion from your office on the following question: In September 1937 the Prosecuting Attorney of this County brought an action to enjoin a cafe where beer was sold on the ground that it constituted a public nuisance. A hearing was held by the court in November of that year and by the decree of the court a permanent injunction was ordered against this place of business by the court. At the hearing of this action testimony was taken from witnesses for both the State and defendants. Thereafter, a cost bill, including the costs made by the State was made up by the Circuit Clerk and paid by the County Court (the costs made by the defendants of course was not paid). A fee bill was issued by the Clerk prior to the making up of the cost bill and a Nulla Bona return made by the Sheriff. Defendants owned and lived upon the premises where this cafe was located. Thereafter the defendants in the Injunction suit conveyed this property to a third person who was unaware that a judgment had been rendered against the defendants in the

> injunction act[illegible] all of the costs in the action amounted to $83.05. The County Court paid its costs which amounted to $60.70. If the purchaser pays the defendant's costs which amount to $22.35 I would like to know whether the judgment lien will be satisfied or whether the entire amount could be collected by an execution as against the premises formerly owned and occupied by the defendants."

From the facts stated in the above request, I am presuming that the trial court in its discretion did not adjudge the plaintiff to pay part of the costs. It also states that the county court paid part of the costs which amounted to $60.70, and I am presuming that the county court in paying these costs was merely paying obligations which should have been paid by the defendant.

The injunction described in your request may be either a common law injunction or an injunction set out under Section 44-a-10, Laws of Missouri, 1935, page 283, which partially reads as follows:

> "That an action to enjoin any nuisance defined in this act may be brought in the name of the State of Missouri by the Attorney General of the State of Missouri, or by any prosecuting attorney or circuit attorney of any county or city in the State of Missouri. Such action shall be brought and tried as an action in equity and may be brought in any court having jurisdiction to hear and determine equity cases. * * *"

According to your request, a permanent injunction was ordered against this place of business and I am presuming against the owner at that time. Under a permanent judgment of this nature, the costs are part of the judgment and considered as a judgment not only against the property but also against the defendant.

Section 1242, R. S. Mo. 1929, reads as follows:

> "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

Under Section 44-a-10, Laws of Missouri, 1935, page 283, no other provision is included as to the assessment of the costs, and therefore the judgment for costs should be adjudged under Section 1242, supra.

That the costs are a part of the judgment was upheld in the case of Minor v. Garhart, 122 Mo. App. 124, l. c. 126, where the court said:

> "This case was simply a total finding of all issues against the plaintiff. There was nothing in the proceeding had in the trial court to bring into operation the discretion of the court and the costs should not have been divided between the parties as the law placed the entire obligation upon the losing party. (Hawkins v. Nowland, 53 Mo. 328; DuPont v. McLaran et al., 61 Mo. 511; Turner v. Johnson, 95 Mo. 452; Bender v. Zimmerman, 135 Mo. 58; Schumacher v. Mehlberg, 96 Mo. App. 598.)"

Under the above holding, it should be held on the statement of facts set out in your request that there is nothing in the proceeding to bring into operation the discretion of the court in assessing the costs between the State and the defendant.

In cases where part of the issues are found for the plaintiff and part of the issues are found for the defendant, the court in its discretion may allow a judgment for part of the costs against the plaintiff and for part of the costs against the defendant, but where all of the issues are found

for the plaintiff, the court would abuse its discretion in allowing some of the costs against the plaintiff and some of the costs against the defendant. It was so held in the case of Huggins v. Hill, 236 S. W. 1054, l. c. 1055, where the court said:

> "In a separate paragraph the judgment further provided that--
>
> "'The defendant, Lena G. Hill, shall recover from the plaintiff one-half of all costs taxed in this case.'
>
> "It is from this part of the judgment that the appeal is taken.
>
> "In approaching the question before us for review, we are fully cognizant of the general rule that in an equity case the allowance of costs is within the discretion of the trial chancellor, and will not be disturbed when no abuse of that discretion has been shown. We are also aware of the doctrine in this state that where substantial issues are found partly for the plaintiff and partly for the defendant, the trial court has discretion to apportion the costs. Bender v. Zimmerman, 135 Mo. 53, 36 S. W. 210; Bobb v. Wolff, 54 Mo. App. 515; Plant Seed Co. v. Michel, 57 Mo. App. 313; Schumacher v. Mehlberg, 96 Mo. App. 598, 70 S. W. 910; Kittredge v. Chillicothe L. & B. Ass'n, 103 Mo. App. 361, 77 S. W. 147. However, in the instant case an examination of the report of the referee, as well as of the judgment rendered thereon, fails to disclose any substantial issue found for respondent."

You also state that since the time that the judgment was made permanent the defendant conveyed his property to a third person who was unaware that a judgment had been rendered against the defendant in the injunction action. Since the in-

junction action was not appealed, and I am presuming a judgment was rendered for all of the costs against the defendant, the costs, being a part of the judgment, would be a lien against the property, in accordance with Section 1103, Laws of Missouri, 1935, page 207, which reads as follows:

> "Judgments and decrees rendered by the Supreme Court, by any United States District or Circuit Court held within this state, by the Kansas City Court of Appeals, the St. Louis Court of Appeals, the Springfield Court of Appeals, and by any Court of Record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held."

You also ask if the lien would be satisfied by payment of part of the costs accrued by the defendant in the amount of $22.35. As the judgment lien now stands in the office of the Clerk of the Circuit Court, it would be necessary that the full amount of all costs be paid before the lien would be considered satisfied. All that is necessary would be an execution on the property in the full amount for the reason that the statute of limitations does not run.

Section 1105, R. S. Mo. 1929, reads as follows:

> "The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof, as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees,

> the lien shall commence on the last day of the term at which they are rendered."

Under the above section, the judgment for costs on the permanent injunction action is still in force and by proper execution can be collected by the State.

CONCLUSION

In view of the foregoing authorities, it is the opinion of this department that upon the granting of a permanent injunction in favor of the State and against certain real estate and the owner thereof either by way of an equitable common law injunction or an injunction under the Liquor Control Act, the judgment for costs may be collected by proper execution and is not barred within a period of three years from the time of the judgment. It is further the opinion of this department that by the payment of part of the judgment by an innocent purchaser of property upon which the judgment for costs in the injunction suit was a lien will not release the full amount of the judgment and it can only be released by the payment of all of the costs.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:HR

CRIMINAL COSTS: The insolvency act must be strictly followed in order to obtain a release on a punishment of a fine and costs.

January 25, 1939

1-31

FILED 32

Mr. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"As prosecuting attorney of Moniteau County, Missouri I would like to have an official written opinion on the following subject matter.

"Section 3859 R. S. 1929 Provides: 'Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being imprisoned one day for every two dollars of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs, if he be unable to pay the same.

"An individual is brought into justice court and he is fined, upon a plea of guilty to the commission of a misdemeanor, and the defendant is unable

> to pay said fine and costs whereupon the justice commits him to jail. Is it mandatory that the justice give the defendant one day for every two dollars of said fine and costs? Or is it mandatory that the defendant be imprisoned twenty days for costs regardless of the amount of costs? Should this section be construed to mean that defendant be imprisoned twenty days for costs and fine regardless how small the fine and costs be?
>
> "If a defendant is unable to pay fine and costs both but is able to pay either the fine or the costs which should he be permitted to pay first, the fine or the costs. If the fine is paid should he be required to endure twenty days actual imprisonment for the costs? If he pays the costs should he be permitted to serve one day for every two dollars of the fine?"

In the latest decision construing the payment of a fine and costs for serving of a jail sentence against a defendant who has been assessed a fine, costs or jail imprisonment, the Supreme Court en banc in the case of ex Parte Secrest, 32 S. W. (2d) l.c. 1087, said:

> "The statute authorizing petitioner's commitment is section 4070, R. S. 1919, as follows: 'Whenever any defendant shall, on a conviction, be sentenced to imprisonment in a county jail, or to pay a fine, he shall be imprisoned until the sentence is fully complied with and all costs paid, unless he be sooner discharged in the manner hereinafter provided.'
>
> "This statute, within its scope, applies alike to misdemeanors and felonies. It

is a part and parcel of every sentence to a fine (Ex parte Parker, 106 Mo. 551, 555, 17 S. W. 658), and the judgment was in substantial compliance therewith. The manner in which defendant could 'be sooner discharged' is thus set forth in the sections immediately following:

"Section 4071: 'When any person is held in custody or imprisoned for a fine imposed for a criminal offense, as specified in the last section, the court in which the cause was tried, or the judge thereof in vacation, on the petition of the prisoner for that purpose, shall sentence him to imprisonment for a limited time, in lieu of the fine; and at the expiration of such time, the prisoner shall be discharged on the payment of costs, or obtaining his discharge in the manner in the next sections provided.'

"Section 4072: 'Whenever any person shall be detained for the costs of a criminal prosecution, he shall, after having endured twenty days' imprisonment in the county jail for the nonpayment of such costs, be permitted to take the benefit of the laws for the relief of insolvent persons confined on criminal process, on making application for that purpose, and conforming to the provisions of such law.'

"Section 4071, supra, provides a method, and we are advised of no other, by which a defendant so committed may discharge the fine apart from the costs assessed against him by the same judgment. He may petition the court in which the cause was tried, or the judge thereof in vacation, to 'sentence him to imprisonment for a

limited time, in lieu of the fine.' When such prison sentence is served, he is entitled to be discharged on payment of costs or obtaining his discharge under section 4072 and the act for the relief of insolvents confined on criminal process. To authorize a discharge, there must be a strict compliance with the statutes prescribing the methods by which it may be obtained. 15 C. J. Section 861, p. 344; Ex parte Parker, 106 Mo. 551, 17 S. W. 658; In re Curley, 34 Iowa, 184; In re Dobson, 37 Neb. 449, 55 N. W. 1071. Having followed a way of his own choosing not authorized by statute, petitioner is not entitled to be discharged.

"It is ordered that petitioner be remanded."

As above set out

Section 4070 R. S. Mo. 1919 is now Section 3726 R. S. Mo. 1929;
Section 4071 R. S. Mo. 1919 is now Section 3727 R. S. Mo. 1929;
Section 4072 R. S. Mo. 1919 is now Section 3728 R. S. Mo. 1929.

Section 3727, R. S. Mo. 1929, set out as Section 4071, R. S. Mo. 1919, in the case of ex Parte Secrest, supra, is governed by Section 3859, R. S. Mo. 1929, which reads as follows:

"Any person detained in prison for the nonpayment of any fine or costs on account of any criminal proceeding may be ordered to be discharged from such imprisonment, by the court or by the judge of the court having criminal jurisdiction for the county in which he may be, or by the clerk of said court in vacation, after being im-

> prisoned one day for every two dollars of such fine and costs, or after having endured twenty days's actual imprisonment for the nonpayment of costs if he be unable to pay the same."

This section sets out the manner of complying with the specific time and amount of service on the fine or punishment as provided by Section 3727, R. S. Mo. 1929.

As stated in ex Parte Secrest, supra, the statute, in regard to relief of insolvent defendants, must be strictly complied with. The article on insolvent defendants is Article 20, Chapter 29, R. S. Mo. 1929, and is too lengthy to set out verbatim in this opinion.

Under the holding of ex Parte Secrest, supra, the court does not see fit to separate the fine or jail sentence from the costs. In other words, the court held that the prisoner should petition in accordance with the insolvency act that he be allowed to serve the judgment of sentence and costs in accordance with Section 3859, R. S. Mo. 1929, and that the costs cannot be separated from the fine or imprisonment if the defendant should take advantage of the insolvency act.

CONCLUSION

In view of the above authorities it is the opinion of this department that if an individual is brought into the justice court and he is fined upon a plea of guilty to the commission of a misdemeanor and the defendant is unable to pay said fine and costs, the justice upon the application of the defendant in writing in accordance with Article 20, which is the insolvency act, must commit the defendant under Section 3727, R. S. Mo. 1929, which provides that the judge shall sentence him to imprisonment for a limited time. In sentencing the defendant to a limited time as set out in Section 3727, R. S. Mo. 1929, the court, in estimating the time, must take into consideration Section 3859, R. S. Mo. 1929, which provides for

imprisonment for one day for every two dollars ($2.00) of such fine and costs, or after having endured twenty days' actual imprisonment for the nonpayment of costs if he be able to pay the same.

It is further the opinion of this department that if the defendant has served his time at the rate of one day for every two dollars ($2.00), then the defendant may be relieved of the costs by twenty days' actual imprisonment and the amount of the costs does not determine this period of actual imprisonment.

It is further the opinion of this department that the defendant, under the ruling of ex Parte Secrest, supra, cannot follow a way of his own choosing not authorized by statute for his release and if he chooses to file the petition under the insolvency act, he should be required to endure twenty days' actual imprisonment for the costs which is provided in the insolvency act.

It is further the opinion of this department that the defendant cannot pay the costs and be permitted to serve one day for every two dollars ($2.00) of the fine but the statute, on the insolvency act, must be strictly followed which provides the petition to be filed and the court to sentence the defendant and the fine and costs be paid in accordance with the insolvency act.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

SHERIFF FEES: The Sheriff is not entitled to fees for serving subpoena until the litigation is at an end.

April 14, 1939.

FILED
32

Honorable R. Homer Gerster, Sheriff
St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of March 22nd, which reads as follows:

> "Please give me your opinion as to Sheriffs Fees in serving Civil case such as Summons where there has been a deposit put up by the plaintiff to the Circuit Clerk when should the Sheriff be paid for his services, from this deposit."

The rule now in this state is different from that of Common Law. At Common Law each party was required to pay for services rendered at the time such services were performed and the successful parties recovered the costs paid by him when judgment was rendered. By statute in this state, security for costs is required to protect the fees of officers of the court. (Section 1237-1238 R. S. Mo. 1929.

In State ex rel. Dale vs. Ashbrook, 40 Mo. App. 64, l. c. 66-67, In holding costs are not paid step by step as demands are made for service on the officer, but accumulate until the litigation is at an end, the court said:

> "The contention of the defendants on this appeal is that, after the party, in whose favor a judgment is rendered, acknowledges satisfaction of it, it cannot be the foundation of an execution, even for the costs which are due

the officers of the court. We do not take this view. At common law litigation was not conducted on the credit system, as with us, but the plaintiff purchased his writ, and each party paid his costs step by step as the services were procured and as the cause proceeded. At the end of the litigation the successful party recovered his costs - that is, the costs which he had paid out. The idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation, in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. 556; Anon., 1 Wils. 130.

"But with us the costs are not ordinarily paid step by step, as each party demands of the proper officer of the court the rendition of some particular service; but they generally accumulate until the litigation is finally ended, and then they are recovered nominally by the successful party, but really by the officer of the court to whom they are due. Trail v. Somerville, 22 Mo. App. 308, 312. We still keep up the ancient form, so far that, according to the judgment entry, the costs are recovered by the successful party, and the execution runs in the same way, so as to conform to the judgment; but they are never, in fact, collected by him, nor paid over to him. According to a usage which, it is believed, has existed from the foundation of our judicial system, the name of the successful party is thus used in the judgment and execution as the person in whose behalf the costs are recovered and collected, but the real beneficiaries are the officers of the court to whom they are due.

> This usage has acquired the force of law. The officers of the court and the witnesses are so entirely the real beneficiaries that they can maintain an action in their own names for the breach of an undertaking given for the security of costs in a litigation. Garrett v. Cramer, 14 Mo. App. 401. The party in whose name the costs are recovered is, in respect of them, at most a trustee of a dry trust-so dry that he is not allowed to handle any of the trust fund. His name in the judgment and execution is a mere naked name of record. The use of it by the officers of the court, in securing their dues, saddles him with no responsibility and endangers his rights in no way. As this portion of the judgment nominally recovered by him belongs to others, and not to him, he cannot satisfy it, or bargain it away with the other party to the record without their consent. He can waive his own rights, but he cannot waive the rights of others."

The St. Louis Court of Appeals in Allen Trail vs. William Somerville; Arba N. Crane, Appellant, 22 Mo. App. 308 l. c. 310-11-12-13-14, leaves no doubt as to the law in this state regarding the time an officer of the court shall receive a fee for services rendered. It holds he is not entitled to his fee until the litigation is at an end. This is what the court said:

> "The question is, whether in this state a referee has the power to withhold his report as a security for the payment of his compensation. We are of opinion that he has not. An examination of the statutes relating to referees (Rev. Stat., sects. 3605, 3626), shows that he is, for the purposes of the particular case, and within the scope of the order of reference, a judicial officer of the court clothed with large powers. By section 3626, Revised Statutes, he shall, in the absence of any special agreement, receive such compensation for his services as the court,

in which the case is pending, may allow, not exceeding ten dollars per day. The statute does not in terms say that such allowance shall be taxed as costs, but the inference is irresistible that it is to be so taxed, and such has always been the practice, in the absence of special stipulations to the contrary. By Section 986, Revised Statutes, 'if, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant, or any officer of the court, rule the plaintiff on or before the day in such rule named, to give security for the payment of the costs in such suit,' and if the plaintiff fails to give security, the court may dismiss the suit. We are of opinion that a referee is an officer of the court within the meaning of this last statute, and that he may, in case the payment of his compensation is endangered, as therein provided, procure a rule on the plaintiff to give security for the costs, which will protect him in the payment of his compensation, whatever the ultimate termination of the suit may be. It is forcibly argued on behalf of the appellant that this statute ought not to be held to apply to referees, because it would be unseemly for a judicial officer of a court, who must decide a pending controversy between the parties, to bring himself into a state of antagonism with the plaintiff, by moving against him for a rule to give security for the costs. The answer to this is that it is entirely a matter of choice with a member of the bar, to whom a cause is

referred, whether he will accept the office of referee or not. He is not, like the permanent officers of the court, obliged to perform certain prescribed duties for whomsoever shall call upon him to perform them; but he may accept the office or decline it, and he may subsequently accept it upon terms. He may, before accepting it, require that the plaintiff shall give security for the costs, or require that the parties shall, by stipulation, or otherwise, properly secure the payment of his compensation.

"It seems to have been the practice in the English courts of common law to allow an arbitrator to refuse the publication of his award until his charges are paid. Musselbrook v. Dunkin, 9 Bing. 605; McArthur v. Campbell, 5 Barn. & Ad. 518. The supreme court of New York in 1848, citing these and other English decisions to the same effect, held that this was the law. Ott v. Schroeppel, 3 Barb. 56, 62. Decisions of the supreme court of New York have extended this rule to referees, and, as late as the year 1880, it was stated in the court of appeals of that state by Rapallo, J., arguendo, that a referee undoubtedly is not bound to part with his report without the payment of his legal fees. Geib v. Topping, 83 N. Y. 46. It was so held in Little v. Lynch (1 How. Pr. N. S. 95), decided by the supreme court of New York in 1885. It is also to be observed that the statute of New York provides in express terms for the taxation of the compensation of referees as costs. 3 Rev. Stat., N. Y. 1875, 533.

"But the practice touching the payment of costs in legal proceedings in this state seems to have departed very materially from the practice of the English courts of common law; and different principles prevail in this state touching the subject of costs from those which prevail in New York. By the ancient practice in England writs were purchased, and each party seems at every step in a proceeding to have paid the fees of the officers of the court for their services, as fast as such services were rendered. Indeed the idea of requiring the plaintiff to give security for costs seems to have been to indemnify the defendant against the costs to which he might be put by the litigation in case it should turn out to be unfounded. Accordingly, the language of such a rule frequently was that the plaintiff be required to give security for the defendant's costs. Roberts v. Roberts, 6 Dowl. P. C. 556; Anon, 1 Wils. 130. It does not seem to have been a part of the idea requiring security for costs, that the plaintiff should be required to give security for his own costs, since he was obliged to pay the ministerial officers of the court for their services, step by step, as the cause proceeded. Hence, when the cause had finally progressed to a judgment, so much of the judgment as related to costs recited that the plaintiff (or the defendant) recover his costs, the theory being that each party had paid his own costs as they accrued, and that the successful party was entitled to recover from the other party such costs as he had paid. Our entries of judgments preserve the same ancient form, although the costs are in fact collected for the benefit of the officers of the court in whose

favor they are taxed, and are never paid to the successful party, except in exceptional cases where he may have paid them, and may be entitled to recover them. As litigation seems to have been thus conducted in the English courts upon what may be termed a cash basis, instead of upon a credit basis, as with us, no statute exists in that country, so far as we know, similar to our statute (Rev. Stat., sect. 986), allowing the ministerial officers of the court to move against the plaintiff in a pending suit for security for their fees. Such being the important difference between the English practice as to costs and our practice, the decision of the English courts, upholding the practice of arbitrators in refusing to publish their awards until their charges should be paid, would seem to have no application to the case of referees under our system. The learned counsel for the appellant, in citing to us the New York decisions already referred to, have pointed out that, under the New York statute, the fees of referees are taxable as costs in the case; and such undoubtedly is the rule, though not expressed in terms under our statute. But they have not shown us that there is in New York such a statute as section 986 of our Revised Statutes, allowing the officers of the court to protect themselves by moving against the plaintiff for security for their fees. We have not been able to discover the existence of such a statute in New York, and the absence of it marks a very important distinction, applicable to the question before us, between the law of costs in that state and in this. Another very important distinction was adverted to in the opinion of this court, recently delivered in the case of Roberts v. Nelson (ante, p. 30),

namely, that in New York an attorney has a lien upon the judgment of his client for his fees, whereas, no such lien is allowed in this state.

"Upon the whole, we are of opinion that a referee in this state is in no better position in respect of his costs than any other officer of the court. He is entitled to the same remedies which are accorded to them, and has the further advantage over them of being able to protect himself, by declining the reference, or by requiring the parties, as a condition of his entering upon the discharge of its duties, to secure the payment of his compensation. The rule which is here invoked, although not so stated in the printed arguments submitted to us, amounts, really to this, that a referee ought to have an artizan's lien upon what he produces to secure the payment of his labor in producing it. If a referee ought to have such a lien, we see no reason why a sheriff or clerk ought not to have the same lien. But if a clerk should withhold a writ or refuse to draft the entry of a judgment, or if a sheriff should refuse to execute a writ or to serve a subpoena, until his fee should be paid, such conduct would be justly regarded as illegal and oppressive. The duties discharged by a referee are analogous to those discharged by a jury; but what would be thought if a jury in a court of record, should come into court with a sealed verdict and announce to the court that they were ready to deliver it whenever the parties paid to the jurors their per diem?

"It seems unnecessary to prolong this argument. The system of paying costs in advance, or step by step, to the officers of the court, has never obtained in this state as in England, but in lieu of this the statute has conferred upon such officers the power to require security for their costs, as already pointed out.

> They may have this security; but, nevertheless, except where interlocutory orders awarding costs are made, they must, as a general rule, wait for their payment until the final determination of the suit. It results from these views, that we are of opinion that the circuit court was right in ruling the referee to file his report before the payment of his compensation, which had been fixed by the court."

CONCLUSION

Therefore, in view of the foregoing authorities, it is the opinion of this department that the Sheriff is not entitled to his fee for services rendered until the litigation is ended.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

MOTOR VEHICLES: TRAILER: Wood saw or feed grinder powered by automobile motor permanently mounted on automobile chassis and towed from place to place by automobile not a trailer.

July 5, 1939

FILED
32

Mr. A. L. Gates
Prosecuting Attorney
Moniteau County
California, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"As Prosecuting Attorney of Moniteau County, I would like to have a written official opinion from your office covering these facts. An individual constructed a wood saw using an automobile motor for the power and an automobile chassis mounted on four rubber tires. This motor is connected directly to the saw and is not used in pulling the saw rig from place to place. An individual constructed a feed grinder, mounted it on an old automobile chassis and is powered by an old automobile motor. These two pieces of equipment are not moved from place to place under their own power, but are hooked on the back of a truck and are pulled by a rod from job to job.

"Is it necessary that this individual have a trailer license, or can such equipment used for farm purposes be classed as farm machinery such as a tractor and not being required to have license tags attached."

Section 7761, R. S. Missouri, 1929, as amended in Laws of Missouri, Extra Session 1933-34, page 99, provides that: "every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall except as herein otherwise expressly provided, cause to be filed, * * * * in the office of the commissioner, an application for registration", and upon the filing of said application and the payment of the fees prescribed therein, the commissioner registers said vehicle by assigning it a number and a plate or set of plates bearing said number.

Section 7759, R. S. Missouri, 1929, gives the following definitions:

> "'Vehicle'. Any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on tracks.
>
> "'Motor vehicle'. Any self propelled vehicle not operated exclusively upon tracks, except farm tractors.
>
> "'Tractor'. Any motor vehicle designed primarily for agricultural use or used as a traveling power plant or for drawing other vehicles or farm or road building implements and having no provisions for carrying loads independently.
>
> "'Farm Tractor'. A tractor used exclusively for agricultural purposes.
>
> "'Trailer'. Any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn be a self-propelled vehicle, except those running exclusively on tracks."

Section 7776, Subsection (g), R. S. Missouri, 1929, provides as follows:

> "Farm tractors when using the highways in traveling from one field or farm to another or to or from places of delivery or repair are exempt from the provisions of this article relating to registration and display of number plates, but shall comply with all the other provisions hereof."

Thus, the only exception to the registration of a farm vehicle is a farm tractor, and, clearly, the vehicle described in your opinion request is not a farm tractor. The precise question is whether this particular vehicle meets the definition of a "trailer"?

As defined in Section 7759, supra, in order to come within the terms of a "trailer", the vehicle must be without motive power "designed for carrying property * * * * on its own structure * * * *".

9 Am. & Eng. Ency. 403 defines the word "design" as follows:

> "'Design' is defined as purpose or intention combined with plan or implying a plan in the mind; purpose, intention, aim."

If the respective vehicles were planned with the aim or intent of permitting the temporary placing of a wood saw and feed grinder on an automobile chassis so as to permit it to be carried to a particular destination and readily removed by a simple manual or physical operation and another piece of property subsequently placed on it, we are of the view that said vehicle would then be "designed" for carrying property. However, as we understand your letter, the wood saw and feed grinder are "mounted" on the respective chassis so that for all intents and purposes said chassis become a permanent part of the respective implements, designed for sawing and feed grinding.

It is therefore the opinion of this department that a wood saw or feed grinder, powered by an automobile motor which is permanently mounted on an automobile chassis and towed from place to place by another automobile, is not a trailer within the provisions of Section 7759, R. S. Missouri, 1929, and, therefore, that a trailer license need not be obtained for it from the Commissioner of Motor Vehicles of the State of Missouri.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

Approved:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

SWAMP LANDS: Where county land patent to swamp land is void purchaser is entitled to refund of purchase money.

July 14th, 1939.

FILED
32

Honora le Marion R. Garstang,
Prosecuting Attorney
Linn, Missouri.

Dear Sir:

We acknowledge your request for an opinion dated July 6th, 1939, which reads as follows:

"The County Court of Osage County desire me to request an opinion on the following proposition:

"In December, 1938, Edward H. Kemple came to the former County Court and requested that a certain tract of land containing approximately 200 acres be surveyed and sold as Island or swamp land and that he be permitted to purchase same at private sale for $1.25 an acre plus the cost of surveying. There may have been some discussion at the time as to the right of the County to sell the land, but at any rate, without any promises or agreements being made or any understanding had as to what would be done in the event the County patent did not stand up, it was agreed by the old Court and the purchaser, Kemple, that the land would be surveyed and sold at private sale for the price of $1.25 per acre plus the cost of the survey. The land was surveyed and the cost of the survey together with the price of $1.25 per acre made the land cost $500.00, which

amount the purchaser paid and received the usual patent. The $1.25 per acre part of the consideration was put into the school fund and the remainder paid over to the County surveyor to cover the cost of the survey. The patent, of course, contains no warranty and is in the usual form. At the completion of the sale nothing further was agreed or promised as to what would be done in the event the title failed.

"In the June Term of the Circuit Court of Osage County, Missouri, an adjoining land owner bought a quiet title suit against Kemple, the purchaser from the County, claiming the land as an accretion to his farm and denying that it was of island formation. The jury found that he was right and judgment was rendered vesting full title in the adjoining land owner and divesting all title out of Kemple, the purchaser from the County. No appeal was timely taken and the judgment is therefore final. The Court costs amount to between $200 and $300 dollars. Nothing was said to the County Court about defending the suit or about the title to the land being in question until after the judgment was rendered.

"At the July term of the County Court, Kemple the purchaser, appealed to the County Court for a refund of his $500.00 and further requested the County to pay one-half of the Court costs in his unsuccessful attempt to defendant his patent.

"That the County could not be compelled to make the refund against its wishes, no warranty or contract to that effect having been made, I take to be true without further consideration, and the purchaser is not taking that position.

"However, the County Court, desiring to be fair and equitable and not desiring to take the benefit of a sale of land that did not belong to them are seriously considering making a voluntary refund to Kemple of part or all of his request, provided they have authority to do so. They take the view that if the land was not theirs, the money is not either, and they do not desire to take advantage of the fact that the purchaser bought a defective patent.

"We therefore request an opinion on the following points:

1. Can the County Court voluntarily make a refund to the purchaser of a swamp land patent, which proved to convey nothing, of the $1.25 an acre of the purchase price that went into the school fund?

2. Can the County Court voluntarily refund under these conditions the amount of money paid by the purchaser to cover the cost of the survey made by the County and which money has been paid out to the County surveyor for his services, by the County by warrant on General Revenue?

3. Can the County Court voluntarily make a refund of part or all of the Court costs in the case of Langendoerfer vs Kemple, a suit brought against the purchaser to try title to this land and which he lost?

4. Could the County voluntarily refund him any part of his attorney fees?

"In connection with question number two, the purchase price was computed at $1.25 per acre plus the cost of the survey. The County sent its surveyor down to make the survey and paid him out of the general revenue. Then took part of the purchase price and put it back in General Revenue to reimburse that fund for the cost of the survey."

Section 11146 R. S. Mo. 1929, provides in part:

"* * * * *: The said court shall not, in any case, pay back any money or interest t at has been paid upon said contract, * * * * *"

Section 11148, R. S. Mo. 1929, provides:

"Whenever the county courts of this state shall have sold swamp or overflowed lands to which they are unable to make a good and sufficient title, the said courts are hereby authorized and empowered, with the consent of the purchaser, or, in case of his or her death or absence from the state, then with the con-

> sent of his or her sureties or legal representatives, to cancel said contract,"

In the case of State v. Adams, 61 S. W. 894, 161 Mo. 349, l. c. 368, the Supreme Court had under consideration a mandamus to compel the county treasurer of Butler County to pay a $3900.00 warrant upon the swamp land fund which had been issued to relator pursuant to a claim for refund in a swamp land deal which did not materialize. There the Supreme Court had under consideration what is now Section 11146, supra, when it is said:

> "The county having failed to comply with its contract in reference to the sale of these lands, we do not see any good reason why the purchase money paid by relator, with interest thereon, should not, in the circumstances of the case, be refunded."

Section 12162, R. S. Mo. 1929, provides:

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; * * * *"

CONCLUSION

Claims against a county for money had and received are by statute intended to be audited, adjusted and settled by the county court exactly as other claims against a county are audited, adjusted and settled.

We are of the opinion that the purchaser of this land who received a void county patent from the county court, could file a claim in the county court for return of his purchase money, and when so filed, the County Court could audit, adjust and settle said claim by refunding any sum of money yet on hand derived from the purchase money. The county has no legal claim for this $1.25 per acre on hand for issuing a void land patent. The County Court would have no legal authority for allowing any claim for a portion of the purchase money which was used and spent for services of the county surveyor, nor would the county court have legal authority to allow any claim for court costs or attorney fees in any suit to quiet title, where the county court did not instigate the suit in the name of the county.

Respectfully submitted,

WILLIAM ORR SAWYERS,
Assistant Attorney General

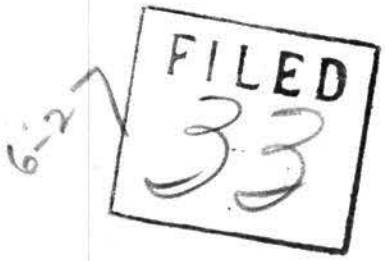
APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WOS:RV

TAXATION:
COLLECTION OF TAXES: Collector or county court may pay only the amount authorized by statute to an attorney for collecting delinquent personal taxes.

June 27, 1939



Mr. M. Stanley Ginn
Prosecuting Attorney
Lawrence County
Aurora, Missouri

Dear Mr. Ginn:

This is in reply to yours of recent date wherein you request an opinion on the question of whether or not the county court and county collector can employ a tax attorney and pay him as his compensation a proportionate part of the taxes collected.

On this question I find that this department, by an opinion dated January 3, 1935, written by Harry G. Waltner, Assistant Attorney General, to Jones and Wesner at Sedalia, Missouri, held as follows:

> "It is our further opinion that delinquent personal taxes should be collected under the provisions of Section 9940 R. S. Mo. 1929, and that into such section there should be incorporated that part of Section 9952 R. S. Mo. 1929 which reads:
>
> "'and for the purpose of collecting such tax and prosecuting suits for taxes under this article, the collector shall have power, with the approval of the county court * * * * * to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed etc; * * * * *'"

We are enclosing a copy of this opinion for your use.

So it will be seen by the holdings in that opinion

that the county court and county collector are bound by the provisions of Section 9952, R. S. Missouri 1929, in the employment of attorneys to collect delinquent personal taxes.

In my research on this question, I also find that in State ex rel., v. Smith, 13 Mo. App. 421 at 423, the court of appeals, in construing the foregoing provisions of the statute, which is in the same form now as it was at that time with the exception that it has been amended so that the attorney may receive a three dollar fee where suit is brought by summons, or a five dollar fee where it is brought by publication, made this statement:

> "It is thus perceived that the attorneys of the collector are not entitled to any fees in proceedings under this statute except such as may accrue as commissions upon 'taxes actually collected and paid into the treasury.' It is also perceived that the law in direct terms prohibits them from receiving any fee or compensation for services except such as may accrue by way of commissions upon taxes actually collected and paid into the public revenue. * * * * "

This still seems to be the law in this state. As you know the general rule of law is that a person, in order to be entitled to receive any public moneys, must be able to put his finger on the statute which authorizes payment of same. No doubt your suggestion that it would be to the best interest of the county to employ some attorney to collect these taxes on a percentage basis nor do we doubt that the county and state would realize much more money from such a procedure, however, we are bound by the foregoing rule and will have to so rule on this question.

CONCLUSION.

From the foregoing it is the opinion of this department that the county collector and county court may only enter into a contract with an attorney to collect delinquent taxes when the terms of the contract are within the provisions of Sections 9940 and 9952, supra.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION:
COMPROMISING TAXES DUTY OF THE COLLECTOR TO START PROCEEDINGS TO SELL:

The county court may compromise taxes as provided by Section 9950, Laws of Mo. 1933, page 426, at any time before they are sold at the third sale. It is the duty of the collector to institute proceedings pertaining to the sale of lands for taxes.

September 8, 1939

9-11

FILED
33

Honorable D. M. Githens
Presiding Judge of the
Butler County Court
Poplar Bluff, Missouri

Dear Sir:

This is in reply to yours of the 5th wherein you submit two questions. First, has the county court or the collector, or either of them, authority to compromise and collect taxes on property after the third sale by the collector? Second, whose duty is it to file a suit on delinquent taxes, the collector, the county court or the tax attorney?

I.

On the first question submitted as to whether or not the county court or the collector can compromise and collect taxes on property after the third sale, we find that Section 9950, Laws of Missouri, 1933, page 426, is the section of the law which is applicable to this question. This section provides as follows:

> **"Whenever it shall appear to any county court, or if in such cities the register, city clerk or other proper officer, that any tract of land or town lot contained in said 'back tax book' or recorded list of delinquent land and lots in the collector's office is not worth the amount of taxes, interest and cost due thereon, as charged in said 'back tax book' or recorded list of delinquent land and lots in the collector's office, or that the**

> same would not sell for the amount of such taxes, interest and cost, it shall be lawful for the said court, or if in such cities the register, city clerk or other proper officer, to compromise said taxes with the owner of said tract or lot, and upon payment to the collector of the amount agreed upon, a certificate of redemption shall be issued under the seal of the court or other proper officer, which shall have the effect to release said lands from the lien of the state and all taxes due thereon, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office; and in case said court or other proper officer shall compromise and accept a less amount than shall appear to be due on any tract of land or town lot, as charged on said 'back tax book' or recorded list of delinquent land and lots in the collector's office, it shall be the duty of said court or other proper officer to order the amount so paid to be distributed to the various funds to which said taxes are due, in proportion as the amount received bears to the whole amount charged against such tract or lot."

It will be noted from this section that the county court is the only body which is authorized to compromise taxes. In connection with this question you also stated that you do not understand Section 9956a. Section 9956a, Laws of Missouri, 1933, page 437, is as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser,

> his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns, at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

This section only pertains to the redemption of lands which have been sold for taxes. Since the full amount of taxes, costs and charges must be paid before the land can be redeemed when sold under Section 9965a, supra, we do not think that the compromise section, referred to above, applies to the provisions of this section. By Senate Bill 311, passed by the Sixtieth General Assembly, it is provided that at the third sale

the delinquent lands shall be sold for whatever the bid is. After this sale, no redemption provisions are provided and we do not think that the provisions of Section 9956a, supra, would apply. The following provisions of Section 9953a of said Senate Bill 311 pertain to the third sale by the collector:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. * * * * * * * * * * "

However, if the lands do not sell at the third sale, then the provisions of said Section 9950 in the compromise provisions will still apply and the county court may compromise such taxes on the terms set forth in said section.

CONCLUSION.

From the foregoing it is the opinion of this department that the county court only is authorized to compromise taxes. Such court is not authorized to compromise such taxes if the lands have been sold and the collector's deed executed and delivered as is provided by the foregoing Senate Bill 311. However, if the lands are not sold at the third sale, we think that the county court still has the authority to compromise such taxes as is provided by said Section 9950.

II.

In your second question you inquire as to whose duty it is to file suit for delinquent taxes, the county collector, county court or the tax attorney.

If you will refer to the Jones-Munger Act of 1933, which provides for the sale of delinquent property for taxes, you will note that there are no provisions for the filing of a suit for the sale of lands for delinquent taxes on real estate. By Section 9952b, Laws of Missouri, 1935, at page 403, you will find that the duties of the county collector, pertaining to the sale of lands which have been returned as delinquent, are set out. This section provides in part as follows:

> "The county collector shall cause a copy of such list of delinquent lands and lots to be printed in some newspaper of general circulation and published in the county, for three consecutive weeks, one insertion weekly, before such sale, the last insertion to be at least fifteen days prior to the first Monday in November. And it shall only be necessary in the printed and published list to state in the aggregate the amount of taxes, penalty, interest and cost due thereon, each year separately stated, and the land therein described shall be described in forty-acre tracts or other legal subdivision, and the lots shall be described by number, block, addition, etc.; provided, however, that if a part or parts of any forty-acre tract or other legal subdivision or lot is assessed on the tax books to two or more parties as owners thereof, then, as to such land or lots, such list shall be so prepared and separated. To such list shall be attached and in like manner so printed and published a notice that so much of said lands

> and lots as may be necessary to discharge the taxes, interest and charges which may be due thereon at the time of sale will be sold at public auction at the courthouse door of such county, on the first Monday in November next thereafter, commencing at ten o'clock of said day and continuing from day to day thereafter until all are offered. The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. * * * * * * * * * * * * * * * "

Throughout this entire Jones-Munger Act it appears that the lawmakers have imposed upon the collector, and him only, the duty of selling delinquent lands for taxes. If the delinquent taxes are on personal property, then the provisions for the sale of such taxes are provided for by Section 9940, R. S. Missouri, 1929, which provides in part as follows:

> "Personal taxes assessed on and after June 1st, 1887, shall constitute a debt for which a personal judgment may be recovered before a justice of the peace or in the circuit courts of this state against the party assessed with said taxes. All actions commenced under this law shall be prosecuted in the name of the state of Missouri, at the relation and to the use of the collector and against the person or persons named in the tax bill, and in one petition and in one count thereof may be included the said taxes for all such years as may be delinquent and unpaid, and said taxes shall be set forth in a tax bill or bills of said personal back taxes

> duly authenticated by the certificate of the collector and filed with the petition; and said tax bill or tax bills so certified shall be prima facie evidence that the amount claimed in said suit is just and correct, and all notices and process in suits under this law shall be sued and served in the same manner as in civil actions before justices of the peace and in circuit courts, and the general laws of this state as to practice and proceedings and appeals and writs of error in civil cases shall apply, as far as applicable, to the above actions. Said actions shall be prosecuted by attorneys employed as provided in article 9 of this chapter of the general statutes, and the fees and compensation allowed in said article shall apply to the above actions:
> * "

CONCLUSION

From the foregoing it is the opinion of this department that there is no provision for a suit to be filed for delinquent taxes on real estate under the Jones-Munger Act.

We are further of the opinion that actions for the sale of personal property shall be instituted by the collector and prosecuted by the attorney appointed as tax attorney, and that the county court has no duties to perform in connection with the suit or the filing of it for the collection of personal property taxes.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

COUNTY TREASUER:) County Treasurer shall advertise bonds for
) bids as directed in Sec. 2911, R. S. 1929;
BONDS, SALE OF:) County Court may order Treasurer to reject bids; and court may order treasurer to again advertise the bonds in the same manner, or then may sell them at private sale.

September 28, 1939

FILED
33

Mr. J. D. Gillespie
County Clerk
Oregon County
Alton, Missouri

Dear Sir:

This Department is in receipt of your letter of September 25th, wherein you request an opinion based on the facts as contained in your letter, which is as follows:

> "This Court (County of Oregon) would like to have the opinion of your office, as to the legal procedure that this Court should take to sell Bonds that was authorized by Election on the 10th day of January 1939, ($25,000.) to construct a Court-house and Jail in said County (W.P.A.).
>
> "1st. Must Bonds be advertised as stated in Section 2911, R. S. Mo. 1929?
>
> "2nd. Does this Court have the power or legal rights to sell at private bids without first advertising such Bonds?"

Your questions involve a construction of Section 2911, R. S. Mo. 1929, which is as follows:

> "The county treasurer of the county issuing such bonds is hereby authorized to sell and dispose of all such bonds in the manner hereinafter provided. Said treasurer, under the

direction of the county court, shall cause notice to be published for thirty days, in at least two daily papers published in the state and one weekly paper published in the county, that sealed proposals for the purchase of all or a part of said bonds as may appear in said notice will be received at his office, and that the same will be opened by him in the presence of the county court on the day and hour mentioned in the notice. Said treasurer may, under the direction of the court, reject any or all bids that the court may not deem satisfactory as to price or otherwise, and in case of rejection, he may again advertise and sell said bonds in the same manner; or if the court so order, he may sell them at not less than their face value, at private sale, and report the same to the court at the next term thereafter."

I.

In answer to your first question as to whether or not the bonds must be advertised as stated in Section 2911, quoted supra, we call your attention to the fact that the section states that the county treasurer "shall cause notice to be published" etc. The verb "shall" when used in a statute is usually construed by our courts as mandatory and not directory and we think the statute is plain in its terms and must therefore be complied with. Accordingly, we rule that the bonds must be advertised as stated in the Section.

II.

In your second question you desire to know whether the County Court can sell bonds at private bids without advertising such bonds.

Of course, having ruled that bonds must first be advertised, it would appear that the same would answer your second question. However, we assume that you refer to the last clause in the statute, "or if the court so order, he may sell them at not less than their face value, at private sale, and report the same to the court at the next term thereafter."

We think that the only construction to be placed upon said statute is, first, that the bonds must be advertised for bids; second, that after the court has considered the proposals for the purchase of the bonds the court may order the treasurer to reject any or all bids; and, third, that the court may order the treasurer to again advertise the bonds in the same manner.

As far as we can ascertain from our research, the statute (Section 2911, supra) has never been passed upon or construed by our courts. In the case of White v. Scarritt, 341 Mo. 1004, l. c. 1013, the statute in question is mentioned, but only incidentally, but we think that it throws some light on what will be our ultimate construction of the same. In said case it is said:

> "On January 11, 1932, the treasurer received only one bid. It was a very low bid, coupled with numerous conditions, and particularly required a disposition of the injunction suit. The court rejected the bid and directed the treasurer to negotiate a private sale of the bonds under Section 2911, Revised Statutes 1929, subject to the approval of the court."

The statute uses the words, "may again advertise," making the matter directory for the second advertisement of the bonds. Therefore, in answer to your specific question, we are of the opinion that the bonds must be first advertised as directed in the statute. If all bids are rejected by the

County Court the County Court can then direct that the bonds be re-advertised or then may sell them at not less than their face value at private sale; but we are of the opinion that no private sale can be made until the bonds are advertised in the manner as contained in the statute.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

OWN:EG

SALARIES AND FEES: Clerk of the Circuit Court of Jackson County may retain fees in payment of his salary.

9/16

September 16, 1939

FILED
34

Honorable William Goodman
Assistant Attorney General
2301 Fidelity Building
Kansas City, Missouri

Dear Sir:

We have yours of the 13th in which you state that you have a letter from Mr. B. T. Flannery, Clerk of the Circuit Court of Jackson County, pertaining to the salary of the Clerk of the Circuit Court of that county.

At the time this matter was under consideration, General McKittrick had the undersigned to make some research on the question and, as I remember, the question which was submitted was whether or not the Clerk of the Circuit Court of Jackson County was authorized to retain fees collected by him as such officer in payment of his salary, or was he required to turn these fees into the county treasury and then be paid by a warrant issued on the order of the County Court.

In our research on this question, we find that the salary statutes as they apply to the clerks of the circuit courts of the various counties of the state have been changed and amended, and it is difficult to determine just to what counties some of these sections apply. The last amendment of the salary statute as it applies to clerks of the circuit courts will be found in Laws of Missouri, 1937, at page 445, Section 11786. However, referring to this section, it will be seen that the highest bracket in which a county may fall in order to come within the provisions of this section is one containing a population of 125,000 and less than 400,000. Referring to the 1930 census, we find that Jackson County had a population of 470,454 in that year. Tracing back through the statutes which have been amended and leading up to the present circuit clerk act

of 1937, supra, we do not find that counties of the population of Jackson County have been within those classes.

Having failed to find a general statute applicable to counties of the population of Jackson County, we have searched through the Revised Statutes and find a special statute which we think applies to that county, that is, Section 11820, R. S. Mo. 1929, which is as follows:

> "In all counties and cities not within the limits of a county having a population of three hundred thousand inhabitants or more, or such as may hereafter have three hundred thousand inhabitants or more, the clerk of the circuit court of such county or city may retain, out of the fees received by him as such clerk, an amount not exceeding the sum of five thousand dollars per annum for his services as such clerk."

This section, together with Section 11821, was what was Section 3271 of the Revised Statutes of 1889. In other words, both of these sections were in one section at that time, however, they have been changed some in the wording since the 1889 revision. It will be noted that Section 11821, R. S. Mo. 1929, applies to counties, and cities not within the limits of a county, having a population of 500,000 inhabitants or more, so that Section 11820, even though it says that it applies to counties having a population of 300,000 inhabitants or more, does not apply to the cities and counties referred to in said Section 11821, that is, those which have over 500,000.

With this explanation in mind, we think that since Jackson County has the aforesaid population, and since it is not within the class mentioned in Section 11821, that is, that it has a population of 500,000 or over, then it comes within the classification of Section 11820, supra. It will be noted that Section 11820 authorizes the clerk of the circuit court to retain out of the fees received by him as such clerk an amount not exceeding the sum of five thousand dollars per annum for his services as such clerk. This statute is plain

and unambiguous and we do not think that it is necessary to apply any other rules of construction in order to determine what it means.

CONCLUSION

From the foregoing, it is the opinion of this department that the Clerk of the Circuit Court of Jackson County, Missouri, may retain out of the fees received by him as such clerk an amount not exceeding the sum of five thousand dollars per annum for his services as such clerk.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

TWB:HR

TAXATION AND REVENUE: Outlawed taxes are not a charge against property.



February 14, 1939.

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Mr. Greenwood:

This office is in receipt of your request for an opinion as follows:

> "The County Treasurer here desires an opinion upon the following question.
>
> "He has certain taxes on his book that have run delinquent for more than five years without any court order concerning them. He also has certain property that has been offered for sale three times with no bidders.
>
> "The question is, does he have a right to charge these taxes off without an order for the county court. Thanking you for an early reply, I am"

Section 9952c, page 431, Laws of Missouri 1933, is, in part, as follows:

> "On the day mentioned in the notice, the county collector shall commence the sale of such lands,

> and shall continue the same from day to day until so much of each parcel assessed or belonging to each person assessed, shall be sold as will pay the taxes, interest and charges thereon, or chargeable to such person in said county. * * * "

Section 9953 is, in part, as follows:

> "If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact * * * "

Section 9953a is as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9962b is, in part, as follows:

> "All lots, tracts and parcels of land upon which taxes assessed or levied prior to the taking effect of this act remain due and unpaid at the date when such taxes would have become delinquent as provided in the act under which they were assessed and levied, and which taxes are not merged in judgment prior to the effective date of this act, shall be deemed to be delinquent under the provisions of this act, and the same proceedings shall be had to enforce the payment of such unpaid taxes, with interest, penalty and costs, and payment enforced and liens foreclosed under and by virtue of the provisions of this act and the same rights of redemption shall attach. For the purposes of foreclosure under this act, the date of delinquency shall be foreclosure under this act, the date of delinquency shall be construed to mean the date when the taxes first became delinquent; * * * "

Section 9961, page 405, Laws of Missouri 1935, is as follows:

> "No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in

compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

Outlawed taxes are not a charge against property for subsequent sale and should not be carried forward in the "back tax book".

The sections hereinbefore cited indicate that each years taxes assessed against the property are to be included in the list of delinquent lands and lots and that such list is the basis for the publication of sale. Accordingly, if at the third sale no offer whatsoever is received by the collector, the law making no provision for a fourth sale, it would appear that those taxes, which at the next sale will be more than five years delinquent, are not a charge against the property which can be enforced under the provisions of the Jones-Munger law. In this connection, we refer you to Section 9961, supra. By virtue of this section, a statute of limitations is operative as to all taxes, initial proceedings for the sale of which have not been instituted within five years of the date of the proposed sale. It is our view that after a third sale is had on a given tract of land without a sale at such offering, the advertisement for sale, published the next succeeding year, constitutes the initial proceeding contemplated by Section 9961, supra.

CONCLUSION

It is therefore the opinion of this office that at the next sale of lands and lots for delinquent taxes,

following a sale at which the tract or lot of land has been offered for the third time without any bid, you should offer the certificate of purchase on such lot or tract of land for all taxes which are not outlawed, to-wit, which did not become delinquent more than five years prior to the date of such initial proceeding and such outlawed taxes should not be carried forward in the "back tax book".

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

SVM:LB

LIQUOR: Funeral parlor chapel can not be classed as a church because religious services are held there weekly. No statutory requirement that a 3.2 beer licensee have good moral character. Suspension of 3.2% beer license not statutory grounds for refusal of subsequent application for similar license. Filing of criminal prosecution is not in itself a conviction requiring the refusal of a 3.2% beer license for one year. Cities can not suppress or prohibit sale of intoxicating liquor authorized by statute.

February 28, 1939

3-4

FILED
25

Honorable G. Derk Green
Prosecuting Attorney
Linn County
Marceline, Missouri

Dear Sir:

We have received your letter of February 16th in which you have asked three questions. The first part of your letter embracing the first question reads as follows:

> "Sometime back Mr. A. L. Burns, city attorney of Marceline, addressed you in regard to an application made for a beer license in the City of Marceline, and at that time you rendered an opinion upon the facts given. This was requested by him at the insistence of the city council. Now they have asked that I communicate with you concerning the same matter, but setting out different facts. The situation is as follows:
>
> 'The Baptist Church, of the City of Marceline, is situated one-half block from the business section. Services are held regularly in this church on Sundays and on certain days during the week. As a part of the church program the pastor conducts services each Saturday afternoon at three o'clock in a funeral home located in the business section of the town. This service has been conducted in the funeral home for approximately eleven months, and has been conducted regularly at the stated time. The services at the funeral home were

authorized by the governing body of the Baptist Church in regular session, the governing body being the congregation. At these services Bible study, preaching, singing, and praying takes place in almost identical manner as at any regular church service on Sunday at the church. The purpose of this service on Saturday is to enable members of the church living in the rural sections to attend the services at the same time they are in the city for the purpose of buying their groceries, or transacting other business, when they would not be able to attend church on Sundays and make an extra trip to town. Of course, members of other denominations are welcome and many residents of the city attend the services. The building in which these services are held is an ordinary one story business building suitably arranged for a funeral home and chapel from which funerals services are conducted. The owner of the funeral home also maintains his business office in one room of the building, and uses the entire building on any occasion for conducting a funeral service. Located in less than one hundred feet of this funeral home is another building, and an application has been presented to the city council for the issuance of a license to sell 5 per cent beer in this business building. No consent to the issuance of this license has been given by the governing body of the Baptist Church. This church has three trustees whose duty it is to attend to the physical properties of the church. It also has a Board of Deacons whose duty it is to assist in the management of the church affairs by making recommendations to the congregation. The governing authority of the church is vested in the congregation or membership meeting in regular conference each month or at any special or called conference, which special conference may be called upon one weeks notice.

> We would like your opinion as to whether or not the described above situation prohibits the issuance of this 5 per cent beer license under the 'Missouri Statutes,' with reference thereto."

On August 17, 1938, this office addressed an opinion to Mr. A. L. Burns, City Attorney of Marceline, in connection with the exact and same situation. In his opinion request, Mr. Burns stated that for several months prior thereto preaching, praying, Bible Study and song service had been held in this chapel "by many denominations and is apparently not restricted to any particular church or creed". He also inferred, without making a definite statement, that sush services were regularly held. A part of our opinion in response to that request reads as follows:

> "It is a well known fact that on account of crowded conditions in church buildings, the Sunday School and Bible classes are sometimes held in courthouses or other buildings about a city, but we do not think that the lawmakers contemplated that such building would be classed as a building used regularly as a place of religious worship, which would prohibit locating a place of selling intoxicating liquor within a certain distance therefrom. We think that the lawmakers had in mind, when they referred to 'other building regularly used as a place of religious worship,' such building as a particular religious denomination may have control over and which building is governed through its board of managers. We do not think that the building and the use thereof which you have described in your request comes within that class.
>
> We are therefore of the opinion that the use of the building mentioned in your request is not such a continuous and consistent use for religious worship that it could be classed as a building regularly used for

> for religious worship, but that such use is more in the class of occasional or casual use. That being the case, the applicant for the license to sell intoxicating liquor would not be required to obtain the written consent of the board of managers, if any, of those worshipping in the building which you have mentioned in your request."

The gist of the facts concerning the same matter as you have outlined them is that the governing body of the Baptist Church of the City of Marceline has authorized the regular Saturday afternoon services in the funeral parlor chapel and the pastor of that church conducts said services; while members of other churches attend, yet the same are in fact Baptist services; that the building is primarily a funeral home and the governing body of the Baptist Church has not consented to any license being issued within the statutory distance from the funeral home.

Section 44-a-14, Laws of Missouri 1935, page 285, reads as follows:

> "No license shall be granted for the sale of intoxicating liquor, as defined in this act, within one hundred (100) feet of any school, church or other building regularly used as a place of religious worship, without the applicant for such license shall first obtain the consent in writing of the majority of the Board of Directors of such school, or the consent in writing of the majority of the managing board of such church or place of worship. The Board of Aldermen, City Council or other proper authorities, of any incorporated City, town or village, may by ordinance, prohibit the granting of a license for the sale of intoxicating liquor within a distance as great as three hundred (300) feet. In such cases, and where such ordinance has been lawfully enacted, no license of any character shall

issue in conflict with such ordinance while such ordinance is in effect."

The question then is whether under the facts the funeral chapel can be classed as a "church or other building regularly used as a place of religious worship." We do not think that it can be so classified.

In our opinion addressed to Mr. Burns, we quoted from 15 R.C.L., Section 137, page 373, a part of which reads as follows:

"Any structure used principally for religious worship and Bible Study is included although some of its rooms may be used by societies incidental to the church, or closely allied to its principles, or by individuals connected with or peculiarly eligible to membership in the church; and it is not necessary that the organization be incorporated. In the application of such legislation, however, the courts properly refrain from including what in reason cannot and in common conception ordinarily is not regarded as a church. The restraint is usually held not to apply to places used occasionally for preaching, or a building used by an organization devoted to the reformation of fallen women, unconnected with any church, or a building occasionally used for entertainments for the benefit of a church, or used by an unorganized body as a mission for Bible study and meetings, when most of the building is used for residential and commercial purposes."

In the case of George vs. Board of Excise of the City of Elizabeth 73 N.J.L. 366, the court in construing a similar situation said:

"The legislature clearly did not intend that wherever religiously inclined per-

> sons meet together for Bible study and the like a church existed within the meaning of this excise regulation, but unless the statute has a meaning as broad as this it does not include the conditions that constitute the prosecutor's case. The action of the municipal board brought up by this writ is affirmed."

In the case of In Matter of Korndorfer 49 N.Y.S. 559, the court said:

> "'The law does not undertake to define or restrict the definition of the words "occupied exclusively as a church," and I think it must be left to such reasonable construction as will accomplish the purpose intended by the legislature, viz. to prevent the traffic of liquor in proximity to such class of buildings."

In the case of Matter of Rupp 106 N.Y.S. 483, the court said:

> "'The statute was designed to protect such buildings only as were at the time of the issuance of the certificate used exclusively for religious worship, that is, "as a church;" a church, referred to as an edifice, in popular comprehensive meaning "a building set apart" for religious worship. Webster's Unabr. Dict."

In the case of In Re Vail 77 N.Y.S. 903 the building, which it was claimed was occupied as a church, was located in an alley way and was a small building ten by sixteen feet. It was occasionally used by a religious association, which had regular quarters elsewhere. In holding that this was not a church as intended by the legislature and that the facts "all indicate that the purpose of its erection and use was solely to defeat the purpose

of Mrs. Lennon to procure a liquor tax certificate," the court said further:

> "It may be that a very considerable majority of the law-abiding citizens of the village of Islip are opposed upon moral grounds to the opening of another saloon upon the main street of that village; but conceding that sentiment is entitled to the highest respect and consideration, still it is better that the evil be endured than that the law should be brought into contempt by an application thereof manifestly made to meet a particular case. Proceedings dismissed, with costs."

CONCLUSION

Therefore, placing a reasonable construction on Section 44-a-14, we are of the opinion that the funeral home, which is built and designed as such, ordinarily used as such and which is not owned by or controlled in any way by the Baptist Church can not be construed as a "church or other building regularly used as a place of religious worship." If the opposite construction were to be placed on this section, it would follow that the laws authorizing the sale of intoxicating liquor could be nullified by a systematic selection of rooms over a city for periodical church services or Sunday School classes. We do not believe that the legislature had any such application of the law in mind when Section 44-a-14 was enacted into law. Rather, we believe that the legislature had in mind the protection of church buildings built or designed and actually used for such purposes primarily, and which buildings would be under the control and management of the managing board of the church involved. In other words, it referred to the church home itself and not other suitable rooms such as a funeral parlor chapel, town hall, court house or lodge hall, all of which are primarily and regularly used for other purposes, but in which religious services might be permitted periodically or otherwise.

II.

The second question contained in your letter is in the following language:

> "In this same connection we would like further to ask your opinion upon this additional statement of facts.
>
> The applicant for this license has at the present time a license to sell 3.2 per cent beer at another location in Marceline. Sometime back, but within the past year he was taken to Jefferson City to appear before the commissioner on a charge of having sold whiskey by the drink in this beer place. The testimony at that hearing was to the effect that two inspectors purchased liquor by the drink and saw it purchased by others at this place, and that it was served by one of the clerks hired by the licensee. The licensee testified that he was not present at the time of such sales and knew nothing about it, and they were made without his knowledge or consent. The commissioner suspended his license for a period of five days. Now a criminal charge has been filed against the licensee, charging him with selling intoxicating liquor without a license.
>
> Do these facts justify or authorize the city council to refuse the issuance of another license to the applicant on the theory that these sales, the suspension of his license, and the charge now pending against him indicate that he is not a person of the good moral character required by the statute?"

There is no law in connection with the manufacture or sale of 3.2 per cent beer which states that a licensee must be a person of good moral character. Consequently, there is no authorization to refuse a license on the ground that the applicant is

not of good moral character as far as the statutes are concerned. Likewise, there is no statute to the effect that the suspension of a 3.2 per cent beer license by the Supervisor of Liquor Control constitutes grounds for such a refusal. Section 13139-y of the non-intoxicating beer laws, Laws of Missouri 1933, page 264, provides that if any person who holds a 3.2 per cent beer license is convicted under the authority of that article, the license shall thereupon be void "and the holder thereof shall not thereafter, for a period of one year after date of such conviction, be entitled to any permit for any purpose authorized under this article."

However, the person you have in mind has apparently not, as yet, been convicted. A complaint filed is not in itself a conviction. Should the person be acquited, there would be no conviction and the terms of Section 13139-y would not apply.

CONCLUSION

Consequently, under the statutory law governing the licensing of 3.2 per cent beer dealers, there is no requirement that an applicant for such a license must be a person of good moral character. Likewise, the suspension of such a license by the Supervisor of Liquor Control is not by statute made a ground for refusing a subsequent application for a similar license. If any person is convicted of violating the provisions of the non-intoxicating beer laws, then such person can not receive a license for a period of one year after date of such conviction. However, the filing of a complaint against the person is not in itself a conviction and the one year period does not begin until there is an actual conviction.

III.

Your last question is in the following language:

> "We would like further to ask your opinion as to the discretion that the council has in granting or refusing

any application for license made to it if the applicant is a person of good moral character and possesses the qualifications provided by the statute, and the location is not within any restricted area, does the city council have any discretion in granting or refusing to grant a license?"

In other words, you are inquiring as to whether the council has the right to suppress or even prohibit the sale of intoxicating liquor within the city limits. If an applicant has every qualification for a license and yet is refused, such refusal would amount to a suppression of the sale of intoxicating liquor, at least to that extent. If one eligible person could thus be refused, all eligible persons could likewise be refused with the result that the city would thereby be wholly suppressing such sales. In this connection, we are enclosing copy of an opinion written by this office on February 26, 1938 and addressed to Mr. Donald B. Dawson, Prosecuting Attorney of Bates County, Missouri. In that opinion, a similar question was asked and we held that the city council had only the authority to regulate and control the sale of intoxicating liquor within the limits of the city in a manner not inconsistent with the laws of the state and that the power to regulate and control said business did not confer on the city the right to suppress or prohibit such sales.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
JFA:RT

TOWNSHIP ORGANIZATION:
TOWNSHIP BOARDS EMPLOYING
MEMBERS:

Township board may not employ one of its own members to act as foreman or overseer of work under the direction of the board.

May 9, 1939

5-11 FILED 35

Mr. G. Derk Green
Prosecuting Attorney
Linn County
Linneus, Missouri

Dear Sir:

This is in reply to yours wherein you submit the following question:

> "I have had numerous requests from township officers of various townships, concerning the right of a member of the township board to be employed by, and draw compensation from the township.
>
> "This question arises particularly in connection with the building of roads out of funds obtained from the bond issues. In several instances, members of the township board act as foreman or overseers of the work and draw pay from the township for such work."

In our search of the statutes as to the powers and duties of the township boards we find that Section 12999, R. S. Missouri, 1929, requires the township board to audit all claims against the township. Section 12301, R. S. Missouri, 1929, provides for the presentation of all claims against the board. Section 8150, R. S. Missouri, 1929, which sets out some of the duties of the township board, provides in part as follows:

> "* * * * * * * * * * * * * * * * *
> In the month of April each year the board shall appoint a road overseer for each district, who shall serve for one year and until his successor is appointed and qualified. Any road overseer may be removed from office by the township board for incompetency, neglect or other good cause, and a successor may be apointed by them in his stead."

By Section 8151, R. S. Missouri, 1929, the township board fixes the compensation of the overseer of the roads. Section 8153, R. S. Missouri, 1929, requires the overseer to make a report to the township board. Section 8154, R. S. Missouri, 1929, provides as follows:

> "The overseer shall not employ any member of the township board nor enter into any contract for road work, material, tools, teams, nor purchase any machinery or material for the use of the road district from any member of the board or a member of his own family, either directly or indirectly, nor in any way use the funds of the district so as to become the beneficiary in the disbursement of the same. * * "

By these sections it will be seen that the township board has general supervision over the road work within the boundaries of the township. Section 8154, supra, quite clearly indicates that the lawmakers did not intend that a member of the township board should be the overseer of a road district, or that he should have any dealings with the overseer of the district. In other words, it is very evident that the lawmakers did not intend that a member of the township board should serve his township in any capacity other than a member of the board.

While there may be no particular statute applicable to your question, yet we think this question should be considered under the rule of public policy. In the case of Meglemery v. Weissinger et al., (Ky.) 131 S. W. 40, it was held that the fiscal county court, empowered to employ a bridge commissioner, a salaried officer, could not appoint one of their own members. The court in that case held that such an appointment would be against public policy, nor does the fact that he was not present with the court when the appointment was made have the effect of changing this salutary rule. At l.c. 41 the court said:

> "* * * The fact that the power to fix and regulate the duties and compensation of the appointee is lodged in the body of which he is a member is one, but not the only, reason why it is against public policy to permit such a body charged with the performance of public duties to appoint one of its members to an office or place of trust and responsibility. It is of the highest importance that municipal and other bodies of public servants should be free from every kind of personal influence in making appointments that carry with them services to which the public are entitled and compensation that the public must pay. And this freedom cannot in its full and fair sense be secured when the appointee is a member of the body and has the close opportunity his association and relations afford to place the other members under obligations that they may feel obliged to repay. * * * * * * * * * * * * "

If a member of the township board were appointed by the board as a foreman or overseer, the township would be put in the situation of having one of its employees reporting to himself and approving his own reports, and

we do not think that the lawmakers intended that any such conditions should exist.

CONCLUSION.

From the foregoing it is the opinion of this department that the township board of a township under township organization is not authorized to appoint one of its members to act as a foreman or overseer of any work being done under the authority and direction of the board, and he is not authorized to draw any pay from the township for such work.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

DOG TAX:
ANIMALS: County dog tax once submitted to voters of county cannot be resubmitted.

May 13, 1939

5-16

FILED
35

Mr. G. Derk Green
Prosecuting Attorney
Linn County
Linneus, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "Under Article 12, Chapter 88 of the 'Revised Statutes of 1929,' a petition was presented and the people of Linn County voted in favor of creating a license tax on dogs in this county.
>
> "That is now being made effective by the officers, enforcing the provisions of that chapter. Some persons contend that they were misinformed of the work of this law at the time of the election and would like now to obtain a vote of the people on the question of taking Linn County out of the effect of the law.
>
> "I have found no way in which they can obtain a vote on this or submit it to the voters for reconsideration. Please advise me if it is possible for vote to be had upon this, and if so the method to obtain the same."

Article XII, chapter 88, R. S. Missouri 1929, amended Laws of Missouri, 1937, page 224, provides for a county dog tax to be determined by local option.

Section 12881 of the article provides in part as follows:

> "* * * * * * * * * * * * * * * * * *
> Provided that upon the filing of petition signed by one hundred or more householders of any county and presented to the county court at any regular or special session thereof more than thirty days before any general election to be had and held in said county, it shall be the duty of the county court to order the question, as to whether or not there should be adopted the law, creating a license tax on dogs, submitted to the qualified voter, to be voted upon at the next election. Upon the receiving of such petition it shall be the duty of the county court to make an order as herein recited, and the county clerk shall see that there is printed upon all ballots to be voted at the next election the following:
>
> "For creating a license tax on dogs--
> Yes. No.
> (Erase the word you do not wish to vote.)
>
> "The returns of said election upon said subject shall be opened, canvassed and certified, as the returns for general elections. If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made."

The question presented by your request is when the license tax on dogs has once been adopted by a county is there any way in which the question may be again submitted to the voters to determine whether the license tax law should be in effect.

While the "county dog tax law" is the law of this state, still its operation is "suspended in the several counties of the state until a majority of the legal voters of any county should decide, at a general or special election, to enforce the same in such county." Welch v. The Hannibal Ry. Co., 26 Mo. App. 358. Once the law has been adopted it then occupies the status the same as any other statutory enactment of the State Legislature.

There is nothing in the county dog tax law providing for a resubmission of this question. Moreover, the form of theballot as given in Section 12881, supra, is:

"* * * * * * * * * * * * * * * * *
For creating a license tax on dogs--

Yes. No.

(Erase the word you do not wish to vote.)"

This form could not be used to repeal, reject or suspend the law which had already been adopted. The ballot form only provides for voting on the question of "creating" a license tax.

Other "local option" statutes have provided for a resubmission of the question. Section 7244, R. S. Missouri 1909, dealing with the liquor local option provided that the question could not be submitted within four years next after the election.

The section dealing with the election to determine whether animals shall be restrained from running at large in the county provides that such election shall be called

for the purpose of submitting to the voters the question of "enforcing, in such county, the provisions of this article." Section 12805, R. S. Missouri 1929.

The form of the ballot in such election as given in Section 12806, R. S. Missouri 1929, is as follows:

> "'For enforcing the law restraining (insert the name of animals in petition) from running at large;'
> 'against enforcing the law restraining (insert the name of animals in petition) from running at large.'"

The wording of the above ballot would allow the voters, on resubmission, to repeal or suspend the operation of the law by voting "against enforcing the law restraining animals from running at large."

In view of what has been said above, it will be seen that when a county dog tax law has once been adopted by a county it then becomes a legislative enactment which can only be repealed or amended by the legislature. We do not mean to hold that the legislature itself could not allow the counties to vote again on whether the dog tax law should be in force in the county but only hold that as the law stands now they have made no such provision.

CONCLUSION.

It is, therefore, the opinion of this department that once the county dog tax law has been adopted in any county, then such question cannot be again submitted to the voters as to whether such law shall be repealed, suspended or not be in effect.

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

TOWNSHIP CLERKS: No fee for drawing or writing warrant.

May 15, 1939

6-16

FILED
35

Hon. Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This will acknowledge receipt of your letter of May 4, 1939, in which you request our opinion on the following:

> "Section 12310, session acts of 1931 is being construed in various ways by the township clerks.
>
> "I wish your opinion on whether or not the township clerk is entitled to a fee of ten cents (.10¢) for writing each warrant over and above the regular $2.50 per day.
>
> "If this section does not authorize such payment, is there any authority for the same."

Section 12310, Laws of 1931, page 377, provides thatthe township clerk, as clerk, shall receive two dollars and fifty cents ($2.50) per day for his services. The section also contains a proviso limiting the first part granting two dollars and fifty cents ($2.50) per day, and to the effect that for certain services, the township clerk is not to be paid per diem for certain services, but is to be paid certain fees. These services are for serving election notices; for filing any instrument of writing authorized by law; for copying and certifying any record in his office.

It is apparent that this statute does not authorize the township clerk to receive anything additional to the two dollars and fifty cents ($2.50) per day for writing warrants.

Our research does not disclose any statute which operates to give the township clerk any additional compensation for writing warrants.

In State ex rel. v. Brown, 146 Mo., l.c. 406, the court said:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.' Williams v. Chariton Co., 85 Mo. 645."

CONCLUSION

Therefore, it is our opinion that the township clerk is not entitled to any additional fee for writing warrants.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAC

COUNTIES: Counties under 70,000 population cannot issue anticipation warrants under Section 2097, R.S. Missouri, 1929.
DRAINAGE DISTRICTS: Drainage districts cannot go into voluntary bankruptcy or cannot be forced into involuntary bankruptcy.

July 1, 1939

7-1

FILED
35

Hon. Joseph L. Gutting
Prosecuting Attorney
Clark County
Kahoka, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion upon two propositions. The first question which you present is as follows:

> "This county does not have a population of any ways near 70,000 inhabitants, and I am wondering if this county can issue notes in anticipation of revenue to be collected for this year? This Court seems to think that this county can do it under section 2097 R.S. Mo. 1929 and subsequent sections, but my advice to them that those sections only apply to counties with a population of between 70,000 and 90,000 inhabitants and therefore would not apply to this county which only has about 16,000 inhabitants."

I have examined the statutes relative to county courts issuing notes against the anticipated revenue. Article 6, Chapter 9 appears to refer exclusively to counties of certain population. Sections 2095 to 2110, inclusive, contain a complete scheme for the manner in which said notes may be issued, how paid and the penalties thereon.

Independent of the first section, 2095, which fixes population, we have examined the laws of 1925,

page 175, and find the title to the act contains the expression, "in all counties of this state which may now or hereafter have not less than seventy thousand inhabitants, nor more than ninety thousand inhabitants, as shown by the last preceding decennial federal census".

We, therefore, agree with you in your contention that the County Court of Clark County is unable to issue notes in anticipation of the revenue to be collected for the year 1939 because said county cannot qualify under Article 6, Chapter 9 for the reason it does not have a population of "not less than seventy thousand inhabitants, nor more than ninety thousand inhabitants".

Your second question is as follows:

> "Can an incorporated Drainage District go into voluntary bankruptcy or can it be forced into involuntary bankruptcy and if so what is the procedure?"

It appears that under Chapter 9, Section 81, entitled "Additional Jurisdiction" (Bankruptcy Forms and Practice, Menin and Herzog, 2nd Edition) and along with what is known as 77b of the Bankruptcy Act of 1935 and as amended by Congress in 1938, that a taxing agency or instrumentality was declared to be within the subject of bankruptcy. The provisions and procedure are very voluminous and we will be unable to quote all of the procedure. Subsection 84 states in substance that the court shall not have any jurisdiction after June 30, 1940, except in respect of any proceding initiated by filing of petition on or prior to June 30, 1940.

Section 81 is as follows:

> "This Act and proceedings thereunder are found and declared to be within the subject of bankruptcies and, in addition to the jurisdiction otherwise exercised, courts of bankruptcy

shall exercise original jurisdiction as provided in this chapter for the composition of indebtedness of, or authorized by, any of the taxing agencies or instrumentalities hereinafter named, payable (a) out of assessments or taxes, or both, levied against and constituting liens upon property in any of said taxing agencies or instrumentalities, or (b) out of property acquired by foreclosure of any such assessments or taxes or both, or (c) out of income derived by such taxing agencies or instrumentalities from the sale of water or power or both, or (d) from any combination thereof; (1) Drainage, drainage and levee, levee, levee and drainage, reclamation, water irrigation, or other similar districts, commonly designated as agricultural improvement districts or local improvement districts, organized or created for the purpose of constructing, improving, maintaining, and operating certain improvements or projects devoted chiefly to the improvement of lands therein for agricultural purposes; or (2) local improvement districts such as sewer, paving, sanitary, or other similar districts, organized or created for the purposes designated by their respective names; or (3) local improvement districts such as road, highway, or other similar districts, organized or created for the purpose of grading, paving or otherwise improving public streets, roads, or highways; or (4) public-school districts or public-school authorities organized or created for the purpose of constructing, maintaining, and operating public schools or public-school facilities; or (5) local improvement districts such as port, navigation, or other similar districts, organized or created for the purpose of constructing, improving, maintaining, and operating ports and port facilities; or (6) any city, town

> village, borough, township, or other municipality: Provided, however, That if any provision of this chapter, or the application thereof to any such taxing agency or district or class thereof or to any circumstance, is held invalid, the remainder of the chapter, or the application of such provision to any other or different taxing agency or district or class thereof or to any other or different circumstances, shall not be affected by such holding."

It may be possible that you can obtain the exact procedure by conferring with the referee in bankruptcy.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

OWN:VAC

COUNTY COURTS: Right to make donations to individuals and associations.

July 12, 1939

7-13

FILED
35

Mr. G. Derk Green
Prosecuting Attorney
Linn County
Marceline, Missouri

Dear Sir:

We acknowledge receipt of your request of July 7, 1939, for an opinion in regard to the right of the county court to make donations to various organizations for livestock shows and agricultural exhibits.

The Constitution of Missouri in Section 46, Article IV, prohibits the grant of public money for private purposes in the following language:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 47, Article IV, provides in part as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money

> or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * "

These sections undoubtedly prohibit the appropriation on the part of the county court to any individuals, associations or corporations, regardless of their classification, so long as the enterprises in which they are engaged are private.

Section 7, Article II of the Constitution provides that no money shall ever be taken from the public treasury in aid of any church, sect or denomination of religion, or any minister or teacher thereof as such.

The statutes make two exceptions which are found in Article VIII, Chapter 87 relating to county agricultural and mechanical societies, and Article XVII, Chapter 87, regarding county farm bureaus and organizations. Section 12490, under the first Article above named, reads as follows:

> "The county court of any county in which there shall be a regularly organized county agricultural and mechanical society, county fair, county corn growers' association, county poultry association, county stock growers' association, or any other organization or incorporated society having for its object the holding of county fairs or the advancement of agriculture or its allied industries may, if it be deemed expedient, appropriate out of the county treasury for the benefit of any such society a sum not exceeding three hundred dollars in any one year; and the money so appropriated shall be drawn

> by the treasurer of the society on proper warrant: Provided, said money shall be awarded by the board of directors or other proper officials in premiums or expended by them in the purchase of premiums, to be known as 'the _____ county court premiums,' to be awarded according to the rules, regulations and by-laws of the society: Provided further, that in all counties in this state having seventy thousand inhabitants or more, the county court of such county may, if it be deemed expedient, appropriate out of the county treasury, for the benefit of any such society, a sum not exceeding one thousand dollars, to be used as in this section above set out, or in any other manner that said board of directors may deem best."

Section 12617, under the second Article above, defines a county farm organization and Section 12616 provides that county courts may appropriate money for the support of the organizations defined in the following section, the funds to be used, however, as provided in Section 12619, which is as follows:

> "For the purpose of carrying out the provisions of this article, all funds appropriated by any county court to a county farm bureau shall be used to pay the salaries and necessary expenses of men and women, either or both, trained in agriculture and home economics, respectively, to serve as county agricultural agents, county home demonstration agents and county boys' and girls' club agents, and to provide such clerical assistance and office equipment as may be necessary to the effective conduct, through these agents, of such educational activities as are specifically authorized by state and federal legislation providing for

> co-operative extension work in agriculture and home economics as defined by the Smith-Lever act of congress."

Under the first section above, it must be noted that the money appropriated by the county court can be used as the premiums or for the purchase of premiums only, and must be given in the name of the county court. For the enlargement or continuance of county fairs, Section 12508, as amended by Laws of 1931, at page 133, provides for the levy of a special tax for the payment of premiums. We are unable to find any further sections giving the county court the right to contribute to the organizations set out in your letter.

In the case of Bayless vs. Gibbs 251 Mo. 492, the Supreme Court said:

> "County courts are not the general agents of the counties of the state. They are courts of limited jurisdiction, with powers well defined and limited by the laws of the state; and as has been well said, the statutes of the state constitute their warrant of authority, and when they act outside of and beyond their statutory authority, their acts are null and void."

We conclude, therefore, that a county court can legally appropriate funds for the purposes mentioned in Section 12490, which must be used for the payment of premiums only, and as provided in Section 12619, and that any contributions to any other individuals, association, corporations or enterprises of any nature are prohibited.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

J. L. TAYLOR
(Acting) Attorney General
RLH:RT

OPTOMETRY:
OPTOMETRY BOARD:
OFFICERS:

Person appointed to Board must file oath of office before he is qualified. Incumbent remains member of Board until successor qualifies.

August 2, 1939

8-10

FILED
35

Dr. F. J. Guilbault
423 North Broadway
St. Louis, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "I was appointed a member of the Optometry Board of Missouri for a term ending June 30th, 1936. On May 26, 1939, J. T. McWay was appointed as a member of the Optometry Board of Missouri, to succeed me. He was confirmed by the Senate on June 20, 1939. According to the records of the office of the Secretary of State, he has not qualified for the office to which he was appointed.
>
> "In view of the fact that my successor has not qualified, I request that you give me an opinion as to whether or not I am still a member of this board."

Section 13498, R. S. Missouri 1929, provides in part as follows:

> "The governor, with the advice and consent of the senate, shall appoint five persons from among such practicing optometrists of the state as have had not less than five years' practical

> experience in optometry as defined in section 13501 of this chapter, who shall constitute the state board of optometry. * * * * * * * The term of the members of said board successively, shall expire, on the 30th day of June of each year and the term of all members after the first board is appointed shall be for a period of five years and until their successors shall be appointed and qualified. * * * * * The members of the state board of optometry, before entering upon the discharge of their duties, shall make and file with the secretary of state, the constitutional oath of office. * * * * * * * * * * * "

Article XIV, Section 6, of the Constitution of Missouri provides as follows:

> "All officers, both civil and military, under the authority of this State, shall, before entering on the duties of their respective offices, take and subscribe an oath, or affirmation, to support the Constitution of the United States and of this State, and to demean themselves faithfully in office."

This department is informed by the Secretary of State that J. T. McWay, the person appointed to succeed you as a member of the State Board of Optometry, has not filed the constitutional oath of office with the Secretary of State which is required by Section 13498 quoted above.

The necessity that an appointee take an oath of office before entering upon the duties of the office is recognized in 22 R. C. L., page 448, wherein the rule is succinctly stated as follows:

> "Where an appointee is required to take an oath of office he cannot be considered as qualified unless he takes such oath."

In State ex rel. Hull v. Gray, 91 Mo. App. 438, the court said at l. c. 444:

> "Taking an official oath may be said to be a prerequisite to the right, de jure, to hold an office. The oath of office marks the entrance upon the duties of an officer. And so we find that all officers under the authority of the State, before entering on their duties, must take and subscribe an oath to faithfully demean themselves in office and support the Constitution of the United States and of this State. Section 6, article 14."

In view of the above authorities it will be seen that Dr. McWay, since he has failed to file his oath of office with the Secretary of State, as required by the statutes and the Constitution, is not at the present time a member of the State Board of Optometry. He must fulfill all the requirements of the statute and the Constitution before he can be considered a member of such board.

The question next arises as to what is your status as incumbent member of the board. As stated above, Section 13498, which provides for the state board of optometry, states that each member of the board shall serve "until their successors shall be appointed and qualified." Article XIV, Section 5 of the Constitution of Missouri provides as follows:

> "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office

> during their official terms, and until their successors shall be duly elected or appointed and qualified."

Section 11196, R. S. Missouri 1929, provides as follows:

> "All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

These provisions are interpreted in State ex inf. v. Williams, 222 Mo. 268, as follows (l. c. 285):

> "* * * * The plain, unequivocal import of this section of the Constitution is, that when the regular term expires, the office becomes, in the eye of the Constitution, vacant, but with authority to the incumbent, already qualified, to continue by virtue of such previous qualification, made effective for the purpose by the Constitution, to discharge the functions of the office until he is succeeded in the way preferred by the people, as pointed out in the Constitution made by them, and in the laws made in pursuance of that instrument.' * * * "

In the recent case of Langston v. Howell County, 79 S. W. (2d) 99, l. c. 102, our Supreme Court spoke as follows:

> "* * * Langston's official term was fixed at one year, but upon the expiration thereof, no successor having been appointed, his right to hold such office, and his title thereto, continued until the right

> of a duly appointed and qualified successor attached. His right to hold over and his continuance in the office was of course contingent and defeasible subject to be terminated at any time by the appointment and qualification of his successor. During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C. J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. * * * * * * * * * * * * "

Therefore, since your successor on the State Board of Optometry, although he has been appointed, has not qualified because he has failed to file the oath of office with the Secretary of State as required by law, you are still a member of the State Board of Optometry and will continue as such until your successor qualifies.

CONCLUSION.

It is, therefore, the opinion of this department that a person appointed to the State Board of Optometry must file an oath of office with the Secretary of State, and until he so does, he is not a member of said board. Until the person so appointed does qualify, the incumbent member whose place he is to take remains as a member of the board and is vested with all the powers and duties of such members.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

COUNTY CLERKS: Senate Bill #239 effective November 1, 1939. Gives clerks no more authority than they had. What source additional pay is to be paid from. May refuse to sign warrants when - .

August 25, 1939

8-25

FILED
35

Honorable Earl C. Gray
County Clerk
St. Charles County
St. Charles, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 15, 1939, concerning Senate Bill #239 of the Sixtieth General Assembly. You present the following questions for our opinion:

1. The effective date of Senate Bill #239.

2. Will said bill give county clerks more authority than they had regarding the finances of the county?

3. From what source is this additional compensation to be paid?

4. When there is a deficit in a special road and bridge fund, may the clerk refuse to sign a warrant on said funds?

I.

Senate Bill #239 pertains to the County Budget Law. This bill was passed by the Sixtieth General Assembly and approved by the Governor on May 31, 1939. It carries a provision in Section 2 thereof which designates

it as a revision bill.

We are enclosing a copy of an opinion rendered by this department on the 18th day of August, 1939, to the Honorable Dwight H. Brown, holding that a bill of the Sixtieth General Assembly so designated becomes effective November 1, 1939.

II.

The only changes made in the County Budget Act, as it appears in Laws of Mo. 1933, p. 340, by Senate Bill #239 that pertain to St. Charles County, a county of less than 50,000 inhabitants, are in Sections 1, 21 and 21a of said bill. In Section 1, the change makes the county clerk the budget officer of the county. In Section 21, the definition of a budget officer is omitted. In Section 21a, an entirely new section, compensation is provided for the county clerk's services as budget officer.

We do not see how these changes in the law confer any additional authority on the county clerk. An examination of Sections 2 to 8, inclusive, of the 1931 Budget Act discloses that all reference to authority of county officers refer to the county clerk or county court and not to the county budget officer.

III.

Section 21a of Senate Bill #239 provides for compensation of county clerks for their services as budget officers in counties falling within certain population brackets. In counties now or hereafter having a population of 15,000 and less than 25,000, according to the last federal census, a compensation is fixed at Four Hundred ($400.00) Dollars, payable in equal monthly installments. St. Charles County, according to the 1930 federal census, has a population of 24,352.

In answer to your third question, we enclose copies of

opinions rendered to Lee Barnham on November 2, 1937, and to G. Derk Green on August 24, 1937, holding that such additional compensation can be paid only if at the close of the fiscal year, after payment of all items which have been included in the budget, there remain funds in one of the classes, then this may be used to pay the county clerk for his services as budget officer, or this salary may be paid out of Class 5 if there is sufficient funds to permit the same, or a surplus in Classes 1, 2, 3 or 4, which may be transferred to Class 5 and used for this purpose.

IV.

In answer to your fourth question, we enclose copies of opinions rendered to Randolph H. Weber on November 10, 1937, and January 11, 1938, holding that warrants may be issued on special road and bridge funds if said warrants do not exceed the anticipated revenue, and that said warrants, upon being presented for payment and there being no funds on hand to pay the same, draw interest from the date of protest at the rate of 6% per annum.

However, in your instance, if the warrants involved are such that they will cause the anticipated revenue to be exceeded in this fund, then the clerk can not be compelled to participate in issuing said warrant because such action would be contrary to Article X, Section 12 of the Constitution of Missouri.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:RT
Encs.

MORTGAGES: Deed of Trust signed by husband and wife on an estate by the entirety securing note of husband is a valid instrument.

September 5, 1939.

9-6

FILED
35

Honorable Charles S. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

This will acknowledge receipt of your letter of August 29, 1939, in which you submit two questions to this office for answer.

We are enclosing herewith copy of an opinion dated August 24, 1938, addressed to Hon. Glen W. Huddleston, Prosecuting Attorney, Carrollton, Missouri, which we think answers your first question.

Your second question is as follows:

"Another question presented in this case is that since this is an estate by the entirety and since the mortgage is signed by both husband and wife but the note representing the debt is signed only by the husband, is this a valid mortgage?"

In order for a mortgage to be good against the wife in the present case it is necessary that it be a valid contract supported by a valid consideration. The rule as to consideration necessary to support a mortgage is the same as the rule which applies to contracts generally. In 41 C. J. p. 385, it is said:

> "The rule applicable to contracts generally that the adequacy of the consideration so long as it is a valuable consideration is immaterial in the absence of fraud applies in the case of a mortgage. A mortgage cannot be held invalid for want of consideration if it is supported by any consideration recognized by the law as sufficient to sustain a promise to pay. The consideration may be a benefit moving to the mortgagor or may consist in a detriment to the mortgageee, although there is no actual benefit to the mortgagor, but there must be some benefit to one party or some injury or detriment to the other."

The rule as to what constitutes a consideration is stated as follows:

> "It may be laid down as a general rule, in accordance with the definition given above, that there is a sufficient consideration for a promise if there is any benefit to the promisor or any loss or detriment to the promisee. It is not necessary that a benefit should accrue to the person making the promise;

> it is sufficient that something valuable flows from the person to whom it is made, or that he suffers some prejudice or inconvenience, and that the promise is the inducement to the transaction. Indeed there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has a right to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not."
>
> 13 C. J. p. 315.

Whether or not the wife received any of the benefits of the loan is not material as long as it can be shown that the loan was made upon the strength of her signing the mortgage along with her husband. The county would not have made the loan had she not signed the mortgage, and therefore, it was sufficient consideration to make the mortgage binding as to her. The courts of this state have followed the general rules above set down.

In the case of Summett v. Realty & Brockerage Co., 208 Mo. 501, it was held that a deed of trust signed by parties who did not receive any of the benefits of a note secured by said deed of trust was valid and binding as to them. At l. c. 514, the court said:

"The money loaned by the company to Latitia Grover on her note, secured by the deed of trust signed by her and all of the remaindermen, was a good and valid consideration as to the latter; and even between the parties to the deed remaindermen are estopped from asserting a want of consideration to them. (Mullanphy to use v. Reilly, 8 Mo. 675; Madison County Bank v. Graham, 74 Mo. App. 251; Halsa v. Halsa, 8 Mo. 303; Coal Co. v. Blake, 85 N. Y. 226; Edwards v. Schoeneman, 104 Ill. 278; Johnston v. Bldg. Assn., 104 Pa. St. 394)."

CONCLUSION

It is, therefore, the opinion of this office that a deed of trust or mortgage signed by a wife along with her husband upon joint property of husband and wife, to secure a note signed by the husband alone, is valid and binding as to the wife and the same may be foreclosed in the usual way.

Yours very truly,

APPROVED:

HARRY H. KAY
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

HHK:RV
Enc.

SCHOOLS: Transportation of school children under Section 9197, R. S. Mo. 1929, should be provided for children living more than one-half mile from the schoolhouse, but it is not necessary that transportation be made from the door of the home to the door of the schoolhouse.

December 12, 1939

12-13

FILED
35

Honorable Charles P. Greenwood
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

Sometime ago you submitted the following letter concerning which you desire our opinion:

> "The village of Avalon, Missouri, in this county has a consolidated school district. Transportation has never been voted by the district but I believe certain outlying rural schools were maintained as a part of the district. A few years ago the attendance at one of these rural schools embraced within the consolidated district fell so low that the school was closed by the directors with the consent of the State Department of Education. The school board furnished a limited transportation to the pupils of the school that was closed. One pupil in particular who had been afflicted with infantile paralysis was allowed the sum of $1.00 per school day for transportation to a rural school adjoining the Avalon school district. Before the school was closed he had to walk 1¾ mile to school. The boy has recovered from his affliction and the Avalon School Board proposed in the beginning of this year to send a bus to the end of the gravel road which is within 1¼ miles of the home of this boy and furnish him free transportation from this point to the Avalon

> school or should this not be satisfactory to the parents of the boy to allow them 45¢ per school day in lieu of transportation. The parents of the boy are insisting upon a continuation of the $1.00 per day allowance. Does the school board have a right to stand upon its offer to furnish transportation as indicated above or do they have to pick the boy up at his home?"

You refer to the district as being a consolidated school district and state that the district has never voted transportation for the other rural districts which may be embraced in the consolidated district.

The 1939 session of the Legislature, page 719, Laws of Missouri, 1939, Section 9197, amended the original Section 9197 so that said section now reads as follows:

> "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district; Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in Section 9228. If two-thirds of the voters, who are taxpayers, voting at

> such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district. Provided that this section shall include pupils attending private schools of elementary and high school grade except such schools as are operated for profit."

Likewise, Section 16a, page 720, was amended, and insofar as the same relates to transportation is as follows:

> "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. * * * *"

The above sections are quoted for the reason that we are not entirely clear, from the facts contained in your letter, as to under what section the school provides for transportation.

You further state in your letter that "a few years ago the attendance at one of these rural schools * * * * *

was closed by the directors with the consent of the State Department of Education." This would indicate that the school was abandoned in accordance with Section 20, Laws of Missouri, 1931, page 346, which is as follows:

> "If any district in this state shall have an average daily attendance of less than 15 pupils as shown by the records of the last previous school year, the state superintendent shall, in lieu of such state aid, after investigation that convinces him that it would be to the best interests of all concerned, require the board to provide for the transportation of the pupils of such district to other public school or schools, provided that the total expense, including transportation and tuition paid by the state, shall not exceed the amount that the state would have otherwise paid to such district."

There appears to be no provision in the statute for reimbursing the student, due to physical affliction, at the rate of $1.00 per day for transportation, even though it may appear to be just and proper. However, we assume that the student was classified under Section 9218, R. S. Mo. 1929, the pertinent part being as follows:

> "Whenever in any school district there shall be found ten or more children who are blind, or who are deaf, or who are crippled, but yet able to be moved about, or who are feeble-minded and yet capable of instruction, the board of education or board of directors of the district may provide appropriate instruction in a special class for such groups of ten or more of each class of defectives, and shall provide transportation to and from school for such children as could not otherwise attend.* * *"

School boards are created by statute and derive their powers solely from the same, and since the child has recovered

the statute does not give them power and authority to allow 45¢ per day. The statutes impower the board to make all needful rules and regulations for the free transportation of pupils. It further provides that free transportion shall be provided to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse.

The pertinent part of Section 9354, Laws of Missouri, 1933, page 388, is as follows:

> "Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on Page 344, Laws of Missouri, 1931. Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: * * *"

Section 9197, R. S. Mo. 1929, seems to be comprehensive in its terms. We quote the pertinent part as follows:

> "Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten tax-payers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: * * * * * *"

Conclusion

When all the statutes are considered and harmonized, we are of the opinion that the school board may be compelled to furnish transportation for the student in question because said pupil lives more than one-half mile from the schoolhouse, but that it was the intention of the Legislature that actual transportation from the door of the home to the door of the schoolhouse should only be furnished as far as reasonably practicable.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

OWN:EG

SHERIFF'S FEES: $1.00 fee allowed for execution; $1.00 fee allowed for garnishment.

January 25, 1939

FILED 37

Mr. Fred Hartle
Sheriff
Cape Girardeau County
Jackson, Missouri

Dear Sir:

We have your request for an opinion, which is in part as follows:

> "Can the sheriff make a demand for his fees before service is had on executions and on a garnishment? We have this trouble with some attorneys. They will have an execution issued out of circuit court, order the garnishment, and the sheriff serves same. The garnishee and defendant calls the attorney and an agreement is made whereby the defendant pays 10 per cent of his salary to the attorney who releases the garnishment so that the defendant will not lose his job, thereby the sheriff loses his fees because of the attorney not notifying the sheriff of the agreement.
>
> Also are we entitled to $1.00 fees on serving an execution and $1.00 for serving garnishment?"

Upon obtaining a judgment, the person owing such judgment is entitled to have an execution issued thereon

at any time within ten years after the rendition of such judgment. Section 1113 R. S. Mo. 1929. We have been unable to find any statute which requires the costs incident to the execution to be paid in advance.

When an execution is issued, it is the duty of the sheriff to levy on property of the judgment debtor. Section 11518 R. S. Mo. 1929. The word "levy" means the actual seizure of property by the sheriff. Section 1175 R. S. Mo. 1929. Under Section 11789 R. S. Mo. 1929 relating to the fee of sheriffs, the sheriff is entitled to a fee "for levying every execution".

In addition to the above levy of execution, the judgment creditor is entitled to direct the sheriff "to summon garnishees". Section 1397 R. S. Mo. 1929. It is necessary that the garnishment be in writing. Schifferli vs. Cantrell 19 S. W. (2d) 22. It becomes the duty of the sheriff to make a return showing that the essential statutory requirements of garnishment have been complied with. State ex rel vs. Pfeffle 293 S. W. 512. The person garnisheed is summoned to answer to the return term of the writ. Dimkins vs. Gootselig 90 App. 639. Section 1397 R. S. 1929 provides that the garnishment shall be served the same as in the case of garnishment under attachment. This means that the proceeding thereafter will be the same as in attachment. For such services, Section 11789 provides that the sheriff shall receive a fee "for serving a writ of scire facias or attachment for each defendant one dollar. The term "defendant" therein refers to and includes the garnishee.

The garnishee, if possessed of money or property, may at any time after garnishment and before final judgment discharge himself by paying the same, or so much thereof as the court shall order, to the sheriff. Section 1419 R. S. Mo. 1929 provides that if judgment debtor shall fail to recover judgment against the garnishee, the court shall enter judgment for all costs, including reasonable attorneys fees and a sum sufficient to indemnify him for his time and expenses, against the plaintiff possessing the judgment.

Section 1398 limits the amount that may be subject

to garnishment to ten per cent of the wages due the head of the family. We find no authority which permits the garnishee to defeat the sheriff of his fees by paying the amount subject to garnishment directly to the judgment creditor. If, however, this payment is made, then it would appear that the sheriff would be entitled to half his usual commission on the amount paid to the plaintiff, his agent or attorney. Section 11789 R. S. Mo. 1929. In any event, the sheriff is entitled to his fees and may institute suit against a person owning the judgment and recover his fees due under the execution and garnishment. Gates vs. Buck 75 Mo. 688.

CONCLUSION

It is, therefore, the opinion of this office that the sheriff is entitled to a fee of one dollar on serving an execution, and an additional fee of one dollar for serving a garnishment in aid of that execution. It is also the opinion of this office that the sheriff is not entitled to make a demand for his fees before service is had on execution and on garnishment.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
FER:RT

PAROLES: Information obtained by Parole Officer privileged information; other data is public record.

July 11th, 1939.

7-11

FILED
37

Hon. Frank G. Harris, Chairman,
Board of Probation and Parole,
Jefferson City, Missouri.

Dear Governor Harris:

This will acknowledge receipt of your letter of recent date which reads as follows:

"The Board of Probation and Parole desires your opinion upon the following questions, towit:

"SECTION 8520, R. S. '29 provides in part, as follows: "all records, hearings and proceedings of said board shall be public and open to the inspection of the public."

"SECTION 9, PAGE 403, Laws of Missouri, 1937, provides as follows: "Information and data obtained by a probation or parole officer appointed under the provisions of this Act in the discharge of his official duty, shall be privileged information, shall not be receivable in any court, and shall not be disclosed directly or indirectly to any one other

than the members of the Board of Probation and Parole and judges entitled under this Act to receive reports, unless and until otherwise ordered by said Board or judge."

"SECTION 11, Page 403, Laws of Missouri, 1937, provides as follows: "All Acts and parts of Acts in conflict herewith are hereby repealed."

"(1) What part, if any, of Section 8520 above referred to is repealed by Section 9, page 403, Laws of Missouri 1937?

"(2) In the event a probation and parole officer obtains from a circuit judge a statement relating to an application for parole of an inmate sentenced by the judge from whom the statement is obtained, and after obtained the statement is attached to his, the probation and parole officer's, report, or if an oral statement, is written into his pre-parole report, is this statement of the circuit judge privileged?

"(3) In the event a member of the Board of Probation and Parole or its secretary writes a circuit judge for a statement relating to an application for parole of one sentenced by the circuit judge of whom the request is made and the circuit judge complies with the request and sends a written statement to the Board of Probation and Parole, is

this statement of the circuit judge privileged?

"(4) To what extent, if at all, are the contents of the file of an applicant for parole privileged or confidential?"

Section 8328, R. S. Mo. 1929, transferred generally all powers and duties theretofore vested in and required of the State Prison Board to the Commissioners of the Department of Penal Institutions. Among the powers and duties of the State Prison Board was the duty and power to investigate all applications for executive clemency coming before the Governor and to make a written report on each case with its recommendations. (See Art. 8, Chap. 44, R. S. Mo. 1929). This duty and power is somewhat enlarged and detailed in Section 5, page 402, Laws of Missouri, 1937.

Section 8330, R. S. Mo. 1929, specifically transferred to the Commissioners of the Department of Penal Institutions the power and duty to investigate applications for executive clemency, said section reading as follows:

"With reference to investigating fully the merits of all applications for executive clemency properly coming before the governor; the making of a written report for the information of the governor of the finding of facts in such cases, together with recommendations thereon, the commissioners of the department of penal institutions shall have and exercise all the rights and powers, and

> perform all the duties and functions, heretofore exercised and performed by the state prison board as set forth and defined in article 8 of this chapter, and such other powers and duties with reference thereto as may be authorized by law."

An Act found at page 400, Laws of Missouri, 1937, created a board of Probation and Parole. Section 2 of said Act provides as follows:

> "There is hereby created and established a Board of Probation and Parole. The powers and duties relative to paroles, commutations of sentence, pardons, and reprieves, now vested in the Commissioners of the Department of Penal Institutions and the Intermediate Reformatory Parole Board are hereby vested in the Board created and established by this Act. Said Board shall be deemed a continuation of the Department of Penal Institutions and the Intermediate Reformatory Parole Board in so far as the Commissioners of that Department and the Intermediate Reformatory Parole Board are empowered to act in relation to investigations, paroles, commutations of sentence, and pardons, and all matters pending before such Commissioners and the Intermediate Reformatory Parole Board in connection with paroles,

> commutations of sentence, and pardons shall be carried on and completed by the Board created in this Act."

Section 11 of said Act of 1937 provides that all acts and parts of acts in conflict with said act were repealed.

It will, therefore, be seen that all powers and duties relating to pardons and paroles which were originally vested in and required of the State Prison Board and subsequesntly vested in and required of the Commissioners of the Department of Penal Institutions, are now vested in the Board of Probation and Parole, created by the Act of 1937, supra, save and except such powers and duties as might be in conflict with the provisions of said 1937 Act. One of the duties originally required of the State Prison Board was set forth in Section 8517, R. S. Mo. 1929, in the following language:

> "It shall be the duty of said board to keep and preserve the files and records concerning all applicants for executive clemency filed with said board or with the governor, and to keep a trial docket of all such applications."

We do not find anything in the above section 8517, which is in conflict with the provisions of the 1937 Act, supra, and consequently, said section 8517 is still binding on the Board of Probation and Parole.

Section 8520, R. S. Mo. 1929, provides as follows:

> "Said board shall have power to make all needed rules and regulations concerning the forms of applications, and manner of applying for executive clemency, subject to the approval of the governor, shall furnish blank forms free of charge, upon request, to any person desiring same; and all records, hearings and proceedings of said board shall be public and open to the inspection of the public."

Is there anything in the Act of 1937, supra, which conflicts with the underscored portion of Section 8520, supra?

Section 9 of the 1937 Act provides as follows:

> "Information and data obtained by a probation or parole officer appointed under the provisons of this Act in the discharge of his official duty, shall be privileged information, shall not be receivable in any court, and shall not be disclosed directly or indirectly to any one other than the members of the Board of Probation and Parole and judges entitled under this Act to receive reports, unless and until otherwise ordered by said Board of Judge. All public officers are hereby required to assist said Board and its

> parole and probation officers in effectuating paroles and probations, and shall permit said Board or its parole and probation officers to have free access at reasonable times to all public records."

Section 8520, supra, provides that all records of the Board shall be public and open to the inspection of the public. However, Section 9 of the 1937 Act provides that information and data obtained by a probation or parole officer in the discharge of his official duty shall be privileged information and shall not be revealed to anyone except the Board of Probation and Parole, or to the judges entitled to receive reports, unless and until otherwise ordered by the Board or Judge. There is therefore a conflict between said Section 8520 and Section 9 of the 1937 Act in so far as information obtained by probation or parole officers in the discharge of their duties is concerned, and the 1937 Act must therefore prevail as to this information. As to all other records of the Board of probation and parole, Section 8520 still prevails, and such other records arepublic. Information obtained by the Board itself or by its Secretary, or data furnished by applicant for parole are not included in the privileged information mentioned in Section 9 of the 1937 Act, and they are therefore, governed by Section 8520, R. S. Mo. 1929.

CONCLUSION

Answering your questions in the order named, it is the opinion of this Department that:

(1) Unless and until otherwise ordered by the Board of Probation and Parole or the judge to whom such information is given, the data and information obtained by a probation or parole officer appointed under an Act found at page 400, Laws of Missouri, 1937, in the discharge of his official duties, is privileged. All other records of the said Board of Probation and Parole are public and open to public inspection in accordance with Section 8520, R. S. Mo. 1929.

(2) Information obtained by a probation or parole officer from a circuit judge and filed with the Board of Probation and Parole would be privileged until and unless otherwise ordered by said Board.

(3) Information and data obtained by the Board of Probation and Parole, or by its secretary, from a circuit judge who had originally sentenced the applicant for a parole would not be privileged.

(4) The contents of the file of an applicant for parole are privileged only to the extent of the data and information therein contained which was obtained by a probation or parole officer in the discharge of his official duties, and not to this extent if the Board of Probation and Parole has ordered otherwise.

Very truly yours,

APPROVED:

HARRY H. KAY,
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

GOVERNOR:)
PARDONS & PAROLES:) Governor can issue pardons and paroles anytime after conviction - does not have to wait a year after convict has been discharged.

August 4, 1939

87

FILED
37

Honorable Frank G. Harris
Chairman
Board of Probation and Parole
Jefferson City, Missouri

Dear Governor:

This Department is in receipt of your letter of July 24th wherein you present a question relative to restoration of citizenship by the Governor. That portion of your letter which relates to the facts is as follows:

> "Under a rule which has been followed by the Governor, a convict on parole is not eligible to have his or her citizenship restored until the lapse of one year from the expiration of the time to which the convict is required to report.
>
> "When and in what cases, under the law, may the Governor restore citizenship?
>
> "I have two cases in mind. One of them has been out on parole over three years, but under the terms of the parole he is required to report. He is keeping the terms of his parole and has a good business, but he cannot obtain insurance on the property he handles because of the fact that his citizenship has not been restored. I do not recall just how long the second I have in mind has been out under parole, but he is complying with the terms of his parole and is engaged in the mercantile business, succeeding well, but can obtain no insurance because of the fact that he is deprived of his citizenship."

There are a number of statutes relating to the power of the Chief Executive to grant paroles and pardons. Some of the statutes are apparently in conflict. Some relate only to crimes committed under certain articles and chapters. As for instance, Section 8442, R. S. Mo. 1929, refers to the three-fourths rule and contains the expression, "and in such case no pardon from the Governor shall be required." Section 4172, R. S. Mo. 1929, refers to the character of crimes which shall constitute a forfeit of citizenship and providing for civil disabilities; also exempting convicts under the age of twenty years; and providing that the Governor may remove the civil disability any time after one year from the date of conviction. Under Article 4, Chapter 90, R. S. Mo. 1929, Sections 12970 and 12971 refer to the effect of a pardon and when citizenship is not lost.

As stated before there are a number of special statutes under each article wherein conviction constitutes forfeiture of citizenship. But regardless of any conflict in the statutes we think the real power of the Chief Executive to grant pardons and paroles is contained in the Constitution. Section 8 of Article 5, Missouri Constitution, provides as follow s:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

The general section governing the power of the Chief Executive to grant pardons is practically in the same language as the Constitution, to-wit, Section 3798, R. S. Mo. 1929, which is as follows:

> "In all cases in which the governor is authorized by the Constitution to grant pardons, he may grant the same, with such conditions and under such restrictions as he may think proper."

We herewith refer to certain decisions construing the power of the Chief Executive to grant pardons and paroles.

In the early case of State v. Sloss, 25 Mo. 291, the court states that the pardoning power belongs exclusively to the executive department of the government and cannot be exercised by the legislative department.

The power of the Governor to grant paroles just the same as pardons, prior to the enactment of past laws and the recent acts governing paroles, was determined by a decision in the case of State v. Asher, 246 S. W. 911, l. c. 913, as follows:

> "No provision is made either in the Constitution or the statute for 'paroles' by the Governor. The question therefore depends on the meaning of word 'parole,' used in reference to the discharge of prisoners from the penitentiary.
>
> "In 29 Cyc. 1562, a parole is defined as:
>
> "'A form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on the violation of the condition of the parole.'

"In the case of Fuller v. State. 122 Ala. 32, loc. cit. 37, 26 South. 146, 45 L. R. A. 502, 82 Am. St. Rep. 1, the court had before it a similar question. The Constitution of Alabama provides that 'the Governor shall have power * * * after conviction, to grant * * * pardons.' The court said:

"'It is the settled law that this grant includes power to grant conditional pardons, the condition to be either precedent or subsequent, and of any nature so long as it is not illegal, immoral, or impossible of performance; and that a breach of the condition avoids and annuls the pardon.'

"To the same effect was the holding in Kennedy's Case, 135 Mass. 48. Chief Justice Marshall in the case of U. S. v. Wilson, 7 Pet. (U. S.) 160, 8 L. Ed. 640, defined a pardon as:

"'An act of grace, proceeding from the power invested with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.'

"The power to pardon includes the power to parole (In re Conditional Discharge of Convicts, 73 Vt. 414, 51 Atl. 10, 56 L. R. A. 658.

"It must follow from the foregoing that a parole is a conditional pardon, and that a 'parole' given by the Governor is but an exercise of the power vested in him by the Constitution and statute with respect to the issuance of conditional pardons. Moreover, it must be understood that section 3702, supra, does not within itself provide for the conviction of a

> defendant, but simply provides severer punishment for the crime charged if convicted. State v. Collins, 266 Mo. 93, 180 S. W. 866; State v. Levy, 262 Mo. 181, 170 S. W. 1114."

Formerly, as stated in the early case of State v. Woolery, 29 Mo. 300, and before our present Constitution, the Chief Executive even had the power to grant a pardon before conviction as well as after conviction. Reverting to the section of the Constitution relative to the Chief Executive's power to pardon, we think the case of Ex parte Jacobs v. Crawford, 308 Mo. 302, l. c. 305, which discusses the same, shows conclusively the broad powers of the Chief Executive, as follows:

> "The power of the Governor in respect to pardons and paroles is declared in Section 8, Article V, of our Constitution. The first sentence of said section reads as follows: 'The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons.'
>
> "It will thus be seen that the Governor has the right to fix the conditions when he paroles a convicted person. All the power that the General Assembly has in the matter is to legislate concerning the manner of applying for pardons. Section 4144, Revised Statutes 1919, merely reiterates the language of the Constitution concerning the power of the Governor to grant pardons upon such conditions and under such restrictions as he may think proper.

> "In a very recent case (In Matter of the Petition of Jasper Mounce for Writ of Habeas Corpus, 307 Mo. 40, decided February 2, 1925), where this court had under consideration the effect upon the term of imprisonment of time elapsed while defendant was out under parole by the trial court, we said:
>
> "'A parole is a matter of grace or favor to a convicted defendant and, when he accepts such parole, he does it subject to all the provisions fixed by the statute and subject to all other conditions which may be imposed upon him by the authority granting such parole, which are not illegal, immoral or impossible of performance. Such, by all the authorities, is the rule where a parole or conditional pardon has been granted by the executive or other constitutional pardoning power and the rule applies as fully and as reasonably to paroles by trial courts under our statute.'"

The effect of the constitutionality of the three-fourths rule provision is discussed in the case of Ex Parte Collins, 94 Mo. 22, l. c. 25:

> "It may be conceded that he became entitled to whatever benefit an observance of those conditions gave him, but what benefit was that? Simply this: that he became entitled to be recommended to the Governor as a fit subject of pardon. This benefit he has received. His right to a pardon does not lie in the terms of the statute. Nor does the amendment of section 1 aforesaid, by the matter contained in section 6533, at all affect his case, since that relates only to those who have served three-

> fourths of the time for which they were sentenced. The expiration of such a period cannot be affirmed of one sentenced for life. Equitably, the prisoner is perhaps entitled to his discharge; but that is a subject which lies entirely in the discretion of the executive. By virtue of the writ which has been issued, we can only make inquiry into his legal rights in the premises."

Conclusion.

In view of the provisions of the Constitution, the statutes and the decisions herein mentioned and quoted above, we offer the following conclusion in answer to your question, "When and in what cases, under the law, may the Governor restore citizenship?"

We think that the Governor has power to restore citizenship to any person after conviction for any and all offenses, except treason and impeachment, upon such conditions and with such restrictions and limitations as he may think proper. The rule which the Chief Executive has been following, namely, that a convict on parole is not eligible to have his or her citizenship restored until the lapse of one year from the expiration of the time to which the convict is required to report, we think is such a rule that the Chief Executive has a right to follow. The granting of a parole or pardon is purely within his discretion. There is no writ or remedy which can compel him to grant a pardon or parole to anyone. However, it may be treated by the Chief Executive simply as a rule, as it is our opinion he has the power to grant a pardon or parole at any time he may see fit after conviction. He may parole or pardon before the convicted person has entered prison, at any time after the convicted person has entered prison or at any time after the convicted person has been released from prison. The granting of a parole or pardon is a matter of grace upon the

part of the Chief Executive. The only authority the General Assembly has in the matter is to legislate concerning the manner of applying for pardons.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

CHATTEL MORTGAGES: Recorder of deeds may make release of
MOTOR VEHICLES: chattel mortgage on his records without the title to such mortgage being presented to show such release.

September 28, 1939

9-29

FILED
37

Mr. E. T. Hardy
Clerk of the Circuit Court
and Ex-Officio Recorder of
Shelby County
Shelbyville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following request:

"I would appreciate an opinion from your office as to the procedure to be followed by me as Ex-Officio Recorder under Section 3097A, Laws of Missouri 1939.

"A point which I don't understand is contained in the second sentence of this new act which reads as follows: 'When such Chattel Mortgage is released it shall be the duty of the Recorder to so show on the Certificate of Title'.

"My experience in the past has been that many mortgagors never release these mortgages and I am not clear under this sentence as to whether or not I would be liable if the mortgagor did not produce his title to show the release. Of course, it is to be presumed that the title would be produced but in view of the fact that so many do not make the release under the old law it occurs to me that the same condition would exist, although perhaps not so frequently.

"In short the point which I would like to be set clear on is this--would there be any liability on me for failure to show the release on the Title if the title was not presented for such showing? Since the sentence in question does not specifically state 'that on the request of the mortgagor', I am wondering if such release could be made without presentation of the title and the release shown on it under the new law.

"I would appreciate an opinion on this point at your earliest convenience."

The section of the law to which you refer is 3097A, Laws of Missouri, 1939, page 278. I find that this department on September 1, 1939, by an opinion to the Recorder of Deeds of the City of St. Louis written by Mr. Burke, held that this section only applies to filing of chattel mortgages and not recording, and is directory and not mandatory that the mortgagee, or his assignee, shall have the certificate of title stamped or sealed by the recorder of deeds. I am enclosing a copy of this opinion for your information.

You seem to be in a quandry as to whether or not you would be authorized to release the chattel mortgage on your records if the party who is asking the release does not also have the certificate of title with him and request you to show such release on the title.

You will note that the first part of said Section 3097A says that it shall be the duty of the recorder of deeds to do certain things on the request of his mortgagee or assignee. I think from that part of the bill which provides: "* * * When such chattel mortgage is released, it shall be the duty of the recorder to so show on the certificate of title * * *," the recorder shall show such release if he is requested to by the mortgagee or his assignee. In other words, we do not think that this new act would prohibit the recorder from making the release of a chattel

mortgage as he has always done, but if he is requested to show this release on the certificate of title, then he should do so.

CONCLUSION.

From the foregoing it is the opinion of this department that the recorder of deeds would incur no liability for his failure to show the release of a chattel mortgage on the certificate of title if it is not presented to him for such showing.

We are further of the opinion that if the mortgagor or mortgagee, or the person presenting mortgage for release, requests the recorder to show such release on the certificate of title, then it is his duty to show such release on the certificate of title.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

CONSTITUTIONAL AMENDMENT: Cost of paying for the sample ballot publication on a proposition should be borne by the State, under Section 10385, R. S. Mo. 1929.

January 16, 1939

2-70

FILED
38

Honorable Ellsworth Haymes
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This Department is in receipt of your letter of January 11th, wherein you make the following inquiry:

> "I have an inquiry from the Superintendent of Schools of Rogersville, Missouri upon which he would like an opinion from your office. I am enclosing his letter to me as it states the matter quite plainly.
>
> "Also the County Court of Webster County has asked me to get an opinion from you as to whether the County or the State should properly pay for the publication of the sample ballots of the Propositions to be voted on at an election. The County Court thought that since the State pays for the notice of the Propositions that they should also pay for the sample ballot publication."

From a reading of the attached letter from Mr. George A. Riley, we think it involves a question of whether or not a school district is subject to garnishment. This matter can be determined by the facts as to whether or not the funds garnisheed have actually become a part of the school district's fund. It would appear so by the fact that the Superintendent collects the same. However,

this appears to be a private rather than an official matter, which does not make it encumbent on this Office to render an opinion. We think the decision of Cline v. School District of the City of Carthage, 42 Mo. App. 460, and the recent decision of Nacy v. LeFage, 111 S. W. (2d) 25, decide the matter.

The second paragraph of your letter relates to the costs for printing sample ballots of propositions to be voted on at an election. If the question involves payment of the printing of sample ballots as in any general election, then we find no provision for the payment of the same.

Section 10301, R. S. Mo. 1929, provides as follows:

> "Whenever the secretary of state has duly certified to the clerk of each county court any proposition or question to be submitted to a vote of the people, the clerk of the county court shall prepare and distribute ballots printed in such form as to call for a vote thereon by scratching either (the) word 'yes' or the word 'no,' that is to say, the said proposition or question shall be printed and have the word 'yes' and 'no' printed below or opposite thereto, in bold, legible type, with the words 'scratch one of the above' printed in smaller type, within the sign of a parenthesis, immediately below the said words 'yes' and 'no,' and any such proposition or question shall not be printed in any other form."

The above section does not provide for the printing of any sample ballots.

The last line of your letter seems to indicate that the question relates to the printing of sample ballot publication. Section 10384, R. S. Mo. 1929, relates to the publication of, and posting notices of amendments, and reads as follows:

> "All amendments proposed to the Constitution of the State of Missouri by the general assembly shall be published with the laws of the session at which they are proposed, and also in some newspaper, if such there be, in each county in the state for four consecutive weeks next preceding the general election then next ensuing, and two or more copies of such amendments, printed in great primer poster type, shall be posted at each voting place for the information of voters; such copies shall be furnished by the secretary of state to the county clerk of each county, who shall have the same duly posted at each voting place in this county on the morning of the election day on which said amendments are to be voted on."

Section 10385, R. S. Mo. 1929, provides for the manner of payment as follows:

> "The secretary of state shall designate in what newspaper in each county said proposed amendments shall be published, and the claim due the publisher of such newspaper for such publication and the costs of publishing the copies of the amendments hereinbefore provided for shall be certified by the secretary of state to the

> state auditor, who shall draw his warrant on the state treasurer therefor, payable out of any money in the treasury not otherwise appropriated."

Noting that Section 10385, supra, uses the expression, "for such publication and the costs of publishing the copies of the amendments hereinbefore provided for," we are of the opinion that it refers to all matters which are to be carried out by the respective counties and county clerks, and if the sample ballot publication referred to in your letter comes properly within the purview of Section 10384, supra, the expense for the same should be paid by the State.

Respectfully submitted

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. W. Buffington
(Acting) Attorney-General

OWN:EG

TOWNSHIP ORGANIZATION: It is the mandatory duty of the county clerk to furnish a prepared form to the township clerk for the publication of the financial condition of the township.

February 8, 1939

2-10

FILED
38

Mr. Charles E. Hassett
Attorney at Law
Poague Building
Clinton, Missouri

Dear Mr. Hassett:

We are in receipt of your letter dated February 4, 1939, which reads as follows:

"Henry County is, as you know, a Township Organization County. Under Section 8170, R.S. '29, a duty is placed on the township board to publish annually, between the 1st and 10th day of March, an itemized statement of receipts and expenditures, inventory of tools, machinery, and other property, in some newspaper published in the township, etc.

"Under Section 8171, the county clerk has a duty to prepare forms for such publication, and on or before the 20th day of February of each year submit the same to the township clerk, and require such publication, as well as the filing of a certified copy of such statement in his office on or before March 20th.

"Only a few of the nineteen townships of this county have been following this procedure. The county clerk has not furnished such forms, although, all townships have been filing such a statement with the office of the clerk.

"In my construction of the above sections, it is my view that these provisions are mandatory. Also, that a full itemized statement is required, and that a condensed form will not be sufficient.

"Naturally, the various township boards are much concerned, and would like to find some avenue of escape from this additional expense. I may add for your information, that the matter is being pressed by the newspapers.

"I would appreciate an opinion from your office as to the effect of these provisions, 8170 and 8171. If at all possible, and if you concur in my view that the statutes mean just what they say, I should like to have this opinion in time for the clerk to comply with the same prior to February 20th."

Section 8170, R. S. Missouri, 1929, reads as follows:

"The township board of directors in all counties under township organization shall keep or cause to be kept a full, true and correct record of all moneys received and disbursed on account of roads and bridges and all other receipts and disbursements of every nature in such township, showing in detail from whom and on what account such money was received, and to whom and for what purpose disbursed, together with a complete inventory of all tools, road machinery and other property belonging to the town-

ship, together with such other information as to the condition of roads and bridges and the needs of same as may be deemed of value, and between the first and tenth day of march of each year shall cause to be published an itemized statement of such receipts and expenditures, inventory of tools, machinery and other property in some newspaper published in such township, and if there be no newspaper published in the township, then such publication may be made in any newspaper of general circulation within such township published in the county; such statement shall be made by the township clerk under the direction of the township board and shall be sworn to by such clerk, and it shall be the duty of the township clerk on or before the twentieth day of March of each year to file a copy of such detailed statement with the county clerk of such county, and the county clerk shall lay the same before the county court at its next regular meeting."

Section 8171 R. S. Missouri, 1929, reads as follows:

"For the purpose of carrying out the provisions of the preceding section, it shall be the duty of the county clerk in counties having township organization to prepare, at the expense of the county, forms for the publication of the detailed statement of the township's receipts and disbursements, on or before the twentieth day of February of each year, and submit the same to the township clerk of each

> township, together with any other information he may deem necessary, and the county clerk shall require each township board to make such publication according to the form submitted, and also require a certified copy of such statement to be filed in his office on or before the twentieth day of March of each year."

It will be noticed in the above Section 8171 that it is the duty of the county clerk to furnish forms for the publication of the detailed statements therein described. This strong statement proves that it was the intention of the legislature that this section should be considered mandatory and especially so as to the issuing of the above forms. The purpose of the issuing of the above forms was so that all of the detailed statements should be uniform from each clerk of each township. It specifically sets out the procedure how, and when, the clerk shall make his detailed statement and when the publication of such statement should be made.

In the case of Kroger Grocery & Baking Co. v. City of St. Louis, 106 S. W. (2d) 435, loc. cit. 439, par. 5-7, the court said:

> "Summarizing the reasons underlying Kansas City v. J. I. Case T. M. Co., supra, on the instant issue, they are to the effect, in so far as material here, that said act of 1879 conferred a permissive, not mandatory, power upon certain municipalities to impose a graduated license upon merchants; but (considering the word "may" in said clause authorizing a graduated license as equivalent to "must" or "shall" (Id., 337 Mo. 913, loc. cit. 931 (8), 87 S. W. (2d) 195, loc. cit. 205 (15-17)), any attempt to exercise the

> authority there conferred to exact graduated license fees must be exercised in conformity with the authority delegated and graduated in proportion to the annual sales (Id.,337 Mo. 913, loc. cit. 930(7), 87 S. W. (2d) 195, loc. cit. 205(13,14), and authorities cited; Keane v. Strodtman (Banc) 323 Mo. 161, 167(11), 18 S. W. (2d) 896, 898(11) (quoting Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S. W. 112, 113, to the effect that when special powers are conferred, or special methods are prescribed for the exercise of a power, the exercise of such power is within the maxim expressio unius est exclusio alterius, and 'forbids and renders nugatory the doing of the thing specified, except in the particular way pointed out'); State ex rel v. Clifford, 228 Mo. 194, 207, 128 S. W. 755, 758, 21 Ann. Cas. 1218."

The holding in the above case was to the effect that when a certain procedure was set out in the law and no other procedure was mentioned, then the procedure set out in the law is the only procedure that could be used in obtaining the results required.

In the case of State v. City of Maplewood, 99 S. W. (2d) 138, loc. cit. 142, Par. 5-7, the court said:

> "The general rule with respect to the use of permissive words in a statute is stated in 59 C. J. Section 633, pp. 1077 and 1078, as follows:
>
> 'On the other hand, where statutes

are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do, and no public interests in private rights are involved, they will be construed as permissive. Generally, statutes, directing the mode of proceeding by public officers, designed to promote method, system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not declare what result shall follow noncompliance therewith. * * *

'Permissive words in a statute in respect of officers or courts will not be construed as mandatory where such construction would create a new public obligation; and it has been held that even mandatory words or provisions in a statute defining the duties of administrative officers may be construed as directory only, unless something in the body of the statute indicates the contrary.'

"Our Supreme Court in State ex rel. Ellis v. Brown, 326 Mo. 627, 633, 33 S. W. (2d) 104,107, stated the rule for determining whether a statute is directory or mandatory in the following broad terms: 'There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of

> every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the ganeral object intended to be accomplished.

According to the holding in this case the intention of the legislature as disclosed by all of the terms and provisions of the act in relation to the subject of legislation should be followed and under section 8171 the fact that the legislature specifically said:

> "It shall be the duty of the county clerk."

The only construction that can be given to the section is that it is mandatory.

Section 8175 R. S. Missouri, 1929, reads as follows:

> "Any official or other person who shall willfully fail to comply with any of the provisions of this article, and any person who shall willfully violate any of the provisions thereof, shall be deemed guilty of a misdemeanor, and where no other or different punishment is provided, shall be punished by a fine of not less than five dollars nor more than five hundred dollars."

This section provides a penalty which grades from a fine of not less than five dollars nor more than five hundred dollars, to be assessed against any official or other person who shall willfully fail to comply with any of the provisions of article

15, Chapter 42 of the Revised Statutes of Missouri, 1929. The fact that a penalty is prescribed against the violation of the act is further evidence to show that it was the intention of the legislature to enact a section which was mandatory upon the county clerk to issue the statement of the township's financial condition.

By reason of said penal section, 8175, supra, and according to the holding in the case of State v. City of Maplewood, supra, the section 8171 cannot be given any construction but that it is mandatory.

CONCLUSION.

In view of the above authorities it is the opinion of this department that under section 8171 R. S. Missouri,1929, it is the mandatory duty of the county clerk to prepare and furnish forms to the township clerks for the purpose of publishing the financial condition of the township.

It is further the opinion of this department that any county clerk who fails to follow the mandatory instructions set out in 8171, supra, could be prosecuted under section 8175, supra. This act of the county clerk is only a ministerial duty and upon failure to perform that duty a mandamus proceeding would properly lie if commenced by some party in interest.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

WJB:RW

TOWNSHIP ORGANIZATION: Township taxes are junior to county taxes for county purposes and the total of the two can not exceed the maximum provided for by the Constitution for county purposes.

TAXES:

May 3rd, 1939.

5-5

FILED
38

Mr. Charles E. Hassett,
Prosecuting Attorney,
Henry County,
Clinton, Missouri.

Dear Sir:

We acknowledge receipt of your request which is as follows:

"A question has been brought up with respect to the limitation upon the levy that may be made by a township board in a county under township organization for road and bridge purposes and for incidental township expenses.

I note that Section 22 of Article 10 of the state constitution a township board may levy a special road and bridge tax not exceeding twenty-five cents on each $100 valuation and that the proceeds of this tax are restricted to road and bridge purposes alone. Under section 12308, R. S. 1929, which section provides for a tax levy to defray township expenses, the following proviso is set out: 'Provided, that said expenses is not, together with the amount levied for road purposes and for special bridge tax, exceed in any one year twenty cents on the one hundred dollar valuation.'

> Undoubtedly a township board may levy not exceeding twenty-five cents for a special road and bridge fund under the limitation set by the constitution. However, the question which I want determined is whether or not they have a right to exceed that fund, which of course is limited solely to road and bridge purposes, in order to receive sufficient income to defray other township expenses. To state the question in a different manner, can a township board authorize a special road and bridge levy up to twenty-five cents on the $100 valuation, and in addition thereto make a levy of five or six cents on the $100 valuation to defray township expenses; or is such a township board limited to not exceed twenty cents for all purposes by the effect of Section 12308? If a township is enabled to make an additional levy over and above the twenty-five cents I should like your opinion as to the limit which would be placed on such an additional levy. As this is a matter which is to be of more than one interpretation we would appreciate an opinion from your office as to the question."

Your request stated another way appears to be: What is the maximum limit of taxes that may be levied for township expenses? Section 22 of Article 10 of the Constitution of the State of Missouri does not deal with the same subject matter raised by your inquiry. Said Section 22 of the Constitution has to do with the authorization of a tax for special road and bridge purposes, but the revenue contemplated by Section 12308, R.S. Mo. 1929, is not for road and bridge purposes but is for the general expenses of the township.

Section 11 of Article 10 of the Constitution of the State of Missouri, deals with the same subject matter and prescribes the rate which may be levied for county purposes, and fixes the maximum rate that may be levied in a given county dependent on the population of that county.

The provision that the county rate in counties having a valuation between $10,000,000.00 and $30,000,000.00 shall not exceed fifty cents on the one hundred dollar valuation. I assume your county to all within that class. If, however, it falls in some other class as in said Section defined the principle to be applied is the same, although the amount might be different.

In the case of State ex rel. against Kansas City, St. Joseph and Council Bluffs Railroad Company, 145 Mo., 596, it was held that where a county court made a levy of fifty cents upon the one hundred dollar valuation of property "for county purposes" in a county having less than $6,000,000.00 worth of property, a further levy of ten cents by townships for "road purposes" is illegal. And that was true whether the county had regular township organization or was organized into townships for road purposes. It was also held in that case that under the words "taxes levied for county purposes" are to be included road taxes levied by townships. The court then said, page 598:

> "Plaintiff seeks to avoid the position of defendant by insisting that the road taxes in question were not levies for 'county purposes.' He insists it is for a strictly municipal purpose, and therefore not within the prohibition of section 11, Article X of the Constitution.

In State ex rel. Hirni v. Railroad, 123 Mo. 72, it was conceded by counsel for the relator, that townships in counties not under township organization were mere geographical subdivisions of the county and in no sense corporations, but they insisted that townships under township organization were municipal corporations and a different principle must govern; but this court held that the Constitution made no distinction between counties that might adopt township organization and those that remained under original county organization as to the rate of taxation that should be allowed in each for government purposes, saying: 'The mere change of the mode of administering county governments does not, and can not change the purpose for which taxes are raised to conduct that government, and as the purpose remains the same in each so the limitations must be the same in each. This must be so, or the framers of our Constitution have wrought in vain to limit the expenses of county government, and their whole legislation on this subject may be set at naught. For, to defeat it entirely, it will only be necessary for all the counties of the State to adopt township organization, and the legislature may then authorize them in addition to the taxes allowed by the Constitution for county purposes, to levy township taxes ad libitum. A construction of the Constitution which would thus authorize the defeat of its main purpose can not be entertained for a moment.' "

In the case of State ex. rel vs. Piper, et al., 214 Mo. 439, the Supreme Court of this State en banc in 1908, held that a county having township organization the taxes levied by the township board should be considered as a part of the taxes levied by the county court "for county purposes" and that 80% of the tax levy "for county purposes" go to the county and 20% to the township board, and if the tax levied by the cou t is the maximum rate permitted by the Constitution "for county purposes" the townships can have for road and all other purposes only 20% of the amount levied by the county court, and said, page 444, the following:

> "The effect of a judgment in relator's favor would be to cut down the assessment for general county purposes from thirty-two to thirty in some cases and to twenty-eight and twenty-five in others.
>
> It is not claimed by the relator that the townships have the right, in the exercise of their statutory power, to assess a road tax so as to increase the total county assessment beyond the forty cents, but he contends that the townships may go to the limit of fifteen cents for roads, and in addition make an assessment necessary to defray township expenses, and those assessments being certified to the county court that court must conform to the action of the townships, give them their full road tax and sufficient to pay township expenses, and appropriate what is left of the forty cents, whatever that may be, to general county purposes. That would render the county court, when making provision for the expense of conducting the county affairs, to a

large extent, subordinate to the township boards. That was not, originally at least, the intention of the General Assembly as expressed in the statutes governing this subject, and if the Legislature has ever changed its purpose in that particular, it has not expressly said so, but appellant contends it has so implied.

The Constitution, article 10, section 11, in imposing this limitation on tax assessments used the words, 'For county purposes,' which include in their meaning all subdivisions of the county for the use of which taxes may be imposed. Section 9284, Revised Statutes 1899, quotes these words 'for county purposes' and uses them in the same sense in which they are used in the Constitution. That section is as follows: 'In all counties in this State which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate percent on the one hundred dollars valuation allowed by section 11 of article 10 of the Constitution of Missouri 'for county purposes' then it shall be the duty of the county court to apportion the tax 'for county purposes' between the county organization and the township organization in the following manner, towit: Eighty per cent of the taxes which may be legally levied 'for county purposes' shall be apportioned to the county organization for county purposes, and twenty per cent of such taxes shall be

apportioned to the township organization for the purposes provided by section 10277 of the Township Organization Law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the Constitution.'

Section 10277 referred to in that section is as follows: 'The following shall be deemed township charges: First, the compensation of township officers for their services rendered in their respective townships; second, contingent expenses necessarily incurred for the use and benefit of the township; third, the moneys authorized to be raised by the township board of directors for any purpose, for the use of the township.'

It is contended that section 9284 does not include taxes levied for road purposes. If that is so, then that section means that the county court shall apportion eighty per cent of the total forty cents to general county purposes and twenty per cent to payments to the officers of the township organization as compensation for their services and contingent expenses, thus exhausting the whole tax, leaving nothing for roads. That would be unreasonable. The General Assembly did not intend to enact a statute that would be self-destructive. The meaning of that section is that the county court shall apportion the tax, eighty per cent for general county purposes and twenty per cent for all such township purposes as the township has a right to exercise. This construction does not deprive the township of the right to levy a tax for road purposes, as relator thinks it would, but

but it limits the share that may be apportioned to the township for all its purposes out of the fund to be derived from the forty cents assessment to an amount which will leave sufficient of that fund to furnish the amount estimated by the county court as necessary for general county purposes, and if there is not enough for both the county must have eighty per cent and the township what is left.

Relator also contends that if section 9284 is construed to include road taxes, then the section has been repealed by implication because, he says, it is in conflict with section 10324, Laws 1901, p. 254, which he says is a later law. That act in its title purports to be an act to repeal certain sections of the Revised Statutes of 1899 specifically mentioned and to enact new sections in lieu thereof. Section 9284 is not one of the sections mentioned as proposed to be repealed, but section 10324 is one of them. The section by the same number enacted in the place of 10324, is substantially the same as the one whose place it takes, except that in the former the limit on the road tax which the township board could assess was twenty cents on the $100, in the latter it was cut down to fifteen cents, and in the former fund when collected was to be kept by the township treasurer and paid out only on warrants of the township board, in the latter it is to be paid out only on order of the road overseer. The sole purpose of the repealed section was to give the township board power to levy a road tax and the sole purpose of the section enacted in its place was the same. Section 10324, Re-

vised Statutes 1899, is also sub stantially the same as section 8527, Revised Statutes 1899, which was enacted first in 1883. The two sections, 9284 and 10324, are not at all in conflict; they are not on the same subject, the one confers power on the county court to apportion the total fund arising from the forty cents tax, the other confers on the township board the power to assess a road tax, and the latter was passed in full view of the power then existing in the county court to make the apportionment and it is subordinate to it. The two sections are in the same volume of the Revised Statutes 1899, both promulgated as the law of the State in the same revision. Surely if the General Assembly had intended to say that the one repealed the other, or that the township board had the authority to appropriate to itself one-half of the total tax authorized by the Constitution to be levied for all county purposes, it would not have left so remarkable a purpose to be gathered from so vague an inference. We hold that whether or not the township board in this case had authority to assess the road tax which it did assess, still, the county court had the power to apportion the whole levy in the way it did, giving twenty per cent to the township board to be administered by it, in building its roads and paying its necessary expenses, and reserving eighty per cent to be administered by the county court for general county purposes, and that the township board must exercise the taxing power given to it in subordination to the authority of the county court to make the apportionment required in section 9284."

Section 9875, Revised Statutes of Missouri, 1929, provides as follows:

> "In all counties in this state which have now or may hereafter adopt township organization, if the amount of revenue desired and estimated by the county court for county purposes and the amount desired and estimated by any township board for township purposes shall together exceed the rate per cent. on the one hundred dollars valuation allowed by section 11 of article 10 of the Constitution of Missouri 'for county purposes', then it shall be the duty of the county court to apportion the tax 'for county purposes' between the county organization and the township organization in the following manner, towit: Eighty per cent. of the taxes which may be legally levied 'for county purposes' shall be apportioned to the county organization for county purposes, and twenty per cent. of such taxes shall be apportioned to the township organization for the purposes provided by section 12303 of the township organization law, as specified by the township board; but the combined rate for both the county and township organizations shall not exceed the maximum rate provided by the Constitution."

The above section should be read in connection with Section 12308, Revised Statutes of Missouri, 1929, and provides the proportion of taxes which goes to the township where the county has levied the maximum taxes for county purposes. Section 12308 becomes inoperative if and when the county has levied the maximum rate allowed under the section for county purposes. Section 12308 is only a delegation of the right or authority to

the township to raise the taxes therein specified when the county has not exercised its authority to levy the maximum rate for county purposes. If the county has not exercised its authority to levy the maximum rate for county purposes, then the difference between the rate the county has levied for county purposes and the maximum rate which could be levied for county purposes, is the field within which section 12308 might be invoked.

CONCLUSION

It is our opinion that if the county has levied the maximum rate for county purposes, then the provisions of section 12308 become non-applicable and the rate so levied by the county for county purposes and the proceeds collected because thereof are to be apportioned in the following way: Eighty per cent thereof shall go to the county for county purposes and twenty per cent thereof shall go to the township for township purposes. If the county had not levied the maximum authorized for county purposes by the provision of the Constitution, then the difference between the rate that has been levied for county purposes and the maximum authorized therefor is subject to the operation of the provisions of Section 12308 and within the limits thereof, the township board may levy the rate in said Section 12308 provided.

Yours very truly,

APPROVED:

DRAKE WATSON,
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

DW RV

ELECTIONS: In counties under the township organization plan the county court is limited to one voting place in a precinct unless the court should divide the precinct and make an order setting out the boundary and the name of each precinct.

May 26, 1939

5-31

FILED
38

Hon. Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of March 28th, 1939, which reads as follows:

"Henry County is composed of nineteen townships. For many years in several of these townships there have been two or more polling places for the convenience of the electorate of those townships.

"These townships have not been subdivided into election precincts but the county court has merely established more than one polling place in each township and from time to time has opened or closed such polling places. For example in Osage Township, which is a long narrow township, there are three polling places the same being established at Brownington, Mount Zion and Piney. Residents of this township may vote at any one of the three polling places, the presumption being, of course, that they will choose the one nearest to them and vote at only one of them.

This township has not been sub-divided into three precincts.

"I note Section 10189 R. S. 1929 provides that the various county courts have the power to divide any township into two or more election districts or to establish two or more election precincts in such a township; or alter the same when deemed for the convenience of inhabitants. It occurs to me that the intent of the law is, there be only one polling place for one precinct and that if there is a necessity for more than one precinct or district in a township that such a township should be divided into districts so that the judges and clerks of the polling places of that district will be in a position to permit balloting only by residents of that district.

"We are not concerned with any question of fraudulent voting by reason of this situation and I have not heard of any complaints with respect to that matter. However, it is obvious that such a situation could be abused in that residents of this township could cast ballots in three polling places. My purpose in writing you is to obtain an opinion as to whether or not there should be created more than one polling place in a township unless that township is divided into two or more districts or precincts. There are several townships in this county which by reason of their size probably should be sub-

> divided. However, most of the townships can be adequately served by the establishment of one polling place.
>
> "My county court is contemplating some alteration with respect to these polling places in the county and we should like very much to have an opinion from your office on this question."

Section 10192, R. S. Mo., 1929, reads as follows:

> "The place of holding the elections shall be designated, and the judges and clerks of election appointed in such districts or for such election precincts, and the elections therein shall be conducted, in all respects, in the same manner as is hereinafter provided by law for the townships."

This section provides that the holding of an election shall follow the manner and procedure as set out by law for the holding of an election in a township. Henry County is operating under the provisions of the township organization law.

Section 12255 R. S. Mo. 1929, reads as follows:

> "The clerk of the county court shall thereupon make out notices for each township, designating the time and

> place for holding the first township election in such township, which shall be holden on the last Tuesday in March next thereafter, and shall deliver such notices to the sheriff of the county, who shall cause the same to be posted up in not less than three of the most public places in the township, and not less than fifteen days before the last Tuesday in March; and the township clerk shall post up notices of all subsequent elections, as directed by the township board of directors."

This section is under article 12, chapter 86, which governs the adoption of township organization, and it will be noticed that this section does not designate more than one place for holding an election in any one township. This section should be strictly construed and it will be noticed further that it does not say "places" for holding the first township election, but states specifically "place" for holding the first township election.

Section 12275 R. S. Mo. 1929, reads as follows:

> "Each township acting under township organization may be divided into as many election precincts by the county court as the court may think the convenience of the electors requires; and the judges of all elections held for township purposes shall be appointed by the township board; but if said

> board should fail to appoint judges, or if any of the judges appointed should fail or refuse to serve, or not be present by eight o'clock on the day of election, then the electors present shall have power to choose from their number men to act as said judges. The judges of election shall have power to appoint two clerks of said election. The judges and clerks shall be sworn and the election conducted in like manner as elections for state and county officers, except as provided in this chapter."

Under this section the county court may divide any township into more than one precinct or district for the purpose of holding an election. This section should be construed along with section 10189 R. S. Mo. 1929, which reads as follows:

> "The county courts of the several counties in this state shall have power to divide any township in their respective counties into two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

Under section 10189, supra, the county courts shall have the power to divide any township into two or more election districts.

Section 10190 R. S. Mo. 1929, reads as follows:

> "Every order made under the provisions of the preceding section shall describe the several districts erected, and the boundary of each, or the precincts established, and the name of each; and the clerk shall, within twenty days after the making of the order, make out one copy thereof for each district erected or altered or precinct established thereby, and deliver the same to the sheriff of the county, who shall cause one such copy to be put up at a public place in each district, or at each precinct, within six days after the same shall be delivered to him."

Under this section, after the county court has divided the township into two or more election districts, it is mandatory that the several districts set out dividing the township should also set out the boundary of the district or precinct, and also should set out the name of each precinct.

Section 10191 R. S. Mo. 1929, reads as follows:

> "If the court fail to designate the place of holding the election or to appoint judges, or the judges appointed fail to act, it shall be the duty of the sheriff to fix the place, and the voters, when assembled, may appoint the judges."

This section is not mandatory, but directory, in that if the section was not followed, it would not

invalidate any election held. It was so held in the case of Breuninger v. Hill, 210 S. W. 67, l.c. 71, where the court said:

> "There is no general statute prescribing the manner in which polling places shall be fixed by the county courts of the several counties. The nearest approach thereto is found in the authority conferred upon such courts to establish election precincts. Sections 5801, 5802, R. S. 1909. The succeeding section (5803) impliedly confers upon them the power of fixing the polling places in providing that, upon their failure so to do, the same may be designated by the sheriff. The election here under review, having been held throughout Buchanan county, was not to be regulated by the statute regarding elections in cities of the first class. This question, however, is foreclosed for another reason: That all elections in cities of the first class, of which St. Joseph is one, are required to be held under the general laws of the state. Section 8564, R. S. 1909. Consequently, in construing the statute (Laws 1917, supra) authorizing a county court to submit a proposition to voters for the creation of an indebtedness for the building of roads, we are not confronted with a mandatory statute in regard to the fixing of the polling places, a violation of which would render the election invalid. *
> * * * * * * * * * * * * * * * * * *

> "We have given express judicial approval to the conclusion we have here reached, first, in State ex rel. Canton v. Allen, 178 Mo. loc. cit. 576, 77 S. W. 868, in which we held that where there was no pretense that the election was fraudulent, or that it was not the expression of the will of the people, a change in the polling places was nothing more than an irregularity, and should not be held to invalidate the election (citing cases). This ruling has been subsequently affirmed in the recent case of State ex rel. Memphis v. Hackman, 273 Mo. loc. cit. 695, 202 S. W. 7."

Section 10195, R. S. Mo. 1929, reads as follows:

> "Poll books for each district or election precinct shall be made and furnished to the judges of election therein, in the same manner as hereafter provided in respect to poll books for each township, and returns shall be made to the office of the clerk of the county court, as in the case of a township forming one election district."

All of the statutes as above set out should be read together in construing the intention of the Legislature in their enactment, and in reading section 12255, supra, section 10189, supra, and section 10195, supra, together, it was the intention to provide one place of election in each township. It was also the intention if voting was held in more than one place in a township, section 10189, supra, section 10190, supra and section 10191, supra, should be followed.

CONCLUSION

In view of the above authorities it is the opinion of this department that although the county court of Henry County has allowed election places to be established in three different places of a township, without dividing the township into two or more election districts, that any election so held was not invalid under the holding of the case of Breuninger v. Hill. Nevertheless, it is the opinion of this department, in view of your request, that the county court should follow sections 10189 to section 10192, inclusive, in dividing the townships so that there would be no question on any election in the near future.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

SOCIAL SECURITY, APPEALS: A procedural statute is applicable to actions which have accrued or are pending as well as to future actions.

June 2nd, 1939.

6-3

FILED
38

Hon. George I. Haworth,
Administrator,
State Social Security Commission,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of June 1st, 1939, which reads as follows:

> "The Sixtieth General Assembly has enacted Senate Bill Number 31 which repealed and re-enacted Section 16 of the State Social Security Law. A number of appeals to this Commission were pending at the time Senate Bill 31 was enacted. There were also several cases pending in the circuit and appellate courts.
>
> " Question: What law should govern the actions pending at this time? The statute in effect at the time the appeal was granted or the newly enacted statute?
>
> "The Federal Social Security Board has made inquiry as to the manner in which litigation pending at the time of passage of Senate Bill Number 31 is to be handled, and we would appreciate receiving an opinion from you on the above question at your earliest convenience."

Your inquiry requires a careful consideration of Section 16, page 475, Laws of Missouri, 1937, which was the provision for appeal before same was amended by the Sixtieth General Assembly. Senate Bill No. 31 as passed by the present General Assembly carries an emergency clause, and the same has been signed by the Governor and is now the law in this state. Section 16, Laws of Missouri, 1937, p. 475, reads as follows:

> "If an application is not acted upon within a reasonable time after the filing of the application, or is denied in whole or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions or old age assistance, or aid to dependent children, may appeal to the State Commission in the manner and form prescribed by thethe State Commission. The State Commission shall upon receipt of such appeal give the applicant reasonable notice of and opportunity for a fair hearing. The State Commission shall determine all questions presented by the appeal. Any applicant aggrieved by the action of the State Commission in the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of his or her judicial circuit within ninety days from the decision appealed from, by giving the State Commission notice of such appeal. Such appeal shall be tried in the circuit court de novo on the sole question of whether the applicant is entitled to benefits

and not as to the amount thereof, and the circuit clerk shall notify the State Commission of such decision. If the judgment be in favor of the applicant, a certified copy of same shall be mailed to the State Commission. Appeals may be had from the circuit court as in civil cases."

Senate Bill No. 31, Section 16, reads as follows:

"If an applicant is not acted upon within a reasonable time after the filing of the application or is denied in whole, or in part, or if any benefits are cancelled or modified under the provisions of this Act, the applicant for pensions, or old age assistance, or aid to dependant children, shall be notified at once and may appeal to the State Commission, said appeal from the State Administrator to the State Commission shall be filed in the office of the secretary of the county commission by the aggrieved applicant within ninety days from the date of the action and decision appealed from. Proper blank form for appeal to the State Commission shall, upon request, be furnished by the county office to any aggrieved applicant and every such appeal to the State Commission shall be certified and transmitted by the county office to the State Commission within ten days after same is filed with the county office. The State Commission shall upon receipt of such an appeal give the applicant reasonable notice of, and opportunity for, a fair and speedy hearing in the county of the residence of the applicant. Every applicant on appeal to the State Commission shall be entitled

to be present, in person and by attorney, at the hearing, and shall be entitled to introduce into the record at said hearing any and all evidence, by witnesses or otherwise, pertinent to such applicant's eligibility as defined under the provision of Sections 11 and 12 of this act and all such evidence shall be taken down, preserved and shall become a part of the applicant's record in said case, and upon the record so made the State Commission shall determine all questions presented by the appeal. Any applicant aggrieved by the action of the State Commission by the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of the county in which such applicant resides within ninety days from the date of the action and decision appealed from. The State Commission, upon a denial of benefits to the applicant, shall, upon request, furnish said applicant with proper form of affidavit for appeal from the said Commission to the Circuit court of the county in which the applicant resides. Upon the affidavit for appeal, duly executed by the applicant before an officer authorized to administer oaths, being filed with the State Commission within ninety days from the date of the said Commission's decision denying benefits to said applicant, the entire record preserved in the case at the time of the applicant's hearing, together with the appeal, shall, by the State Commission,

be certified to the circuit court of the county in which the applicant resides and said case shall be docketed as other civil cases except that neither party shall be required to give bond or deposit any money for docket fee on appeal to the Circuit Court. Such appeal shall be tried in the circuit court upon the record of the proceedings had before and certified by the State Commission, which shall in such case be certified and included in the return of the State Commission to the court. Upon the record so certified by the State Commission, the circuit court shall determine whether or not a fair hearing has been granted the individual. If the court shall decide for any reason that a fair hearing and determination of the applicant's eligibility and rights under this act was not granted the individual by the State Commission, or that its decision was arbitrary and unreasonable, the court shall, in such event, remand the proceedings for redetermination of the issues by the State Commission. Appeals may be had by either party from the circuit court upon the record in the same manner as provided herein for appeals from the State Commission to the Circuit Court and all appeals to the Circuit and Appellate Courts shall be advanced on the docket of said Courts for immediate hearing and determination. In no event when appeal is taken shall any person's name be removed from the rolls of public assistance under this act, until the case has been heard and determined by the State Social Security Commission. The file and record of

> every person whose name is duly entered upon the public assistance rolls of this state shall, at all reasonable times, be open to inspection by such individual and to any representative of such individual."

This request only goes to the proper manner of procedure on appeals, where litigation was commenced under the former provision and was pending when the amendment became effective.

Under the common law there was no right of appeal. Therefore, in the absence of any constitutional or statutory right of appeal, there is none.

3 C. J., Section 29, page 316, reads in part as follows:

> "The proceeding by appeal was entirely unknown to the common law. It is of civil-law origin, and was introduced therefore into courts of equity and admiralty. Consequently, the remedy by appeal in actions at law, and in this country in equity also, is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision."

The General Assembly may, in its discretion, take away this remedy or modify same. Section 30 of 3 C. J., page 318, reads as follows:

> "Where the remedy by appeal is not secured by the constitution, but is purely statutory, it is subject to the control of the Legislature, which may, in its discretion, grant or take away the

> remedy, and prescribe in what cases, under what circumstances, in what manner, and to or from what courts, appeals may be taken. It follows that the substantial requirements of statutes authorizing appeals must be complied with by parties wishing to avail themselves of the right conferred. But the legislature, of course, in taking away or regulating the right of appeal, can pass no valid act in conflict with constitutional provisions securing the right. When, however, the constitution merely recognizes the right of appeal or even defines the appellate jurisdiction of the supreme court, appeals are nevertheless creatures of statute and, in the absence thereof, do not exist, although in the latter case it has been said that the legislature cannot unreasonably restrict the right."
> (See Western Tie & Timber Co. v. Naylor Drng. Dist. 126 S.W. 499, l.c. 505, also Lacutt v. Toohey's Estate, 89 S.W. (2), 662.

In this state the law is well established and so long as one's rights are not impaired, the General Assembly may change the remedy without violating any constitutional amendment pertaining to enacting laws of a retrospective character.

In Lovell v. Davis, 52 Mo. App. 342, l. c. 345, 346, the court held that an appeal should follow the Act of 1891, which became effective subsequent to the commencement of this litigation. In so holding the court said:

"It appears from the record in the cause that, between the institution of the suit and the trial, the said act of 1891 took effect and became operative. It is contended by the defendants that the appeal was not authorized in this case by the said act of 1891, and that in order to make the act applicable a retrospective operation must be given to it which is forbidden by the constitution. We do not think this contention can be maintained. The act is remedial in its scope and character. It allows an appeal to be taken from the action of a court in granting a new trial which before its enactment was not allowed under our code of procedure. That the general assembly may change the remedy in such cases there can be no doubt. Judge Cooley in his Constitutional Limitations says: 'As a general rule every state has complete control over the remedies which it offers to suitors in its courts. It may abolish one class of courts and create another. It may give a new and additional remedy for a right already in existence. And it may abolish all remedies and substitute new.' It is always within the power of the state to change the remedy so long as it does not essentially affect the right embodied in the contract, and that such change thus made does not infract the rule forbidding the impairment of contracts.

"In Hoffman v. Quincy, 4 Wall. 535, it was declared by the Supreme Court of the United States that it is competent for the states to change the

> form of the remedy or to modify it otherwise as they may deem fit, provided no substantial right secured by the contract is thereby impaired. That provision of the bill of rights which prohibits the legislature from passing any law retrospective in its operation extends only to prohibiting legislation of a retrospective character which disturbs rights of a private nature. State v. Kemper, 9 Mo. App. 532; Ins. Co. v. Hill, 86 Mo. 466; State v. County Court, 34 Mo. 546; State v. Hager, 91 Mo. 452; Porter v. Mariner, 50 Mo. 364; Willshear v. Kelly, 69 Mo. 363; Ins. Co. v. Flynn, 38 Mo. 483; Bolton V. Lansdown, 21 Mo. 399; Tennessee v. Sneed, 96 Otto (U.S.) 69. It is too plain for argument that no vested right is taken away or impaired by the act, nor does it impair the obligation of any contract, so the defendants' objection is without force."
> (See also Sheehan v. The Southern Ins. Co. 52 Mo. App. 351.)

In Aetna Insurance Company v. Hyde, 315 Mo. 113, l. c. 127, the Superintendent of Insurance ordered a rate reduction in fire insurance in October, 1922. In November, 1922, several insurance companies filed their petition in the circuit court to review the order and set the same aside. The superintendent of insurance promulgated this order under sections 6283 and 6284, R. S. Mo., 1919. Subsequent to the filing of the petition in the circuit court, the legislature amended these statutory provisions under which the Superintendent of Insurance issued his order. These amendments became the law in June, 1923. The Supreme Court in holding the laws as amended were applicable to this case, had this to sayd:

> "The plaintiffs contend that the Act of 1923 is not applicable to this case because the act went into effect in June, 1923, long after the order of the Superintendent was made. The referee held that those provisions in the Act of 1923 set out above only related to the remedy, did not affect any vested right, and therefore were applicable to the case in hand.
>
> "No doubt the referee was right in his statement of the law. A new enactment which only affected the remedy, has no effect upon vested rights, does not impair the obligation of contracts and may control in the decision of a case. (Gladney v. Sydnor, 172 Mo. l. c. 324; Clark v. Railroad, 219 Mo. l. c. 533.) Such an act does not offend against the constitutional restriction that no law retrospective in its operation can be passed by the General Assembly. (Sec. 15, Art. II, Mo. Const.)."

The above decision clearly indicates that so long as the new provision does not affect any vested right and does not impair obligation of contracts, it shall be controlling in the decision of the case. This new amendment merely goes to the procedure and does not violate any right.

In Aetna Insurance Company v. O'Malley, 118 S. W. (2d), 3, l. c. 8, the court, in holding a new statute dealing with procedure only, prima facie it applies to all actions, those pending and future, said:

"It is true that section 5874 was not in effect when the review action was brought. The review action was brought on November 10, 1922. The effective date of section 5874 was June 25, 1923. Although section 5874 was not in effect when the review action was brought, its applicability to that action depends upon whether ornot it is a procedural statute. If it deals with procedure only, it was applicable to and should have governed the case from its effective date, June 25, 1923. The rule governing the applicability of procedural statutes under such circumstances is stated by this court in Clark v. Railroad, 219 Mo. 524, 534, 118 S. W. 40, 43, as follows: 'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, prima facie it applies to all actions - those which have accrued or are pending and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.' "

Therefore, in view of the above and foregoing, it is the opinion of this Department that the statutes in question being nothing more than procedural statutes, that Senate Bill No. 31 as passed by the Sixtieth General Assembly applies to pending litigation as well as litigation in the future.

Yours truly,

AUBREY R. HAMMETT, JR.
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

ARH Jr/rv

COUNTIES: May not impose a tax on skating rinks under Section 14323, R. S. Mo. 1929, unless performances or exhibitions of professional skill are given.

July 14, 1939

7-15 FILED 38

Mr. Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Mr. Hassett:

We acknowledge your letter of July 8th, as follows:

"The County Court of Henry County has been levying a tax at the rate of seventy-five cents per day upon skating rinks in this county on the theory that they are public exhibitions within the meaning of Section 14323, R. S. 1929. There have been some objections to the assessment of this tax on the part of the skating rink proprietors and at the request of the County Court I am seeking your opinion as to their right to levy such a tax.

You will note that Section 14327, relating to counties having a population of fifty thousand or more provides specifically that such a tax may be collected on roller rinks. There is no specific statement of this nature in Section 14323 which applies to all counties of the state. It occurs to me that it could be asserted in as much as 14237 permits a tax on roller rinks, 'or any other kind of public exhibitions' that this is a legislative declaration that roller rinks are public exhibitions and that therefore a tax may be levied against roller rinks in counties of this size as being public exhibitions within the meaning of 14323.

> We would appreciate an opinion from your office with respect to (1) the power of the court to assess such a tax, and (2) the reasonability of the amount of seventy-five cents a day. The court has not set a monthly or annual rate of taxation and would like your suggestion as to whether or not they should do so."

Henry County, according to the last decennial census, contains a population of 22,931.

Section 14323, R. S. Mo. 1929, provides that:

> "The county courts of the several counties in this state are hereby authorized to impose from time to time, by an order or orders entered of record, such tax as they may deem proper and reasonable upon all public theatrical and minstrel performances, shows and circuses, or any other public exhibition in said several counties: Provided, that nothing in this section shall be so construed as to apply to any educational, religious or charitable exhibition."

The first question to be determined is whether the words "public exhibition" are broad enough to include a skating rink so as to permit the imposition of a tax by the county court under Section 14323, supra.

37 C. J., Section 15, p. 175, in discussing the power of counties to impose license and occupation taxes, states in part:

> "The power of requiring licenses and imposing license and occupation taxes may be delegated by the legislature to political subdivisions or agencies of the state, such as to counties * * *. In such cases, the power to license or tax is not inherent, but is wholly dependent upon, and limited by, the statute delegating the power; and will not be implied from a power to tax property. Statutes delegating such power are to be construed

> strictly; and when the occupations which may be taxed are enumerated in the statute, the power to tax others is denied by implication."

In the case of Harris v. Commonwealth, 81 Va. 240, l. c. 242, 243, appellant was accused and convicted of unlawfully keeping and maintaining "a certain public performance called a skating rink" without a license.

The statute provided in part:

> "No person shall, without a license authorized by law, exhibit for compensation any theatrical performance, or any performance similar thereto, panorama, or any public performance or exhibition of any kind, lectures, literary readings and performances, except for benevolent or charitable purposes * * *."

The court, in observing that skating rinks were not enumerated in the statute, and consequently could not be brought within it unless it could be shown that actual performances or exhibitions of professional skating were given, said:

> "Now, it will be observed that skating rinks are not enumerated in the statute, and consequently cannot be brought within it, unless it is clearly shown that they are so conducted as to be properly 'public performances or exhibitions.' And this is to be determined by the jury on the particular facts of each case, under suitable instructions from the court as to the law. But here the evidence shows that no performance of any kind was offered to the public except on extraordinary occasions when exhibitions of professional skating were given, and then the license tax was paid as required by law. On ordinary occasions admission fees were charged merely for the privilege of skating; and for this

> no license tax is imposed. And if of those persons who paid for this privilege, some preferred, after entering the hall, to witness rather than to participate in the skating, a liability cannot, for that reason, be imposed on the accused, to which he would not have been subject had all chosen to exercise the privilege for which they had paid. In other words, it is clear that the liability of the accused to prosecution, for not taking out a license, cannot be made to depend upon the course pursued by the patrons of the rink after their admission thereto.
>
> Moreover, if it can be justly said that on ordinary occasions there was any public performance, because of the fact that some of those who visited the rink were mere spectators of the exercises, it certainly cannot be said that such performance was exhibited by the accused. For those whose movements were witnessed by the spectators were not agents or employees of the accused, or in any way subject to his control; but were persons who resorted thither for their own pleasure or amusement, and not for the purpose of exhibiting themselves or their skill to the others. In short, we are of opinion that, according to the strict construction which must be given to the statute, the present case is not within its provisions.
>
> If, in the judgment of the legislature, a license tax ought to be paid, under all circumstances, for the privilege of conducting a skating rink for compensation, it is competent for that body, by altering the statute, to so provide. We can only construe it as it is."

You point out that under Section 14327, R. S. Mo. 1929, relating to counties having a population of fifty thousand or more, roller rinks are specifically mentioned, and, therefore, that this demonstrates a legislative declaration that roller rinks are public exhibitions.

> "The county court of every county in this state having a population of fifty thousand inhabitants or more, and lying adjacent to cities that now have or that may hereafter have a population of three hundred thousand inhabitants or more, and the county court of all counties which now have or which may hereafter have a population of not less than one hundred fifty thousand inhabitants and not more than five hundred thousand inhabitants, shall, at the May term of the county court of each year, impose, by an order entered of record, a license tax, such as the court may deem proper and reasonable, upon all theatrical or minstrel performances, exhibits, shows, circuses, menageries, roller rinks, or any other kind of public exhibitions; also scenic or gravity railways, cane racks, shooting galleries, baby racks, knife boards, or any other kind of avocations, set up in connection therewith; and it shall be unlawful for any person, association, company, corporation, or copartnership of persons (except if the same be for religious, educational or charitable purposes, then it shall be exempt from such license tax), to give, perform or present, exhibit or set up any theatrical or minstrel performances, exhibits, shows, circuses, menageries, roller rinks, or any other kind of public exhibitions, or scenic or gravity railways, cane racks, shooting galleries, baby racks, knife boards, or any other kind of avocations, set up in connection therewith, without first taking out a license therefor from the county clerk and paying the license tax imposed by the county court, as aforesaid, which shall be paid into the county treasury for the use of the general revenue fund of the county * * *."

The answer to such suggestion is, of course, that the legislature has under Section 14327, supra, specifically conferred the power to license skating rinks.

From the foregoing, we are therefore of the opinion that absent a showing that the skating rink is giving performances for exhibitions of professional skill, the county court of Henry County has no power to levy a tax upon skating rinks under Section 14323, R. S. Mo. 1929, on the theory that they are public exhibitions. Having no authority to impose a tax, your second question obviously need not be considered.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

CANCER HOSPITAL: Cancer Commission proper party to execute contract of bailment with Federal Government.

August 16, 1939

8-18

FILED
38

Miss Dorothy A. Hehmann
Executive Secretary
Missouri Cancer Commission
3713 Washington Blvd
St. Louis, Missouri

Dear Miss Hehmann:

We have your letter of the 11th in which you submit copy of a proposed contract to be entered into between the United States on the one part and some agency representing the Cancer Commission on the other, and in which you ask the opinion of this office as to who should sign the contract on behalf of the Commission.

The proposed contract obligates the bailee therein named, among other things, to be responsible for the safekeeping of radium and containers being loaned to the State of Missouri by the United States to be used in connection with the treatment of cancer, and to replace any radium or containers lost or damaged. Therefore, the contract should be signed by some person or agency which can carry out these provisions, including the provision for replacing radium or containers lost or damaged.

Section 2, page 496, Laws of Mo. 1937, reads as follows:

> "The Cancer Commission of the State of Missouri is hereby empowered and directed to establish a hospital to be known as the State Cancer Hospital."

Section 6, page 496, Laws of Mo. 1937, reads as follows:

> "The Cancer Commission of the State of Missouri shall make all necessary rules and regulations for the conduct and discipline of the State Cancer Hospital."

While Section 1 of the act creating the Cancer Commission (page 496, Laws of Mo. 1937), authorizes the Commission to appoint an Administrator to have charge of the operation and conduct of the Cancer Hospital, yet the primary duty of establishing the hospital and maintaining it and directing its policies rests with the Cancer Commission. In actual practice, the Administrator would be the one who would be responsible for the radium being loaned to the institution by the United States, but in case of loss or damage to the radium or containers, the Cancer Commission would be the agency which would have to make good such loss or damage.

CONCLUSION

It is, therefore, the opinion of this office that the Cancer Commission is the proper party to execute the contract of bailment with the United States covering the loan and use of radium in the cancer hospital at Fulton. Such execution should be effected by the signature of such officers as the Cancer Commission may, by resolution, authorize to execute the same on its behalf. Normally the president and secretary of the Commission would be the logical parties to execute the contract.

Yours very truly

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

OFFICERS: Not liable for tax illegally collected if done in good faith and paid over into the County Treasury.

August 21, 1939

8-22

FILED
38

Honorable Charles E. Hassett
Prosecuting Attorney
Henry County
Clinton, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of August 18, 1939, as follows:

> "I have an opinion from your office under date of July 15, 1939, prepared by Max Wasserman, holding that Henry County has no power to levy a tax upon skating rinks on the theory that they are public exhibitions.
>
> In 1938 the Henry County Court levied a tax in the amount of 75¢ per day upon skating rinks, and continued to assert the right to collect such a tax up to the time of receipt of the opinion.
>
> One of the operators through his attorney, Maurice J. O'Sullivan, has made demand upon our Constable, County Clerk and County Treasurer for the return of the amount of $117.75, being the amounts paid for such license fees, and threatening action upon the bonds of these officers unless the same is repaid.
>
> Enclosed herewith is a copy of the letter sent each of the above officers.
>
> At the request of these officers I am writing you for an opinion with respect to any liability they might have on their official bonds. It is my impression of the law that a voluntary payment

> of tax or license fee cannot be recovered. This letter asserts some compulsion on the part of the officers. However, the County Court entered an order of record setting the amount of such license fees and the same were collected pursuant to this order of court. It is my impression also that the officers are protected by the court ordering it made.
>
> I would appreciate an opinion from your office with respect to this matter at your early convenience."

With respect to the recovery of taxes illegaly collected by officers, 26 R. C. L. declares that:

> "This action may be maintained against the collector as long as the money remains in his hands, or if he has notice of the claim while the money is still in his hands, but after he has in good faith paid it over to the treasurer of the body politic for which he is acting he is no longer liable, and the action is more commonly brought against the county, city or town into the treasury of which the tax has been paid."

See also Seaboard Air Line Railway Co. v. Allen, 82 Fla. 191, 89 So. 555, l. c. 558; and 60 C. J. Sect. 1279, p. 1001.

If the taxes were paid voluntarily, the owner of the skating rink would not be entitled to a refund of same. Robins v. Latham, 134 Mo. 466, l. c. 473. However, irrespective of whether same was paid voluntary or involuntary, if it can be shown that the county officers acted in good faith in the collection of the tax and paid it over into the county treasury, they would not be liable.

In the case of State ex rel. v. Reynolds, 270 Mo. 589, l. c. 601, 602, the Supreme Court of Missouri en banc, in an action to recover taxes illegally collected, stated the liability of the officers as follows:

"In this kind of a situation, we think the rule announced in Lewis County v. Tate, 10 Mo. 651, is applicable. It is there said:

'The money thus collected was paid over into the county treasury. Whatever may be the liability of the county, and of this we are not authorized to give any opinion, it is clear that the collector is not liable. Where money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back.'

In Mechem's Public Offices and Officers, sec. 694, it is said:

'Where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it, but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, although it appears that he acted under an authority which was void.'

In Cooley on Taxation (3 Ed.), p. 1482, it is further said:

'But in general, if the money, though actually collected by compulsion, is paid over to the proper receiving officer before suit brought, the collector is protected, and this principle has been applied to cases in which the officer's authority was void for unconstitutionality or other reason.'

This rule is supported by many cases found cited under the text, and we think it the safe rule."

From the foregoing, we are of the opinion that the constable, the county clerk and the county treasurer of Henry County, and their sureties, are not liable for a

tax illegally collected from skating rinks if same was collected in good faith and has been paid over into the county treasury.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

COURTS:
DOCKET FEES AND USE OF: Circuit court, in absence of statutes authorizing same, may not make a rule requiring that a portion of the filing fee be used for maintaining the library of the court.

September 30, 1939

10-3 FILE 38

Mr. Frank W. Hayes
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the following:

> "Will you please, therefore, advise us whether in your opinion the Circuit Judge, under his power to fix the filing fee and make rules governing his court, would have the power to designate that a portion of the filing fee might be used for the purpose of maintaining a library for the use of its court, its officers and the local bar, or whether it would be necessary to have similar legislation passed as is referred to above."

We take it from your request that the court proposes to make an order providing for an additional amount of deposit for costs in each case filed and then require that a part of this deposit be used for the upkeep of the court library.

The deposit has been treated as costs of the suit. If this plaintiff prevails in the action, the deposit is returned to him, but if he loses, then it is applied in payment of the costs.

In the case of The City of St. Louis v. Meintz et al., 107 Mo. 611, 615, the Supreme Court, in discussing costs and fees and when the same may be taxed, said:

> "* * * The word costs, when used in relation to the expenses of legal preceedings, means the sum prescribed by law as charges for the services enumerated in the fee bill. Apperson v. Ins. Co., 38 N. J. L. 389. As between a party to a suit and the officer or witness, the charges allowed are usually denominated fees; but as between the parties to the suit these charges are usually called costs. Thus our statute makes it the duty of the clerk of the court to subscribe all bills of costs agreeably to fees which shall be allowed by law. R. S. 1889, sec. 2940. Costs are creatures of the statute, and can only be allowed and taxed when and in the amount authorized by statute. * * * * * * * * * * * * * * "

In the case of Shed v. Kansas City, St. Joseph & Council Bluffs Railroad Company, 67 Mo. 687, 690, the court said:

> "* * * The rule is that all statutes in reference to costs must be construed strictly, and that an officer cannot legally claim remuneration unless the state has expressly conferred the right. * * * * * * * * * * "

While the amount of the deposit which the court proposes to be set aside for the library may not be termed strictly as costs or fees, yet insofar as the litigants are concerned it is costs to them in connection with the suit. If it is cost to them, then we think the rule announced in Shed v. Kansas City, St. Joseph & Council Bluffs Railroad Company, supra, should be applied.

Your letter indicates that such an order might be made by the court by virtue of its powers to make rules governing the court, and you refer to the Supreme Court requiring a docket fee for each case. We have inquired of the Clerk of the Supreme Court and find that

none of that docket fee is set aside for the library. By referring to the appropriations, you will find that the appropriation of the Sixtieth General Assembly, Laws of Missouri, 1939, page 48, provided Fifteen Thousand Dollars ($15,000.00) for books and supplies for the court and library, so none of the docket fee is used for the library.

You refer in your letter to the Acts of 1935 and 1937, which authorized a part of the deposit to be used for the library. It is significant that the lawmakers, by the Act of 1935, page 221, provided for an additional One Dollar ($1.00) for the costs of a suit which was to be used for the maintenance of the library. This act applied to Buchanan County. The Act of 1937, Laws of Missouri, 1937, page 219, made the same provisions for a deposit for the library in Jasper County. Because of the fact that these two acts have been passed, it seems that the authority to require such deposit could be acquired only from the Legislature. The lawmakers, in these acts, have made it possible for this additional deposit to be made in each case and used for the library by terming such deposit as costs of the case. Following the rule which is recognized by the foregoing statute, it does not appear to us that a court would have authority to make a rule requiring such deposits. However, the courts have inherent powers to make some rules. In Volume 15 C. J., page 901, Section 276, the rule is stated as follows:

> "While courts are very generally authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, a court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make such rules. This power is, however, not absolute but subject to limitations based on reasonableness and conformity to constitutional and statutory provisions. Thus a court cannot make and enforce rules which are arbitrary, or unreasonable, or uncertain

> in their operation, which deprive a party of his legal rights, or which contravene any constitutional or statutory provision or principles of general law.
>
> "It is sometimes required by statute that the judges of courts of coordinate jurisdiction throughout the state shall meet at certain intervals to establish uniform rules.
>
> "Special rules for particular cases may sometimes, under statutory authority, be made when justice so requires, although the effect may be to exempt such cases from the operation of the ordinary rules of court. But on the other hand, it has been held that courts have not inherent power to extend an existing practice to meet a particular situation or to create a new procedure without legislation."

At page 904, Section 278 of Volume 15 C. J., on the question of matters subject to regulation by court rules, the rule is stated as follows:

> "Only such matters as are not regulated by general or special laws in reference to practice and procedure may be regulated by a rule of court. * * "

We hardly think that a rule of court requring a litigant to pay for the library which is used by the court would come within the class of rules permitted by the foregoing rule stated in 15 C. J.

Since the lawmakers, by the Acts of 1935 and 1937, supra, have attempted to regulate this branch of the procedure in certain counties, then we think it has been generally recognized that the power to make such rules is only acquired from the Legislature.

CONCLUSION.

From the foregoing it is the opinion of this department that the circuit judge would not be empowered to designate that a portion of the filing fee deposited as costs in a suit in his court could be used for the purpose of maintaining a library for the use of that court, its officers, and the local bar without legislation authorizing the same.

Respectfully submitted

TYRE W. BUTTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION & REVENUE: County assessor has no legal authority to assess property at twenty per cent less than its actual value. State Board of Equalization to equalize taxes. Mandamus is the remedy to compel actual value assessment.

November 9, 1939

11-10

FILED
38

Honorable Ellsworth Haymes
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

This Department is in receipt of your letter of October 27th, wherein you make the following request:

"The assessor in this county (Webster) published a notice in a paper when he started his assessing for this year, stating that he was reducing the valuation of all farm lands 20%. While much of the farm land in this county is over assessed, there is quite a bit of it which is undervalued. While I have no doubts that this is an erroneous method of assessment, I have been unable to find a satisfactory remedy for the county. I would like to have your advice as to how to proceed to force the assessor to value the property at its actual value.

"Also would like to ask you a question regarding the raise in salary of Prosecuting Attorney's and County Clerks. In many adjoining counties these two officers have drawn their raise from the 22nd day of September. However I have advised the Court that we were not entitled to the raise until November because they are denominated as revision bills. Please tell me if I am correct in that assumption."

Under Section 9792, R. S. Mo. 1929, the pertinent part of which is as follows:

> "The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation,"

it is the duty of the assessor to assess property at its true value.

It is the duty of the assessor under Section 9800, R. S. Mo. 1929, to make and return to the county court, on or before the 20th day of January in every year, a fair copy to the assessor's book, verified by his affidavit annexed thereto "that, so far as he has been able to ascertain the same, it is correctly set forth in the foregoing book, in the manner and the value thereof stated therein, according to the mode required by law."

Under Section 9812, R. S. Mo. 1929, the board of equalization in each county has certain powers relative to fixing the valuation of taxable property in the county, with the proviso, "that said board shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by said state board of equalization."

It was held in the case of State ex rel. v. Bethards, 9 S. W. (2d) 603, that the county board of equalization is authorized to hear complaints and equalize valuation, but has no power to assess; and it was also held in the case of Terminals v. Koeln, 3 S. W. (2d) 1021, that the value of the property to be assessed, by the assessor or board of equalization, is not conclusive on the state board of equalization.

A decision bearing on the statutes which we have heretofore mentioned is that of Bank of Carthage v. Thomas,

330 Mo. 19, l. c. 29, wherein it was held as follows:

> "Section 9792, Revised Statutes 1929, commands the assessor to 'value and assess' all property 'according to its true value in money.' 'The "values" mentioned in the statutes are the valuations of the officials whose duty it is to make them . . . The requirement of section 12802 (Sec. 9792, R. S. 1929), that the assessor assess the property at its true value in money, means nothing more than that such true value is his estimate, his valuation.' (State ex rel. Thompson v. Bethards, 320 Mo. 1164, 9 S. W. (2d) 603.) The law contemplates that, in accordance with Section 9792, Revised Statutes 1929, the assessor did 'value and assess' the personal property of each of the plaintiff banks at what he judged, considered or deemed to be its true value in money. But such valuation is not a final and conclusive determination of the true value of the property for the statute, Sections 9812 and 9813, Revised Statutes 1929, provides that the county board of equalization in equalizing 'the valuation and assessments' upon all property within the county 'shall raise the valuation' of any property 'such as in their opinion' has been returned below its 'real value' and 'reduce the valuation' of any property 'which in their opinion has been returned above its true value as compared with the average valuation' of property within the county. 'But such findings of true value (by the assessor and county board of equalization) are not conclusive upon the state board of equalization, which is a creature of the Constitution, and Section 12855, Revised Statutes 1919 (Sec. 9863, R. S. 1929), a law equal in authority, dignity, and force with the statutes

above cited (Secs. 9792, 9812 and 9813, R. S. 1929), requires such board to "add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value," and to "deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value," although such exercise of its judgment as to true values may result in raising some individual assessments above values previously fixed as true. Such action of the state board of equalization is conclusive.' (Columbia Terminals Company v. Koeln, Collector, 319 Mo. 445, 3 S. W. (2d) 1021.) The presumption that the valuation fixed by the State Board of Equalization 'is the true value attaches' to the action of that board. (State ex rel. Thompson v. Bethards, supra.) The State Board of Equalization in the performance of its duties acts judicially (State ex rel. v. Vaile, 122 Mo. 33, 26 S. W. 672; State ex rel. Johnson, Collector, v. Merchants' & Minors' Bank, supra, Jefferson City Bridge & Transit Company v. Blaser, supra) and it is presumed that in making its finding fixing the aggregate valuation of bank stock in Jasper county it acted upon proper and sufficient evidence, facts and information. Such finding is therefore final and conclusive and becomes the aggregate true value of such property for taxation."

We are of the opinion, by the above decision, that the action of the county assessor, in assessing property at twenty per cent less than its actual value, may be reviewed and the true value assessed by the county board and the State Board of Equalization.

But in answer to your question as to any remedy you may have to compel the assessor to assess the property at actual value in the first instance, we think that the remedy used in State ex rel. v. Dirckx, 11 S. W. (2d) 38, would be appropriate; and likewise in the decision of State v. Bethards, supra, the remedy in each instance being by the writ of mandamus.

In reply to your question regarding the additional salary of the prosecuting attorneys and county clerks, as to the time it becomes effective, we are enclosing an opinion rendered by this Department on October 24, 1939, to Mr. W. A. Holloway, Chief Clerk, Auditor's Office, Jefferson City, Missouri, wherein a similar question is discussed and a conclusion reached. It would therefore appear by the enclosed opinion that the effective date is November 1, 1939.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

OWN:EG
Enc.

TAXATION AND REVENUE: Lands sold by collector for delinquent taxes on real estate and purchased by him constitutes a void sale. A transfer of his rights obtained by such certificate would convey nothing. The money paid by such collector at such sale constitutes a voluntary payment.

December 14, 1939.

12-16

FILED
38

Mr. Joseph Hatcher
County Collector
Audrain County
Mexico, Missouri

Dear Mr. Hatcher:

We desire to acknowledge your request for an opinion relating to the Jones-Munger law, on December 11, 1939, which is as follows:

"I have a very peculiar situation which is as follows:

"In November, 1937, Mr. F. Edwin Pollard then County Collector of Audrain County, bought at a tax sale which he conducted himself, a piece of property, a farm of forty acres, belonging to one Addie Worsham. Before the two year redemption period was up, Mr. Theo Barnes acting agent for Mr. A. W. Worsham of the State of Texas, obtained an assignment of this certificate of purchase from F. Edwin Pollard. At the time of the assignment, Pollard was not Collector. In the meantime Mr. Worsham mailed me a check which I held for quite some time, to redeem this place and I held this check pending the out come of the assignment. Mr. Barnes presented the certificate to this

> office for a deed to be made out to A. W. Worsham. Upon information from the State regarding the buying of property by a Collector, I refused to give Mr. Worsham a deed. Mr. Worsham thru his agent, paid $140.00 for the assignment, this amount being thirty dollars more than the sale price and subsequent taxes.
>
> "The questions arising from this; Am I, as Collector, within my rights refusing to deed this property? Has Mr. Theo Barnes, as agent of Mr. A. W. Worsham, any recourse on Edwin Pollard for the amount paid him or will Mr. Worsham lose the cost of the assignment? If I should deed this property, what would be the complications that might arise later regarding legal ownership. Mr. Theo Barnes seems to be responsible and stands to lose on the exchange. All he wants is to clear the responsibility he is now under.
>
> "I would appreciate it very much for any information regarding the above case."

In an opinion rendered by this department to Honorable G. Logan Marr, Prosecuting Attorney of Versailles, Missouri on November 30, 1937, a copy of which is enclosed herein, it was held that the collector did not have a legal right to purchase land sold for delinquent taxes under the provisions of Senate Bill No. 94, Laws of Missouri 1933 and quoted a statute which indicates that such sale shall be void.

The collector purchasing at such void tax sale could convey by the transfer of his certificate no better interest or title than he received by such convey-

ance. Therefore the transfer of the certificate being void, there would be no statutory interest from which the owner or party in interest should redeem. Neither should a deed be made by a subsequent collector in December 1939 or thereafter to the assignee of such certificate even though he offers to meet the other requirements of said Senate Bill No. 94.

In construing the rights of the grantee of a grantor, who had received a tax deed which was void, the court in Childers v. Schantz, 120 Mo. 305, 313 held:

> "The old sheriff's deed to Crockett, based upon the judgment in the tax suit against Godsey and Nichols, conveyed no title, because Nichols never had any interest in the land, and because Godsey was dead when the suit was commenced. Graves v. Ewart, 99 Mo. 17. And it follows that the quit claim deed from Crockett to Norman conveyed nothing".

In an opinion by this department to Mr. Will Hargus, Prosecuting Attorney of Harrisonville on March 3, 1934, the question of voluntary payment of taxes was discussed and held not recoverable by the payer.

Further considering the question of a voluntary payment, in regard to a mistake of law, the court, in the case of Hethcock vs. Crawford County, 200 Mo. 170, 176, held:

> "Plaintiff's learned counsel argues the mistake was one of fact. He argues, moreover, that the trial court found it was a mistake of fact and that we are bound by that finding. If there was evidence sustaining

that finding, plaintiff's contentions are sound. But we find no such evidence. What facts did plaintiff mistake? Plaintiff's learned counsel puts his finger on none. Did he keep an account of these commissions and by inadvertence fail to transcribe them into his statements or settlements? No. Did he charge these commissions in some settlements and omit them, by slip, out of others. No. Did some clerk or deputy make these statements and settlements and neglect a duty assigned to him by plaintiff to put such commissions into his settlements? No. What mistake of fact, then, did plaintiff make? None that we can see. To the contrary, his mistake was of law, pure and simple; and ignorance of the law excuses no man.

"The question, then, comes to this? Having without duress, misrepresentation, or any form of imposition or fraud on the part of defendant's agent, the county court, voluntarily paid this money into the county treasury on the theory it was tax money and belonged to the county treasury - that he had but rendered unto Caesar the things that were Caesar's - can he recover it back, or must he abide the event? Courts have been extremely lenient in seeing a mistake of fact, as distinguished from a mistake of law, but plaintiff has produced no case on all-fours with this one. To the contrary, there is a live line of controlling decisions holding that under such a record, the mistake is not a fact but of law, and that money so paid voluntarily cannot be recovered back. * * * "

CONCLUSION

Therefore, it is the opinion of this department that the sale of lands for delinquent taxes on real estate by the collector under the provisions of Senate Bill No. 94, Laws of Missouri 1933, and purchased by such collector, is void. That his assignment of a certificate of purchase procured at such sale conveyed no interest or title in and to the land and that the money paid by him, at such sale, for the certificate was a voluntary payment. That it is the duty of the subsequent collector to apply such sum as payment on the delinquent taxes assessed and levied against the land and offer the same for sale for the balance due.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

PROBATE COURTS:)
)
INHERITANCE TAX:)

Inheritance tax appraiser cannot employ attorney to advise him relative to the appraisement and charge the fee of such attorney as necessary expenses incurred in the performance of his duties as appraiser.

January 5, 1939

FILED
39
4-3.

Hon. Mitchel J. Henderson
Probate Judge
Kansas City, Missouri

Dear Judge:

This will acknowledge receipt of your request for an opinion of recent date which reads as follows:

"As Probate Judge and a County official I am desirous of obtaining an opinion from you as it affects Section 589. You are familiar with the fact that the Court appoints inheritance tax appraisers to appraise estates. Section 589 states that the appraiser is entitled to Five Dollars a day, etc., "And the actual and necessary expenses incurred by him in the performance of his duties."

In the large cities we have, of course, large estates with many intricate legal problems and other problems. The inheritance tax appraiser must know about certain legal problems before he can file a proper report. In the Bernheimer estates we have here, Jerome Bernheimer was a very rich man. He died in September, not this year, but a year or two ago, and his wife died the following December. A legal question arose in the mind of the appraiser as to whether or not that portion of the Jerome Bernheimer estate which was left to Mrs. Bernheimer was taxable in the Bertha Bernheimer estate. Second, whether or not that portion of the estate which was left in trust for Earl Bernheimer is taxable because of the fact that there is a clause in the Will that if Earl Bernheimer dies without issue, at his death the estate will go to charitable institutions.

I have always understood that an appraiser had a right to employ an accountant or experts to give him advice about ninety-nine year leases and things of that kind because the statute says he is entitled to "actual and necessary expenses incurred by him in the performance of his duties." I take it that means more than mere street car fare or taxi cab fare in going to and from the various pieces of property.

In the Bird estate and in the Peters estate which consisted largely of stock in the Emery, Bird, Thayer Company depending much on the value of the stock in that company, the stock of that company depended on the value of certain lease-hold interests they had at 11th & Walnut and Grand and in addition to that the Emery, Bird lease provided that the rent should be payable in gold. That matter, as you perhaps know, has been in the Courts for some time as to whether or not they had to pay the rents in gold or coin of the realm. We have had several estates that have had Emery, Bird, Thayer stock. As a lawyer I couldn't advise them just exactly how to value it.

Some members of the Bar Committee claim that you as attorney-general are the legal adviser of the appraiser. That couldn't possibly be, for the simple reason you are legal adviser for the State; you are legal adviser for the State Treasurer; you are interested in every dollar being collected that can be collected. You are a part and parcel of the inheritance tax laws. You have to be notified in these matters. In other words, you occupy in my judgment a partisan position (not that I haven't confidence in any position you take with respect to these matters) and being a part and parcel of it and representative of the State Treasurer who is charged with the authority of collecting these things, it looks unreasonable and unjust that you should be called upon to advise every inheritance

tax appraiser in the state of Missouri about what the law is on every little subject that comes up within his jurisdiction.

The inheritance tax appraiser stands as a fair and impartial appraiser between the State of Missouri and the estate. The lawyer for the estate shouldn't, of course, be the legal adviser of the appraiser and as a corollary, if the lawyer of the estate shouldn't advise him, should the attorney-general representing the state and those in charge of collecting the taxes be the adviser? In my opinion the appraiser is entitled to outside legal advise from lawyers who can give him the benefit of their judgment as to legal questions involved without any interest on either side.

These appraisers come to me almost every day with their problems. I don't think it is my duty to give them advice because I am supposed to sit as a Court if there are exceptions filed to hear the thing impartially from the standpoint of the State of Missouri and the estate.

Some seem to be of the opinion that all you have to do is appraise a few knives and forks or appraise 40 acres of land out here in the country some where and that is all there is to it. But thatis far from it. In my opinion the law means just what it says that he is "entitled to the actual and necessary expenses incurred by him in the performance of his duty."

The performance of an appraiser's duty means full performance. Now, if this requires the expert advice of a tax man in order that he might make full performance, then I think he is entitled to employ him. If it requires the advice and the opinion of a lawyer, I think he is entitled to employ him. If it requires the opinion and advice of experts on the values of leases and leaseholds, Ninety-nine year leases and things of that kind, I think he is entitled to employ them. But I don't want to make a mistake in this matter and I would like to have the benefit

of your judgment in a written opinion directed to me about it."

As we interpret your letter, your question stated briefly is:

In cases where the value of estates depends in a large measure upon a correct interpretation of certain legal questions connected with the estates, can the Probate Court allow the fee of an attorney for the appraisers as part of the actual and and necessary expenses incurred by the appraiser in the performance of his duties.

Section 585, R. S. Mo. 1929, reads as follows:

"The probate court which grants letters testamentary or of administration, either original or ancillary, on the estate of any decedent, shall have jurisdiction to determine the amount of tax provided for in this article and the person, persons, association, institution or corporation liable therefor, and to determine any question which may arise in connection therewith, and to do any act in relation thereto which is authorized by law to be done by such court in other matters or proceedings coming within its jurisdiction. Such court or the judge thereof in vacation shall immediately upon the filing of the inventory and appraisement of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the said court or judge, that such estate is not subject to the tax provided for in this law, such finding and opinion shall be entered of record in said court, and thereupon the provisions of section 583 shall become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax, unless upon the application of interested parties the existence of other property or an erroneous appraisement be shown. If it appear that said estate may be subject to such tax, it shall be the duty of the court to set a day for the hearing and determining the amount of said tax and to cause notice thereof to be given in the same time and manner and to the same parties as is hereinafter provided for appraisers, or the court

> before determining such matters, may of its own motion, or on the application of any interested person, including the state treasurer, the prosecuting attorney or attorney-general, appoint some qualified tax-paying citizen of the county as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax under the provisions of this article. Every such appraiser shall make and subscribe, and file with the court appointing him, an oath that he will faithfully and impartially discharge his duties as such appraiser and that he will appraise all the property, estate, interest therein or income therefrom involved in the proceeding in which he is appointed at its clear market value and shall forthwith fix a time and place for hearing the evidence and shall file notice thereof with the court appointing him not less than ten days prior to the date so fixed and shall also give notice by mail to all interested persons whose address he may have, always including the state treasurer and the prosecuting attorney of the county."

It will be seen from the foregoing section that the power to determine the amount of the inheritance tax and any other question connected therewith is vested in the Probate Court. To determine the amount of the tax necessarily requires a determination of the value of the estate subject to the tax. The probate court under the foregoing statute may set a day for hearing and determining the amount of the inheritance tax against any estate. At such hearing the court would of necessity have to determine the value of the assets of the estate. If this procedure is followed no doubt the probate court would subpoena witneses to testify as to the value of the assets, and from such evidence and from other knowledge or information the court may have, the court would set a value on the estate. In other words, the court would appraise the estate for the purpose of determining the amount of inheritance tax due by the estate.

Said section 585 R. S. Mo., 1929 provides, however, that before the probate court determines the amount

of the tax due, it may appoint, "some qualified tax-paying citizen of the county as appraiser to appraise and fix the clear market value of any property, estate or interest therein, or income therefrom which is subject to the payment of a tax ****". Such appraiser must subscribe to an oath that he " will appraise all the property, estate, interest therein or income therefrom **** at its clear market value". He is also given authority to set a date for hearing evidence as to the value of such assets, and by section 586 R. S. Mo., 1929 he is authorized to issue subpoenas and compel the attendance before him of witnesses and the production of books, records, documents, papers and all other material evidence and to take the testimony of all witnesses under oath. The appraiser is therefore given ample power to secure all information that is necessary to assist him to arrive at the clear market value of the prope rty, which is all he is required to do.

It is suggested in your letter that in some cases the value of certain assets depends upon a determination of certain legal questions such as the legal effect of certain clauses in a lease. However, the appraiser is not charged with the duty of determining the actual value of the assets. He is charged with the duty of determining the "clear market value". Clear market value is the amount which property will bring at a fair sale between a willing seller and a willing purchaser. The appraiser can ascertain from market reports, from the opinions of witnesses brought before him and from other information readily available to him what the clear market value of property is. The question for him to determine is;"What would this property bring in an exchange between an owner who is willing but not compelled to sell and a buyer who is able and willing to buy"? It is true the interpretation which the seller and buyer put upon legal questions affecting the property would affect their respective estimates of the value of such property, but this would be of little importance in appraising the property at its clear market value. If property will sell at a fair sale for a certain figure, then that is its market value even though the seller or purchaser, or both, might be badly mistaken as to what title either had or was acquiring. Certain legal questions would no doubt in some cases hold the market value of property down but the ultimate value to be determined is the market value and not what the market value should be. In other words, suppose the stock of Emery, Bird, Thayer Company has not sold and is not valued by anyone at more than a certain figure per share and the reason given by those placing such a low value

on it is that there is a serious question as to whether rent on certain leases has to be paid in gold. Even if the appraiser should secure able attorneys and those attorneys should advise him that under the terms of the lease in question the rent did not have to be paid in gold, would that alter the fact that the stock could not be sold for more than a certain figure because there was a doubt in the mind of the buying public as to whether that interpretation of the lease provisions was correct? The ultimate question is one of fact, that is, what will the stock sell for at a fair sale, and it is not a question of what it would sell for if people really understood some lease provision. The thing to be determined is what the property will sell for on the market at a fair sale and not what it ought to sell for.

It therefore seems to us that the advice of an attorney is not necessary for an appraiser before he can perform his duties. He can use all the evidence and information he can get to arrive at a clear market value of the estate. He then reports to the court what his findings are (Sec. 586, R. S. Mo., 1929). Any interested person may file exceptions to such report (Sec. 587, R. S. Mo., 1929). The court will rule upon the exceptions and assess the tax and from that assessment interested parties may appeal to the circuit court (Sec. 587, R. S. Mo., 1929).

In your letter you state that you do not deem it your duty to advise appraisers because you are supposed to sit as a court if exceptions are filed to the appraiser's report. We are not saying that it is your duty to advise appraisers, but in so far as inheritance tax matters are concerned the Probate Court is not a judicial tribunal but is an administrative agency.

In the case of De Pauw University vs. Brunk, 53 Fed. (2d) l.c. 651, it is said:

> "The probate court, so far as inheritance tax matters are concerned, is not a judicial tribunal. It is an administrative agency. It is not uncommon for states to commit to courts administrative functions. The assessment of a tax and its collection are administrative matters. The function assigned to the probate court is that of the assessment of the tax."

Likewise the Missouri Supreme Court has held that the assessment of taxes is an administrative act, (In Re: Hall's Estate, 85 SW (2d) 621.)

CONCLUSION

It is therefore the opinion of this office that inheritance tax appraisers appointed to appraise estates for the purpose of assessment of inheritance tax cannot employ attorneys to advise them relative to the appraisement and charge the fee of such attorneys as a necessary expense incurred in the performance of their duties as appraisers.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RW

SALES TAX: The city is liable for a sales tax on material which it purchases directly and supervises the work itself. The same applies to property owners if the materials are furnished to them at their request.

July 5, 1939

76

FILED
40

Hon. Roger Hibbard
City Attorney
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an official opinion which reads as follows:

> "The City of Hannibal is desirous of an opinion from your office in connection with the liability of certain individuals for the payment of Missouri Sales Tax. The enclosed copy of a letter from the Lawson Coal and Sand Company, Hannibal, Missouri, was presented to the City of Hannibal in an effort to collect sales tax on the materials listed therein.
>
> "Under the WPA working regulations it was necessary for the City of Hannibal, with its own force, to do an extended amount of construction work to complete paving projects. By this I mean this work could not be done by WPA labor nor could we participate in WPA materials allowances. This made it necessary for the City to do this work and pay for the same from the general fund. The City would not have had to expend this money except for these WPA projects. Is the City liable for sales tax of the materials purchased for that purpose?
>
> "In the same connection, are the property owners who participate in these WPA projects for paving under a duty to pay a Missouri Sales Tax for materials purchased in Missouri and used on the WPA projects?"

In the case of City of St. Louis v. Smith, 114 S.W. (2nd) 1017, it was held to the effect that the contractors and not the city were liable as consumers for sales tax on materials used in the construction of paving, a sewer and a hospital where the contractors agreed to furnish all materials and deliver the completed work for a lump sum. It was the dealer's duty to collect the tax from the contractors at the time of the sale.

It was the contention of the state in that suit that the city was liable for the tax. However, from the facts which you present, it does not appear that the Lawson Coal and Sand Company was dealing with contractors for improvements of any nature for the city, but, on the other hand, it appears that the City of Hannibal, by the statement of your facts, carried on the work and made the improvements itself.

The word "person" is defined in Laws of 1935, page 413, as follows:

> "'Person' includes any individual, firm, copartnership, joint adventure, association, corporations, municipal or private, * * * * ."

The same provision is contained in the Laws of 1937, page 555.

I cannot determine from your letter whether or not the projects were carried on exclusively by the City of Hannibal.

We note that the Lawson Coal and Sand Company, in submitting the demand, made the following statement:

> "The above account does not include any sand purchased for the Armory, as such material was not taxable, neither does it include any material which was charged to the City but paid privately."

Again applying the decision in the case of St. Louis v. Smith, 114 S.W. (2nd) 1017, we rule as follows:

That the City of Hannibal is liable for the tax on the materials used in the WPA projects which were conducted and operated by the city itself with no middle-man intervening, that is, the city was the user and consumer of the materials within the meaning of the law.

The same would be applicable to property owners in the WPA project, the test being whether or not the work was being done for the property owners and the property owners would be liable directly to the persons who furnished the materials. In other words, the middle-man must be eliminated in the case of property owners also.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

OWN:VAC

MUNICIPALITIES:
MOTOR VEHICLES:
REGULATION OF LIGHTING EQUIPMENT:

Municipalities under a special charter without a special provision in such charter may not regulate lighting equipment on motor vehicles except that which is provided by the statutes.

July 25, 1939 7/28

FILED 40

Mr. Roger Hibbard
City Attorney
Hannibal, Missouri

Dear Mr. Hibbard:

This is in reply to yours of recent date wherein you submit the following question:

> "The Police Department of the City of Hannibal wishes an opinion on the power of the City Council to require the use of 'dimmers' or deflected headlight beams, on motor vehicles operating in the City, on streets lighted by the usual street lights. In view of Section 7778 R. S. 1929, and the restriction of Section 7780, R. S. 1929, could the City Council lawfully place this restriction on the use of lights on motor vehicles?"

In our research on your question we find that the city of Hannibal was organized under a special charter by an act of the General Assembly which was approved March 8, 1873, Laws of 1873 at page 238. Cities, towns and villages, whether operating under a special charter or a statute applicable to them, must look to their charter or the applicable statutes for their powers and duties. Section 7 of Article IX of the Constitution of Missouri sets out the provision for the organization and classification of municipal corporations. It provides as follows:

> "The General Assembly shall provide, by general laws, for the

> organization and classification of cities and towns. The number of such classes shall not exceed four; and the power of each class shall be defined by general laws, so that all such municipal corporations of the same class shall possess the same powers and be subject to the same restrictions. The General Assembly shall also make provisions, by general law, whereby any city, town or village, existing by virtue of any special or local law, may elect to become subject to, and be governed by, the general laws relating to such corporations."

Your question particularly applies to the authority of the city of Hannibal to pass an ordinance which would require "dimmers" or deflected headlight beams on motor vehicles operating in that city.

In searching through the charter of the city of Hannibal to ascertain whether or not the General Assembly granted such powers to that city by the charter, we find that Section 19 of Article IV provides that the city shall have power:

> "Sec. 19. To make regulations to secure the general health of the city, and to provide the city with water."

We do not think that the city, under this section, would have authority to pass an ordinance providing for regulation of the lights of a motor vehicle which operates on its streets.

Section 35 of the same Article provides in part that the city shall have power to:

> "Sec. 35. To prevent, prohibit and punish fast and immoderate riding or driving within the city; * * * * * *"

We do not think this section is broad enough to cover the authority you seek in your letter.

Section 52 of said Article provides in part as follows:

> "Sec. 52. To provide for, maintain, and (and) regulate the peace, good government, order and police of the city, and also to impose, collect and enforce fines, forfeitures and penalties for the breach of any city ordinance; * * * * * * * * * * * * * "

We think that this section would not be broad enough to include the power of the city to pass an ordinance regulating the lights of a motor vehicle. These are the only sections of the charter of the city of Hannibal that we find which could be applicable to your question.

Since the Legislature might, by additional legislation, grant such authority to a municipality operating under a special charter, we look to the statutes to ascertain whether such authority has been granted. Section 7778 R. S. Missouri 1929, which relates to the lighting equipment of a motor vehicle which operates on the public streets or highways of this State, provides in part as follows:

> "For the purpose of revealing its position and direction, a motor vehicle, while on the highway, whether in operation or at rest, during the period from one-half hour after sunset to one-half hour before sunrise, and at all times when fog or other atmospheric conditions render the operation of motor vehicles dangerous on the highway, shall carry lighted signal lamps as herein required; such lamps shall be so constructed, mounted and adjusted as to project the required kind of light so that it shall be plainly visible under normal atmospheric conditions

from a distance of at least five hundred feet in the direction projected. Motor vehicles and motortricycles shall display at least two white lights mounted at the front and directed forward, and one red light mounted at the back and directed to the rear. * * * * No vehicle shall display or project to the front or sides any other than white light, or such shades as are commonly known and recognized as white, and no vehicle shall display at the back, or project toward the rear, any other than a red light, excepting that on motor vehicles and trailers which are required to carry number plates on the rear; the rear lamp shall be so constructed, mounted and adjusted as to project from its sides, top, bottom or front, sufficient white light upon such plate to make the number plainly visible from a distance of twenty-five (25) feet: Provided, however, nothing in this section shall be construed to prohibit the use of additional red rear lights carried for added safety or of such white lights of low intensity as may be required in the operation of mechanical rear signalling devices, but no motor vehicle shall have mounted at its back any lamp projecting towards the rear a light of sufficient intensity to conceal the number or to interfere with the vision of anyone following. * * * * * * * * * * * * All motor vehicles, except motorcycles and motortricycles, shall carry, in addition to or in lieu of the front signal lamps, two lighted head lamps, and motorcycles and motorticycles shall carry at least

one lighted head lamp for the purpose of illuminating the road ahead when the vehicle is in motion; such lamps shall be mounted at the front of the motor vehicle so that the top of their door glass openings is not more than forty-two (42) inches above the ground, shall project only white light, or such shades as are commonly known and recognized as white, and shall be directed and equipped, and their door glasses and bulbs shall be adjusted, as herein required. Class 'A' door glasses shall have their entire inside surfaces etched or ground to such a degree that the lighted filament shall appear blurred and all light emitted shall be gradually and uniformly diffused in all directions. Class 'B' door glasses, commonly known as diffusing lenses, shall be symmetrically or uniformly moulded so that the lighted filament shall appear blurred and all light emitted shall be diffused with practical uniformity in all directions. Class 'C' door glasses, commonly known as diffusing and deflecting lenses, shall be so moulded that the lighted filament shall appear at least slightly blurred or deformed and all light emitted shall be diffused, the major portion thereof being diffused laterally only, but to an extent sufficient to blend the light so as to materially shorten its range, and spread it more widely over the road. Plain, clear door glasses, or moulded lenses, which merely deflect the major portion of the light without diffusing or blending it shall not be used, except on gas head lamps and then only when the same are adjusted as herein required for class 'C' door glasses. Head lamps shall be equipped with lamp bulbs

of such candle power as is necessary to reveal objects one hundred and fifty (150) feet ahead but not exceeding thirty-six (36) candle power each for class 'A' door glasses, thirty-two (32) candle power each for class 'B' door glasses and twenty-one (21) candle power each for class 'C' door glasses. The cone or shaft of concentrated light projected by the reflector of a head lamp shall be adjusted by proper direction of the lamp and adjustment of the bulb so that its uppermost part shall not rise above the level of the top of the door glass opening within a distance of seventy-five (75) feet ahead of the lamp and so that its center shall not be directed to the left of a line from the center of the lamp and parallel to the direction of the car. One or both of the lamps shall direct sufficient light downward and to the right to illuminate the right side of the highway for a distance of fifty (50) feet ahead of the lamp. Adjustment for direction and elevation herein required shall be made on level ground with the motor vehicle normally loaded as to passengers, cargo, fuel and equipment with the lamp doors wide open in the case of class 'A' or class 'B' door glasses and closed with door glasses in place in case of class 'C' door glasses. Such adjustments shall be firmly fixed and permanently maintained. Class 'B' or class 'C' door glasses and substitute for class 'A' door glasses shall not be used and no device or adjustment in connection with a light upon a motor vehicle to enable the same to comply with the requirements of this article shall be used upon a motor vehicle upon the

highways until the same have been tested and approved as provided herein. To obtain such test and approval the manufacturer or agent shall make application in writing therefor to the commissioner and shall remit a fee of $50.00 payable to the state treasurer, and shall submit two pairs of such door glass or device for tests. The commissioner shall make, or cause to be made, such indoor and road tests as he may deem necessary, and shall, within thirty (30) days from the date of such application, report his findings to the applicant in writing. In the event he shall find the lenses or device comply with the requirements of this article he shall issue to the applicant a certificate so stating and designate therein the classification and maximum candle power of bulbs permitted for such lenses or device and a statement of the requirements as to adjustment, as set forth in this section. If he shall find that the lenses or device submitted do not comply with the requirements of this section, he shall so notify the applicant in writing by registered mail. All lenses or devices so examined shall remain in the office of the commissioner properly labeled and a complete record of the investigation and findings shall be filed in said office. In case of disapproval, applicant may appeal from the decision of the commissioner to the members of the state highway board or commission and secretary of state sitting as a board of review, by filing a written notice, addressed to the secretary of state, of his intention to appeal and setting forth the grounds thereof, and for such appeal the applicant shall remit a fee of $50.00, payable to the

state treasurer. The board shall hear such appeal within thirty (30) days after receiving such notice and shall hear such evidence as the applicant or commissioner shall present and shall make or cause to be made such investigation and tests as the board deems necessary. In the case of a tie vote of the board on such appeal, the board shall call upon the state highway engineer or some other competent, disinterested person to hear the evidence, examine the lenses or device and cast the deciding vote. The board shall certify to the applicant its findings, which shall be final. Any registered motor vehicle owner resident of this state, or any organization of motor vehicle owners within this state may appeal from any decision of the commissioner either approving, disapproving or classifying any lenses or devices to the board on the same terms and conditions as provided herein, and provided such appeal is taken within thirty (30) days after the findings of the commissioner are published. No dealer shall sell a motor vehicle equipped with gas or electric lamps unless such lamps comply with the provisions of this article, and no persons shall sell any lenses of class 'B' and 'C', or substitute for class 'A' lenses unless he delivers with each pair a copy of the commissioner's certificate of approval of such lenses and complete instructions as to the attachment and adjustment of such lenses and bulbs, as required by this section. The commissioner shall publish a list of the lamps and devices approved by him and furnish a copy thereof, within thirty (30) days after the approval

thereof, to all registered dealers and to the sheriffs, prosecuting attorneys and county clerks of all counties and the chief of police in each city having a metropolitan police department and to automobile clubs who file written application therefor. Electric side lamps or substitutes therefor, having fronts and sides of plain clear glass or glass defined as class 'C' may be equipped with bulbs not stronger than four candle power each and shall project all concentrated light downward below the level of the lamp; if their fronts and sides are of glass defined as class 'A' or 'B' they may be equipped with bulbs not stronger than eight candle power each, said lamps mounted as far forward as the windshield and projecting unobstructed white light forward may be used as the front signal lights required herein. Moulded door glass or side glass for side lamps shall be inspected and classified as required of head lamp door glass herein. Dirigible search lights, or lights commonly known as spot lights, shall not be used on highways within the limits of municipalities, except in emergencies or when headlights are inadequate owing to rain or fog, and then only: Provided, the shaft of condensed light is directed downward below the level of the lamp, and at no time into the eyes of other persons, but such lights may be used at any time on public highways outside of the limits of municipalities: Provided, their light is directed as hereinbefore required. No search light, or spot light, shall be equipped with a bulb stronger than twenty-one

(21) candle power; such search lights and spot lights shall be so constructed and mounted that their light and direction can be fully and easily controlled from the driver's seat while the vehicle is in motion."

It will be noted by this section that the lawmakers have attempted to cover the entire field of legislation pertaining to the lighting equipment of motor vehicles.

The general rule is that a municipality may enact ordinances to carry out the provisions of a statute if such authority has been granted by the Legislature. Reading this section, however, we fail to find where the lawmakers have expressed an intention that the municipal authorities may pass such ordinances. Referring to Section 7780 R. S. Missouri 1929, it will be noted that the lawmakers have seen fit to provide that municipalities may, by ordinance, establish reasonable speed regulations for motor vehicles within the limits of such municipalities, and may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions, and may, by ordinance, levy and collect license taxes from the owners of and dealers in motor vehicles and trailers, residing in such municipalities, and require the display of license plates. By reading these two sections together, and by taking into consideration that the lawmakers, at the time of the enactment of laws pertaining to motor vehicles, had both sections in mind at the same time, and since they only provided under said Section 7780 that municipalities may pass certain legislation, then by applying the rule of "The expression of one thing is the exclusion of all others," we would come to the conclusion that the lawmakers did not intend that municipalities should be authorized to pass any legislation pertaining to said Section 7778, which pertains to the lighting equipment of motor vehicles.

While there might be a question as to whether or not a municipality would be authorized to pass an ordinance in conformity to the provisions of said

Section 7778, yet we are certain that since said Section 7778 does not provide for "dimmers" or deflected headlight beams on motor vehicles, then a city without a special provision in its charter or under the statute, would not be authorized to enter into that field of legislation.

In speaking of Section 7780 R. S. Missouri 1929, the Supreme Court, in Kenney v. Hoerr, 23 S. W. (2d) 96, at 98, said:

> "It is true section 24, par. (b), of the same law, Laws Mo. 1921 (1st Ex. Sess.) pp. 76, 100, permits municipalities by ordinance to make additional rules of the road or traffic regulations to meet their needs, and to establish one-way streets and provide for the regulation of vehicles thereon. This being so, if an ordinance be enacted under sanction of the state law, it will be valid as an additional regulation. On the other hand, if the ordinance make a requirement contrary to the state law with respect to a matter on which the state law is intended to be controlling, the ordinance cannot stand."

While such legislation as you suggest might not be contrary to the state law with respect to lighting equipment, yet the city is required to go a step farther and show that it has authority, by charter or statute, to enact such legislation.

CONCLUSION.

From the foregoing it is the opinion of this department that the council of the city of Hannibal does not have authority to enact ordinances requiring the use of "dimmers" or deflected headlight beams on motor vehicles operating in that city.

Respectfully submitted

APPROVED:

Assistant Attorney General
TYRE W. BURTON

COVELL R. HEWITT
(Acting) Attorney General

WATER DISTRICTS:
ADDING TERRITORY TO THE
DISTRICT:

June 1, 1939

FILED
41

Mr. John W. Hoffman, Jr.
Attorney at Law
2400 Fidelity Building
Kansas City, Missouri

Dear Mr. Hoffman:

This is in reply to yours of recent date wherein you request an opinion from this department based on the following statement:

> "Under section 4 of the Article pertaining to Public Water Supply Districts, as enacted and set forth in the Session Acts of Missouri, 1935, at page 327, there is a provision, being the last paragraph of said section 4 which reads as follows:
>
> "' * * Provided, further, should any owner of real estate that abuts upon a district once formed desire to have such real estate incorporated in the district, he shall first petition the Board of Directors thereof for its approval.'
>
> "Under this proviso, any individual owner of real estate who actually abuts the property may petition the board of directors for incorporation of his property into the district. The problem which has arisen is whether or not a group of persons

> who are the owners of various parcels of land, all of which adjoin the district when described together, but some of which does not actually abut the district, can consolidate their property by unanimously petitioning the board of directors to have their property incorporated into the district."

The act authorizing the formation of water districts is new in this state having been enacted in 1935 and there seems at this time to be only one case in which the court passed on the provisions of this act. However, that opinion does not cover the question which you have submitted. This act or any other act insofar as it imposes a tax or an obligation upon property should have a strict construction.

From a reading of Section 4 of the act it seems that property can be brought into the district in three ways, first, by the original proceedings; second, by petition and third, by an election. In the second case you will note on page 330 of Laws of Missouri a case in which the boundaries of the district may be extended or enlarged by petitioning the board which petition shall be filed by five or more owners of real estate in the territory proposed to be annexed and then the same proceedings for annexation are carried out which are provided for in the organization of this district. In this class of additions to the district both those who are willing and those who are unwilling may be added to the district providing a necessary vote is cast. Then the last provision which covers your question is where the owner of real estate which abuts on the district desires to be incorporated in the district. This is a case in which the owner voluntarily asks that his land or property be placed in the district. Since the owner is the person who is primarily interested, then we do not see that this part of the act should be so strictly construed.

The provisions of the act provide for a board of directors to represent the district. Under the provision to which you have referred in your request

the owner of the real estate petitions this board of directors for their approval for the incorporation of his lands in the water district. This board represents all of the land owners in the district and it seems that the purpose of providing that the board approve the addition of lands to the district, then there would be nobody who could complain provided the owner also agreed.

It appears from your suggestions that there are a number of parties who own lands near the district, but all of their lands do not abut the boundaries of the district, however, they are all willing to join together and make one application to be admitted to the district. There is no doubt that the parties whose real estate abuts the district could be incorporated in the district providing the board approves their petition. It would seem to be a useless thing to require these parties to make different applications for the admission of their property to the district when one application and proceeding would be sufficient.

We find a rule in 59 C. J., page 961 at paragraph 571, which is somewhat applicable to the question here. It is as follows:

> "In construing a statute to give effect to the intent or purpose of the legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if apossible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal

interpretation of the statute, and even though both are equally reasonable. * * * * * * * * * * * * * * "

Following this line of construction and applying it to the statute under consideration, we think the purpose of the lawmakers was in providing that an owner of real estate that abuts upon the district may have such real estate incorporated was to provide for those who voluntarily wish to be admitted into the district and that the main purpose of this part of the act was to take care of all who were willing to come into the district without being voted in.

As you suggest in your letter these real estate owners propose to consolidate their land together and make the application through one party as a trustee or some agent for them.

We do not think that the lawmakers ever intended for an unnecessary thing to be done and it would be unnecessary in this case for different applications for admission to the district to be made where one application would suffice.

CONCLUSION.

From the foregoing it is the opinion of this department that where a group of owners of land consolidate their land and describe the same as one individual tract and that the tract when so described abuts upon a water district that the same may be incorporated into the district in accordance with the provisions of the act.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General
TWB:DA

ELECTION CONTEST: LEGISLATURE: Representative entitled to receive emoluments of office from State Treasury upon determination of election contest.

June 29, 1939

7-11

FILED
41

Mr. W. A. Holloway
Chief Clerk
Auditor's Office
Jefferson City, Missouri

Dear Mr. Holloway:

We wish to acknowledge your request for an opinion under date of June 26, 1939, as follows:

> "During the 60th General Assembly there was a contest filed by Mr. W. N. Mosier of Clark County contesting the election of Mr. Orvey C. Buck, who had been certified by the County Clerk as the Representative-elect of Clark County.
>
> Mr. Buck was regularly certified to this office for all the compensation due a Representative throughout the entire Session, however, the Committee on Elections made its report to the House on May 16th but the report was not acted upon by the House of Representatives until June 24th, at which time the House accepted the report of the Election Committee which held that Mr. Mosier was the duly elected Representative of Clark County, Missouri.
>
> We would like to have an opinion from your office concerning the payment of mileage, per diem, postage and salary to Mr. Mosier."

In addition to the facts set out in your letter, we have ascertained from the House Journal of the 60th General Assembly that Mr. Buck was sworn in as a member of the House of Representatives on January 4, 1939, and that on the following day Mr. Mosier filed an election contest.

Section 11423, R. S. Mo. 1929, provides as follows:

"Whenever any office, elective or appointive, the emoluments of which are required to be paid out of the state treasury, shall be contested or disputed by two or more persons claiming the right thereto, or by information in the nature of a quo warranto, then no warrant shall be drawn by the auditor, or paid by the treasurer, for the salary by law attached to said office, until the right to the same shall be legally determined between the persons or parties claiming such right: Provided, however, and it is hereby further enacted, that in all cases when the person to whom the commission for such office shall have issued shall deliver to the party contesting his right to such office a good and sufficient bond in double the amount of the annual salary of such office, conditioned that if, upon final determination of the rights of the contestants, it shall be decided that the obligor is not, and that the obligee therein is, entitled to the office in controversy, he shall pay over to the obligee the amount of salary therefor drawn by him as such officer, together with ten per centum interest thereon from the date of the receipt of each installment received by him, then, and in such case, notwithstanding the provisions of this law, a warrant may be drawn by the auditor, and paid by the treasurer to the person holding the commission aforesaid, for the amount of his salary, as the same shall become due. It shall be the duty of any person contesting the election of any such officer to give notice of such contest to the state auditor, and no such contest shall be heard or determined until he shall satisfy the tribunal trying such contest that such notice has been given."

Article 4, Section 16, of the Constitution of Missouri provides that members of the General Assembly receive from the public treasury such compensation for their services as may from time to time be provided by law, as follows:

> "The members of the General Assembly shall severally receive from the public treasury such compensation for their services as may, from time to time, be provided by law, not to exceed five dollars per day for the first seventy days of each session, and after that not to exceed one dollar per day for the remainder of the session, except the first session held under this Constitution, and during revising sessions, when they may receive five dollars per day for one hundred and twenty days, and one dollar per day for the remainder of such sessions. In addition to per diem, the members shall be entitled to receive traveling expenses or mileage, for any regular and extra session not greater than now provided by law; but no member shall be entitled to traveling expenses or mileage for any extra session that may be called within one day after an adjournment of a regular session. Committees of either house, or joint committees of both houses, appointed to examine the institutions of the State, other than those at the seat of government, may receive their actual expenses, necessarily incurred while in the performance of such duty; the items of such expenses to be returned to the chairman of such committee, and by him certified to the State Auditor, before the same, or any part thereof, can be paid. Each member may receive at each regular session an additional sum of thirty dollars, which shall be in full for all stationery used in his official capacity, and all postage, and all other incidental expenses and perquisites; and no allowance or emoluments, for any purpose whatever, shall be made to or received by the members, or any member of either house, or for their use, out of the contingent fund

> or otherwise, except as herein expressly provided; and no allowance or emolument, for any purpose whatever, shall ever be paid to any officer, agent, servant or employe of either house of the General Assembly, or of any committee thereof, except such per diem as may be provided for by law, not to exceed five dollars."

In the case of State v. Gordon, 149 S. W. 638, l. c. 642, 245 Mo. 12, mandamus was sought by the State Superintendent of Schools to compel the Auditor to issue a warrant for his salary. The Auditor refused because of a pending contest as to relator's right to the office, and cited Section 11423, supra requiring him to withhold issuance of warrant until the right to the office was legally determined. The court said:

> "Dealing as it does exclusively with funds in the state treasury, it applies to each and every office holder who is paid directly from the treasury."

The members of the General Assembly being paid for their services from the public treasury, Section 11423, supra, would be applicable to a contest pending in the Legislature. It is to be noted, however, that the last sentence of said section provides that no contest is to be heard by the tribunal trying the contest until the party contesting the election satisfies it that notice has been given to the Auditor.

Article 4, Section 17, of the Missouri Constitution provides in part that:

> "Each house * * * shall be sole judge of the qualifications, election and returns of its own members * * *."

Insofar as Section 11423, supra, seeks to impose a prohibition upon the Legislature to determine the qualifications of its members, it is unconstitutional. However, unconstitutionality of part of the statute does not render the remainder thereof invalid. In the case of Barker v. St. Louis County, 340 Mo. 986, 104 S. W. (2d) 371, the court said:

> "The invalidity 'of a part of a statute does not render the remainder of the statute invalid where enough remains, after discarding the invalid part, to show the legislative intent and to furnish sufficient means to effectuate that intent. (State ex rel. McDonald v. Lollis, 326 Mo. 644, 33 S. W. (2d) 98, l. c. 100, and cases there cited."

That no notice was received from the contesting party of the contest could not be interposed as reason for failure to pay the de jure member in view of the expressed mandate that "no warrant shall be drawn by the Auditor", until the rights to the office be "legally determined between the persons or parties claiming such rights".

It having been determined that Section 11423, supra, is applicable, the question arises whether the de jure member is entitled to "payment of mileage, per diem, postage and salary" in view of the fact that the de facto member, Mr. Buck, has been paid "all the compensation due a representative throughout the entire session".

Mechem on Public Officers, Section 332, page 222, declares that if payment is made to an officer de facto, an officer de jure cannot recover his salary or other compensation from the government.

> "But it is held that if payment of the salary or other compensation be made by the government, in good faith, to the office de facto, while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer de jure when he has recovered the office, at least where the officer de facto held by color of title.
>
> 'It is plain,' says ANDREWS, J., "that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. The certificate of boards of canvassers certi-

fying the election of a person to an elective office is prima facie evidence of the title of the person whose election is certified. But it often happens that, by reason of irregularities in conducting the election, or the admission of disqualified voters, the apparent title is overthrown and another person is adjudged to be rightfully entitled to the office. But this can seldom, if ever, be ascertained, except after a judicial inquiry; and in case of an appointed officer, the validity of the appointment often depends upon complicated questions of law or fact. If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making the payment, to go behind the commission and investigate and ascertain the real right and title. This, in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right.'"

And 55 A. L. R. 998 states the majority rule similarly, as follows:

"II. MAJORITY RULE.

While there is much conflict as to whether or not payment of salary by a state or municipality to a de facto

> officer who holds the office by color of title constitutes a valid defense, when the de jure officer, after establishing his title, subsequently seeks to recover salary for the same time from the same source, the general rule prevails that this is a good defense; and it seems to make little difference generally whether the public body had notice or knowledge that the incumbent's right to office was then being contested. And the rule has frequently been applied even to cases of removals or suspensions which have been found to be unwarranted, where the de jure officer sues for his salary after being restored to his office. The courts taking this view generally agree that, upon grounds of public policy, the office must be filled and the salary cannot be paid twice; and, further, that the de jure officer's sole remedy is against the de facto officer; they also appear generally to consider that the certificate of election, or the commission, or a judgment of a lower court in the incumbent's favor, is itself sufficient justification for paying the de facto officer. It will also be observed that some of the courts state other grounds for the rule."

And in 59 A. L. R. 117 it is stated that Missouri has always been in favor of the majority rule.

> "The Missouri court, which appears to have been the only one that has directly passed upon this point since the original annotation, and whose position was not altogether clear at that time, now declares emphatically in the reported case (STATE EX REL. GALLAGHER V. KANSAS CITY, ante, 95) that it always has been in favor of the majority rule, which is set out in 55 A. L. R. 998."

We find no fault with the above rule, but same has no application here for the reason that we have a statute (Section 11423, supra) which provides that when the title of an encumbent of an office whose services are paid from the State Treasury is contested, no part of his salary is to be paid until the contest is finally determined.

The annotation in 55 A. L. R. 1007 recognizes that the above rule is altered under a statute similar to ours.

In the case of Tout v. Blair, 3 Cal. App. 180, 84 Pac. 671, the winner of an election contest in a mandamus proceeding, was held not to be entitled to any salary for the time during which the office was held by and salary paid to the contestee. Same, however, was based on a statute which, in addition to declaring that when the title of the incumbent of an office was contested no part of his salary could be paid until the contest was determined, provided "that this section shall not be construed to apply to any party to a contest * * * who holds the certification of election * * * and discharges the duties of the office, but such party shall receive the salary of such office, the same as if no such contest was pending."

It is apparent, therefore, that the above case furnishes no authority for deciding the question presented. However, under a statute similar to ours, and without the further provision as noted in the above case, the court held that payment to the de facto officer was no defense in a suit by a de jure officer to recover his salary. The latter case is commented on in 55 A. L. R. 1008, as follows:

> "But, under a statute providing simply that, when the title of the incumbent of any office is contested, no warrant can be drawn for any part of his salary until the final determination of the contest proceedings (without the further provision, as noted in Tout v. Blair (Cal.) supra), payment of salary to one who had acted as judge, upon a lower court decision in his favor, where the office was surrendered to him by plaintiff, who served for a time after being elected and won the office back after an appeal, was held to be no defense,

> being a violation of the express provision of the statute, in Dotson v. Cassia County (1922) 35 Idaho, 382, 206 Pac. 810 (without mention of Gorman v. Boise County (1877) 1 Idaho, 655, supra, II."

At this point we desire to state that we have not overlooked consideration of State v. Clark, 52 Mo. 508, and State v. Draper, 48 Mo. 213, both holding that a de facto officer is entitled to the compensation of office until ousted. Said cases, however, were not election contests so as to make Section 11423, supra, applicable. See also 46 C. J. 1059.

The argument might be advanced that in any event Mr. Mosier did not attend the session of the Legislature, however, we are not advised in the matter. It should be pointed out though that this would not deprive him of his right to recover the compensation provided him by law. In the case of State v. Gordon, supra, (S. W. l. c. 641) the court said:

> "Compensation to a public officer is a matter of statute, not of contract; and it does not depend upon the amount or value of services performed, but is incidental to the office. Throop on Public Officers (section 3) says: 'It has often been held that an officer's right to his compensation does not grow out of a contract between him and the state. The compensation belongs to the officer as an incident of his office, and he is entitled to it not by force of any contract, but because the law attaches it to his office.'
>
> Mechem on Public Offices & Officers says:
>
> 'Sec. 855. As has been seen, the relation between the officer and the public is not the creature of contract, nor is the office itself a contract. So his right to compensation is not the creature of contract. It exists, if it exists at all, as the creation of the law, and, when it so exists, it belongs to him 'not by force of any contract, but because the law attaches it to the office.' The most that can be said is

that there is a contract to pay him such compensation as may from time to time be by law attached to the office."

Section 11231, R. S. Mo. 1929, provides as follows:

"The members of the general assembly and the president of the senate of this state shall receive, as compensation for their services, the sum of five dollars per day for each and every day they may serve as such, for the first seventy days of each session, and one dollar per day for every day they may serve thereafter to the end of the session; except during the sessions for the revision of the statute laws of the state, when they shall each receive five dollars per day for every day they may serve as such for the first one hundred and twenty days, and one dollar per day for every day they may serve thereafter, and five dollars per day for every day they may be necessarily employed in going to and from said general assembly, and shall also receive at each regular session of the general assembly the sum of thirty dollars in addition to their per diem, which shall be in full for all stationery used in their official capacity, and all postage, together with all other incidental expenses and perquisites, and no allowance or emoluments for any purpose whatever shall be made or received by the members, or any member of either house, or for their use, out of the contingent fund or otherwise; nor shall any member receive pay per diem until he has appeared in his seat and answered to his name at the meeting of each session of the legislature; nor shall any member be entitled to traveling expenses or mileage for any extra session that may be called within one

day after an adjournment of the regular session. And each member of the general assembly, at each session thereof, except sessions called within one day after the adjournment of any regular session, who shall attend at the place of meeting, shall receive the following amounts, for mileage, that is to say:

From the county of --

Clark . . . . . $37.00."

An examination of the above statute and Article IV, Section 16, of the Missouri Constitution, supra, reveals that the allowances for stationery and postage, and other incidental expenses including mileage, are not made dependent on their actual expenditure by the members.

From the foregoing, we are of the opinion that Mr. Mosier, having been determined in the contest to be the duly and legally elected member of the Legislature from Clark County and seated and sworn in said capacity, is entitled to mileage per diem, postage and salary due him under Section 11423, R. S. Mo. 1929, supra.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

LOTTERY: "Policy writer" of a drawing in this state can be prosecuted for a felony, or for a misdemeanor.

September 28, 1939

9-29

FILED

41

Hon. Maurice Hoffman
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated September 25th, 1939, which reads as follows:

"The Police Department here is endeavoring to rid St. Joseph of the "Policy" racket and have asked for my co-operation, and I want to do all I can to assist them.

"'Policy' is unquestionably covered by the lottery laws, and is played in this way: An agent or salesman, familiarly called a 'policy writer', calls on the player--the customer-- and the player selects three numbers out of a range of numbers from one to sixty. The writer calls on other players, or customers, and they too make selections of three numbers each, paying five, ten or twenty-five cents to the 'writer'.

"Each day a 'drawing' is held, that is to say, from a box containing numbers from one to sixty, nine numbers are drawn out. If the player's three numbers are among the nine that have come out of the box he wins a cash prize for that day, the amount of the prize depending upon whether he has made a five-cent, a ten-cent or a twenty-five-cent play.

"Under Section 4314 of the Revised Statutes of 1929 it is made a felony to 'make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state.'

"Under this section, the person who conducts the enterprise is undoubtedly guilty of a felony, but I would like your office to render an opinion to me as to whether the 'policy writer,' who contacts the players, records the numbers upon which the player wagers, receives the consideration, and then turns over the list of wagers to some unknown party connected with the operation of the enterprise is also guilty of a felony under section 4314, or is simply guilty of a misdemeanor.

"Before I start filing cases under this felony section I would like to know that I am on the right track and I would appreciate an opinion from your office on the subject."

Section 4314 R. S. Mo. 1929, reads as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state) (or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state,) he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment

> in the county jail or workhouse for not less than six nor more than twelve months." (Underscoring and parentheses ours)

The part of the above section which is applicable to your request, is the first disjunctive which specifically states "business or avocation in this state." In construing that part of section 4314 the drawing in the nature of a lottery as a business or avocation must be consummated in this state. The latter part of section 4314 applies to the place of advertisements or the publication in any newspaper circulated in this state.

Section 4315 R. S. Missouri, 1929, reads as follows:

> "Any person who shall sell or expose to sale, or cause to be sold or exposed to sale, or shall keep on hand for the purpose of sale),(or shall advertise or cause to be advertised for sale,) (or who shall print or publish such advertisement,) (or shall aid or assist, or be in anywise concerned in the sale or exposure to sale of any lottery ticket or tickets, or any share or part of any lottery ticket in any lottery, or device in the nature of a lottery, within this state or elsewhere,) (and any person who shall advertise or cause to be advertised the drawing of any scheme in any lottery,) (or shall print or publish such advertisement, and shall be convicted thereof in any court of competent jurisdiction, shall, for each and every such offense, forfeit and pay a sum not exceeding one thousand dollars." (Underscoring and parentheses ours).

It will be readily seen that this section, although it mentions the words "who shall sell," it more specifically applies to the advertising of lottery tickets in any manner, whether the device of lottery is situated in this state or elsewhere.

Both of the above sections were practically the same at the time of their first enactment. They were distinguished in the early case of State v. Cobb, 15 Mo. App. 433, l.c. 439, where the court said:

> "Under the law, as we understand it, any one who establishes, or aids in establishing, a lottery as a business, or advertises such a lottery, is guilty of a felony; whilst one who merely sells tickets, or advertises the sale of lottery tickets, or advertises the numbers drawn, is guilty of a misdemeanor. A vendor of lottery tickets may merely advertise that fact, and publish the numbers drawn; or he may establish a lottery as a business in Missouri, or aid in doing so, or advertise the lottery itself, setting forth, in circulars or otherwise, the supposed advantages of the scheme, the number and amount of prizes, the guarantees that prizes will be paid, and all those circumstances which are calculated to induce persons to purchase tickets. These latter acts, by which the public are incited to buy, the legislature has seen fit to make felonious; and, by no fair construction of the law, can it be said that this species of advertising is not a felony under the law, unless the advertiser is a proprietor of the lottery advertised."

It will be noticed under the above ruling that the court held that a vender of lottery tickets could be prosecuted under the felony section, which, in your case would be section 4314, or could be prosecuted under the misdemeanor section which, in your case, would be section 4315. It all depended upon the facts in the case. They held that one who is guilty of aiding or assisting in making or establishing a lottery in this state would be guilty of a felony. While the mere selling of the lottery tickets was only a misdemeanor, they further said that the vender who, in selling the tickets, committed acts which would also be punishable under the felony section, could be convicted of a felony. State v. Cobb, 15 Mo. 433, was affirmed in 90 Mo. (Sup.) 196.

In distinguishing the two sections 4314 and 4315, supra, it is very noticeable that where the business or avocation is in this state, the felony section should be applied; while, under section 4315, the misdemeanor section only, applies, for the reason that the felony section in cer-

tain cases would not have a venue in this state.

In the case of State v. Hilton, 248 Mo. 522, can be found a form of information or indictment which was held sufficient. In that case the circuit attorney of the city of St. Louis filed an information charging two defendants under two counts under the "policy" act. In the information the first count charged that the two defendants did establish a policy as a "business and avocation", and in the second count the circuit attorney alleged that the same two defendants did aid and assist in making and establishing a policy. At the close of the testimony the circuit attorney elected to proceed upon the second count which was the aiding section. The verdict in the case was affirmed by the court.

In the case of State v. Cronan, 189 Mo. 663, the second count of an indictment on "policy", as set out by the court was held sufficient. In holding the indictment good, the court at l. c. 669, said:

> "The indictment is assailed as insufficient in that it fails to define in what manner a 'policy' was made or established, and fails to define what is meant by a 'policy'. This objection was made and answered in State v. Wilkerson, 170 Mo. l.c. 191, 192, in which BURGESS, J., speaking for this court, said: 'Now what is it at which the statute is leveled? Clearly the unlawful and felonious making and establishing a policy as a business and avocation, and these facts are set forth in the indictment. The statute specifically defines the offense in such a way that it cannot be misunderstood, nor can there be any question as to the kind of policy intended, for when the statute says "make and establish a policy' it is well understood to be "a form of gambling in which bets are made on numbers to be drawn by lottery." (Century Dictionary.)' The indictment in that case was in all essentials like the one before us, and adhering to the views there expressed, we hold the indictment is sufficient. The statute itself sufficiently individuates the offense, and in such case it is well-established law of this State that an indictment following the form of the statute is sufficient."

This case was reversed and remanded, solely on the ground that the jury brought in a special verdict and did not include in the wording "as a business and avocation." The court also said that if a general verdict had been brought in, such as "find the defendant guilty as charged in the indictment", the verdict would have been good.

Again referring to section 4314, supra, the wording "or aid or assist in making" is not ambiguous, and should apply to any one assisting in a lottery where the drawing is made in this state.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the "policy writer" who contacts the players on a lottery which is in the nature of policy and where the drawing takes place in this state, can be prosecuted under the felony section 4314, supra.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

TOWNSHIP TRUSTEE: FEES: The township trustee is entitled to commission on all moneys which he is required by law as official to disburse.

October 20, 1939

10-24

FILED
41

Mr. Lee Hocker
Chairman of the Township Board
Prairie Hill, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the question of:

> "Whether the township trustee is entitled to commission in paying out bonded money and also when the taxes are collected to pay such bonds off whether or not he would be entitled to a commission on warrants issued in payment of such bonds."

We note from your letter that you state that your township now has $30,800.00 outstanding bonded indebtedness and that the reason that you make your inquiry is that it seems to you that the township would be paying the commission twice on the bond money, that is, that the trustee would be receiving a commission on moneys appropriated in payment of township indebtedness which moneys come from the proceeds of such bond sale and then when the moneys are collected to pay these bonds off that the trustee would be receiving the commission again.

The questions which you have submitted may be considered from two angles:

1. Is the trustee allowed commission on money which the township board directs him to pay out for legal demands against the township, such moneys being derived from the sale of the bonds belonging to the district and which were voted for that purpose?

2. Is the trustee allowed a commission on moneys which the township board directs him to pay out for the purpose of paying off the bonds of the district?

On the questions which you have submitted, I find that the duties of the township trustee as to paying out of township funds in payment of claims against the township are set out in Section 12306, R. S. Missouri, 1929, which is as follows:

> "When any claim or account, or any part thereof, shall be allowed by the township board of directors, they shall draw an order upon the township trustee in favor of the claimant for the amount so allowed--said order to be signed by the president of said board, and attested by the township clerk and delivered to said claiment."

Section 12303, R. S. Missouri, 1929, states what shall be charges against the township. This section is as follows:

> "The following shall be deemed township charges: First, the compensation of township officers for their services rendered in their respective townships; second, contingent expenses necessarily incurred for the use and benefit of the township; third, the moneys authorized to be raised by the township board of directors for any purpose, for the use of the township."

You state in your letter that the bonds in question which had been issued by the district were in the amount of thirty thousand dollars. We presume these bonds were issued by virtue of the provisions of Section 7961, R. S. Missouri, 1929. It will be noted that Section 7963, R. S. Missouri, 1929, provides that when a township votes such bonds that the county court shall sell the bonds

and turn the proceeds over to the treasurer of the township and be by him disbursed on the order of the board. It appears from this section that it is the official duty of the township trustee to disburse such moneys.

Section 12288, R. S. Missouri, 1929, provides in part as follows:

> "The township trustee and ex officio treasurer of each township shall receive and pay over all moneys raised therein for defraying township expenses: * * * * * * * * * * "

Section 12290, R. S. Missouri, 1929, provides as follows:

> "He shall keep a correct account of all moneys coming into his hands by virtue of his office, from what source received, and what amount, of the amount paid out, to whom paid, and on what account, in a book to be kept by him and provided for the purpose by the township; said book to be kept in such a manner as to show the amount of money in his hands belonging to each school district or fractional part in the township and the amount of road money belonging to the township. He shall make settlement annually between the twentieth day of March and the fifteenth day of April with the county clerk of all moneys received by him on account of schools, showing how the same have been disbursed, and he shall settle with the county treasurer within twenty days after the apportionment of the school funds to the school district, and receive all money in the hands of the county treasurer belonging to his township, and receipt for the same, and shall pay all warrants drawn on him by the board of school directors in his town-

> ship out of the funds belonging to the district making the order, and he shall not pay any money out belonging to any other fund than that mentioned in the warrants, and he shall file with the township clerk on or before the day of the regular meeting of the township board in April a detailed statement of all money by him received and paid out, to whom and out of what fund, and the amount on hand, and at the expiration of his term of office he shall turn over to his successor all moneys, books and papers belonging to the office, and take duplicate receipts for the same, one to be filed with the township clerk, the other to be retained by himself."

Section 12291, R. S. Missouri, 1929, prohibits the township trustee from paying out any moneys except on order of the township board, and Section 12292, R. S. Missouri, 1929, requires the township trustee to make an annual settlement.

On the question of the township treasurer handling the proceeds of road bonds, we find that this department, on the 10th of August, 1938, by an opinion rendered to Mr. Mark W. Wilson, Prosecuting Attorney, Clinton, Missouri, written by Mr. Wasserman, has treated that subject. We are enclosing a copy of that opinion for your information. We are also enclosing a copy of an opinion dated August 10th, 1938, written to Honorable Glen W. Huddleston, Prosecuting Attorney at Carrollton, Missouri, by the writer of this opinion which treats on the question of disbursements made for expenses of the township. We are enclosing a copy of that opinion for your information.

CONCLUSION.

On the first question submitted above, it is, therefore, the opinion of this department that the township trustee should be allowed a commission on all moneys

which the township board directs him to pay for legal demands against the township, even though the moneys used for the payment of such obligations come from the sale of bonds voted by the district.

Second, since the proceeds from the sale of the bonds are turned over to the township trustee and disbursed by him under order of the township board, and since he is required to receive, safely keep, account for and report on such funds, it is the opinion of this department that the township trustee is entitled to charge a commission on moneys which he pays out on order of the township board for the purpose of paying off such bonds.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

STATUTES: House Bill No. 16 passed by the 60th General
REVISION BILLS: Assembly goes into effect November 1, 1939.

October 24, 1939

10-28

FILED
41

Mr. W. A. Holloway
Chief Clerk
Office of the State Auditor
Jefferson City, Missouri

Dear Sir:

The question submitted is, what is the effective date of House Bill No. 16, page 329, Laws of Missouri, 1939? Or, to put the question in another way, does the bill become effective ninety days after the adjournment of the legislature, or on November 1, 1939?

A correct answer to this question requires the consideration of the constitutional and statutory provisions on the subject.

The Constitution provides (Section 36, Article IV) as follows:

> "No law passed by the General Assembly, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment of the session at which it was enacted, unless in case of an emergency (which emergency must be expressed in the preamble or in the body of the act) the General Assembly shall, by a vote of two-thirds of all the members elected to each house, otherwise direct; said vote to be taken by yeas and nays, and entered upon the journal."

So the Constitution does not decide the question.

Applying the general rule that the legislature of the State of Missouri can pass any rule or law not repugnant to either the Federal or State Constitution, it would appear that the legislature could make a law effective any date it saw fit, provided that date was ninety days or more after the adjournment of the legislature.

An examination of the statute law on the subject reveals that there are two articles which might throw some light on the question: Article III of Chapter IV, entitled "Authentication, taking effect, and repeal of statute," and Article V of Chapter IV, entitled "Revised Statute for 1929."

The 60th General Assembly reenacted Section 659 as contained in Article III, the only change being that the figures "1929" are changed to "1939", and reenacted Section 691 which is contained in Article V, making only the same change.

It would appear that Section 659 is the controlling statute, not Section 691, for the reason that Section 659 is contained in Article III which particularly deals with the subject of when a law shall take effect; whereas, Section 691 is contained in Article V, which deals with revision matters. Said Section 659 reads as follows:

> "A law passed by the general assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions:
>
> "(a) A law necessary for the immediate preservation of the public peace, health or safety, which emergency must be expressed in the body or preamble of the act and which is declared to be thus necessary by the general assembly, by a vote of two-thirds of its members elected to each house, said vote to be taken by yeas and nays, and entered on the journal, or a law making an appropriation for the current expenses of the state government, for the maintenance of the state institutions or for the support of public schools, shall take effect as of the hour and minute of its approval by the governor; which hour and minute may be endorsed by the governor on the bill at the time of its approval.

> "(b) In case the general assembly, as to a law not of the character hereinbefore specified, shall provide that such law shall take effect on a date in the future subsequent to the expiration of the period of ninety days hereinbefore mentioned, said law shall take effect on the date thus fixed by the general assembly.
>
> "(c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

Section 691 reads as follows:

> "The Revised Statutes, as declared by this article shall take effect and go into operation on the first day of November, 1939, except such laws passed by the present general assembly and incorporated therein as shall by their provision take effect at a different time."

Similar statutes have appeared in our books since 1877 and 1879, respectively.

Throughout the years, up until the present time, Section 691 has remained practically unchanged. In 1919 (see Laws 1919, Page 485) there was added the clause, "Laws changing the time of holding court shall take effect in ninety days, etc." This clause was dropped in 1929 (see Laws 1929, Page 247), and has not again been incorporated in the section (see Laws of 1939, Page 483).

However, a very important change was made in Section 659 in 1929 (see Laws 1929, Page 247), and that change has carried forward in the Laws of 1939 (see Laws of 1939, Page 478). Prior to the change made in 1929 this section was Section 7062, Laws of 1919, and read as follows:

> "Sec. 7062. All laws passed by the general assembly, except the general appropriation act, shall take effect and go into force ninety days after the adjournment of the session at which they are enacted, unless in case of emergency, which emergency shall be set forth in the body of the act, the general assembly shall, by a vote of two-thirds of all its members elected to each house, otherwise direct--said vote to be taken by yeas and nays and entered upon the journal."

So far as our research reveals, the Supreme Court of Missouri has not passed upon the question of effective dates since this important change was made in 1929. That court did have before it the question in State vs. Schenk, 238 Mo. 429, 142 S. W. 263, and considered Sections 8094 and 8061, R. S. of 1909 (now Sections 659 and 691, respectively), and held that such a law went into effect ninety days after the adjournment of the legislature. It also had the same question before it in State vs. Byrd, 286 Mo. 593, 223 S. W. 751, and had before it for consideration Sections 7062 and 7095, R. S. 1919 (now Sections 659 and 691, respectively), and held that a law such as this went into effect ninety days after adjournment of the legislature. However, when those cases were decided the important exception contained in subsection "(c)" was not a part of the law, which said sub-section "(c)" reads as follows:

> "(c) Laws not of the nature hereinbefore specified enacted by the general assembly at its regular session in 1939 and each ten-year period thereafter, and except as otherwise provided by law, the Revised Statutes of 1939 and each ten-year period thereafter, shall take effect on the first day of November in the year of their enactment or authorization: provided, that unless suspended under the referendum or unless otherwise provided by law, laws changing the time of holding

> court shall take effect in ninety days after the adjournment of the session at which such laws may have been enacted."

Hence, the decisionsof the Supreme Court in the two cases cited, while helpful, are not conclusive or decisive of the question before us. The question involves the interpretation of Section 659 with sub-section "(c)" in it.

Article II of Chapter 4, R. S. 1929, treats of the construction of the statute. In this article is Section 655 which, among other things, declares that "words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

There are also certain other well established rules of interpretation which require no citation of authorities, among such rules being the following:

(a) That all parts of a statute must be given force and effect, if possible.

(b) That apparent contradictions and repugnant sections must be construed together and reconciled, if possible.

(c) To the extent of any necessary repugnancy between them the special will prevail over the general statute.

Under this last rule, if there is any repugnancy between Section 659 and Section 691, the provisions of Section 659 must prevail because it is the particular article which deals with the effective date of statutes.

Applying these rules to the interpretation of Section 659, we find that the first clause is as follows:

> "A law passed by the General Assembly shall take effect ninety days after the adjournment of the session at which it is enacted, subject to the following exceptions."

So unless House Bill No. 16 comes within one of the exceptions named, it became effective ninety days after the adjournment of the legislature. However, we find exception "(c)",

which, among other things, contains the following: "Laws not of the nature hereinbefore specified enacted by the General Assembly at its regular session in 1939 * * * shall take effect the first day of November in the year of their enactment or authorization." The clause "Laws not of the nature hereinbefore specified" undoubtedly refers to sub-sections "(a)" and "(b)". Sub-section "(a)" refers only to the emergency acts and appropriation acts. Sub-section "(b)" refers only to laws which contain within themselves a specified effective date subsequent to the ninety-day period. House Bill No. 16 does not come under either classification.

So we are forced to the conclusion that if any force or effect is to be given to the first clause of sub-section "(c)" that House Bill No. 16, as well as all other bills passed by the 60th General Assembly and not included in sub-sections "(a)" and "(b)", becomes effective November 1, 1939, and not ninety days after the adjournment of the legislature.

Respectfully submitted

J. R. BAKER
Of Counsel

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

ROY McKITTRICK
Attorney General

JRB:HR

FINANCE DEPARTMENT: Publication of unclaimed deposits in failed banks.

December 5, 1939

12-6

FILED
41

Honorable R. W. Holt
Commissioner of Finance
Jefferson City, Missouri

Dear Mr. Holt:

This is to acknowledge receipt of your letter of November 25th, in which you request our interpretation of Section 5304, page 771, Laws of Missouri, 1939. Your letter is as follows:

> "Will you please furnish me, at your earlist convenience, with an interpretation of the above section, as revised by the 1939 Legislature, so that this Department may proceed with the preparation of the unclaimed dividends for publication."

Upon examination we find that Section 5304, Revised Statutes of Missouri, 1929, was repealed and a new Section 5304, Laws of Missouri, 1939, at page 771, was enacted in lieu thereof. Said new section provides as follows:

> "On the second Wednesday in January, 1940 and on the second Wednesday in January in each fifth year thereafter, the Commissioner shall cause to be published in some newspaper qualified under the law for the purpose of publishing legal notices in each county in the State of Missouri and the City of St. Louis the names of the liquidated corporations for the benefit of whose unlocated depositors, creditors, stockholders or shareholders the Commissioner

> holds deposits, dividends or interest as Trustee, together with the full names of the persons entitled to receive such unclaimed deposits, dividends or interest from the Commissioner. The list published in each county shall be the list of the banks liquidated in that particular county and no other banks; provided, however, that the names of the persons entitled to unclaimed deposits, dividends or interest amounting to less than Five Dollars, shall not be included in any of the above mentioned publications and provided further that after said sum or sums of money belonging to any unlocated depositor, creditor, stockholder or shareholder has remained with the Commissioner for a period of more than six years, said sum or sums of money shall be paid into the escheat fund of the State of Missouri. Provided, no publication by the Commissioner shall be required after said money has been paid into the escheat fund."

We take it that you desire an interpretation of this section to determine the duties involved upon the Commissioner of Finance in publishing the information required under the above section.

Under this section it is the duty of the Commissioner of Finance on the second Wednesday in January, 1940, and on the second Wednesday in January in each fifth year thereafter, to cause to be published in each county in the State of Missouri and the City of St. Louis, in some newspaper qualified under the law to make legal publications, the names of the liquidated corporations under your supervision; that is, the corporations which have been finally liquidated. The list published in each county shall be the list of the banks liquidated in that particular county, and no others.

We notice that said section requires the publication on the second Wednesday in January, 1940, and on the second

Wednesday in January in each fifth year thereafter. It is a well-known fact that in the rural counties of the State, where only weekly papers are published, that the publications of same are in the latter part of the week, and we think it would be a sufficient compliance with the statute to have same published on Thursday or Friday, or on any other day in the week within the seven-day period subsequent to the second Wednesday in January, and such publication would meet the requirements of the statute. However, the Commissioner of Finance should make as strict a compliance with the statute as possible.

Under this section it is your duty to cause to be published the list of the liquidated corporations, as aforesaid, in a newspaper in the county in which the respective liquidations were had, and in the same publication, and at the same time, a complete list of the names of the persons entitled to unclaimed deposits, dividends or interest amounting to $5.00 or more due from the banks in the counties where the liquidation was had. Said section further provides that after you have published in the newspapers as aforesaid, as required by law, and same remains unclaimed, it shall be your duty to pay said sums of money, belonging to the unlocated depositors, creditors, stockholders and shareholders, into the escheat fund of the State of Missouri.

Very truly yours

COVELL R. HEWITT
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

CRH:EG

STATE CANCER COMMISSION: Interpretation of provision in contract for State Cancer Hospital relative to heating.

December 19, 1939

12-20

FILED
41

Mr. Frank T. Hodgdon, Chairman
State Cancer Commission
3713 Washington Boulevard
St. Louis, Missouri

Dear Mr. Hodgdon:

We are in receipt of your request for an opinion together with enclosures. Your letter reads as follows:

> "Over a year ago the general contract for the Cancer Hospital, which is now under construction at Columbia, was let to the Dickie Construction Company. The completion date of this contract called for 360 days from and including the date of the contract, or September 15, 1939. In addition, two paragraphs (copies of which are enclosed) were contained within the contract in regard to keeping the building dry and warm.
>
> "It is the interpretation of the Cancer Commission from paragraph No. 10 (Page G.C.-9) that the Dickie Construction Company is responsible for heating the building and keeping it dry and warm. It is our interpretation 'heating' implies responsibility for the services of someone to fire the furnace, plus the cost of whatever fuel is used.
>
> "The original contract called for the use of gas. Some months after the contract was awarded various changes were made, including a change from the use of gas to coal at the request of the legislature.

Such changes necessitated additional time for construction, bringing the completion of the building into December, 1939. Recently climatic conditions have become such that it is necessary to have heat in the building. On October 19, 1939 the architect asked the Commission to have coal delivered to the building site. We explained our position (by telephone) as stated above. We were informed the general contractor did not consider himself responsible, because the completion date had been extended. As seen from an excerpt from correspondence in regard to Change Order No. 18, the following statement was made by Dickie Construction Company:

"'For the extra work described above, we request an extension of sixty (60) days to the completion time given in our contract. We have included nothing in the above estimate for temporary heat, because of these changes, therefore, we ask that this be considered and adjusted when and if temporary heat becomes necessary.'

"However, it is our interpretation from this contract that by their own wording Dickie Construction Company implies their responsibility by <u>asking</u> 'that this be considered and adjusted . .'

"The question at present is: who is responsible for the cost of fuel and the cost of firing the furnace until the building is completed?

"The Commission at its last meeting on October 29th decided to present the matter to you and abide by your decision. We would appreciate a reply as soon as possible, since the contractor is urging the Commission for an immediate answer."

Change Order No. 18 reads as follows:

"Excerpt of letter from:
Dickie Construction Company
to:
Jamieson & Spearl, Architects

Re: State Cancer Hospital
Columbia, Missouri
PWA Docket No. Mo. 1337-F

Date: March 9, 1939

'For the extra work described above, we request an extension of sixty (60) days to the completion time given in our contract. We have included nothing in the above estimate for temporary heat, because of these changes, therefore, we ask that this be considered and adjusted when and if temporary heat becomes necessary.'"

The following are clauses in the contract of the State Cancer Commission with the Dickie Construction Company:

"Page G.C.-9

Paragraph #5: 'The contractor must at all times protect the building and material for same from the weather and when the building reaches such a condition that storm water can do any damage muslin screens must be placed in all windows or they may be closed with boards and old sash.'

> Paragraph #10: 'This contractor must keep the building dry and warm at all times when by being wet or cold the work will suffer injury before completion, Heating apparatus will be installed to heat the building. This contractor will use same but all damage to it shall be made good at his expense.'"

There is no dispute but that the Commission has been responsible for delay in performance of the contract. There is also no dispute that under the terms of the contract the general contractor is responsible for keeping the building dry and warm. The question arises whether by virtue of the Commission's delay the general contractor is presently relieved from his responsibility to heat the building.

Donnelly on the Law of Public Contracts, Section 283, page 401, states that:

> " * * * Where the public body postpones commencing the work to a more unfavorable season of the year, and the situation of the parties is so changed that they could not have intended the stipulation as to time to remain in force, no responsibility for stipulated damages can rest upon the contractor."

Similarly, in the case of Wentzel v. Lake Lotawana Development Co., 48 S. W. (2d) (Mo. A.) 185, l. c. 197, the court in holding that the contractor was entitled to reasonable time for completing the work because of the owner's delay, said:

> "Plaintiff's evidence was that on account of the delay springtime came on before he had finished felling the trees and trimming branches and brush, and that, with the sap rising and leaves coming out, the operations of trimming and burning became more difficult and required a longer time and more work. In the case of Mis-

> souri Bridge & Iron Co. v. Stewart, 134 Mo. App. 618, 114 S. W. 1119, 1120, this court said: 'But here the case shows that the parties themselves made a substantial change in the contract, which, in effect, did away with the time limit provision, which left a reasonable time, implied by law, for the performance of the work. In such circumstances, it will not do to say that the contractor should yet be held to the time limited by the contract with an allowance of the time necessary for the changed conditions of the work. That might result in great injustice to the contractor.'"

The same rule that provides for abrogation of the stipulated damage clause, and an extension of time for completion of the contract where the owner is responsible for the delay, must necessarily and by analogy apply to a provision requiring heating of the building where the evidence is such that to enforce same would result in an added expense to the contractor which would not have been necessary had the owner not delayed.

A letter under date of October 26, 1939, which you enclosed from George Spearl, the Commission's architect, to Miss Dorothy Hehmann, Executive Secretary of the Commission, reads in part as follows:

> "In reply to Miss Hehmann's question, we would state that the original general contract required the contractor to keep the building dry and warm, i.e. to provide temporary heat at his own expense if the weather required it. Completion was called for in September and had he been delayed the weather has been such that no temporary heat would have been necessary. Doubtless all contractors who figured the job gambled on this fact in putting in their lowest

> possible bid. This was the reason that, when discussing Change Order 18 with the architects, the contractor made the price of the additional work, for which he asked an extension of time, contingent on the fact that he would not be held responsible for temporary heat."

You declare that the Dickie Construction Company by their own interpretation of the contract implied their responsibility for heating the building by asking that if temporary heat became necessary the cost "be considered and adjusted." We can not agree with the Commission's construction. The heating question was not only to be "considered" but also "adjusted" "when and if temporary heat became necessary."

Temporary heat having become necessary by reason of the delay of the Commission, we are of the opinion that under the terms of the contract the State Cancer Commission is responsible for the cost of fuel and the cost of firing same after the date originally set in the contract for completion.

Respectfully submitted

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:HR

COUNTY COURT:) Court may pay board and lodging of jury
) kept together in misdemeanor case.
JURORS:)

February 21, 1939

FILED
42

Honorable Andrew Howard
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 18, 1939, which is as follows:

> "The sheriff of this county has put in a bill to the County Court for the board of jurors while deliberating on misdemeanor cases. The bill covers a number of misdemeanor cases which have been tried in this county during the past three years.
>
> "Section 3826, R. S. Mo., 1929, makes provision for compensation to the sheriff for boarding jurors while they must be kept together on felony cases, but I do not find any statute making such provision in misdemeanor cases.
>
> "Can the County Court properly allow the sheriff's above mentioned bill?"

Section 3682, R. S. Mo. 1929, provides that,

> "With the consent of the prosecuting attorney and the defendant, the court may permit the jury to separate at any adjournment or recess of the court during the trial in all cases of felony, except in capital cases; and in misdemeanors the court may permit such separation of the jury of its own motion, * * *"

This section, as we read it, makes it mandatory to keep the jury together in a capital case, authorizes separation of the jury in other felony cases if done with the consent of the prosecuting attorney and the defendant, and permits the court to use his own discretion on whether the jury shall be kept together or permitted to separate in misdemeanor cases.

Section 3826, R. S. Mo., 1929, provides in part as follows:

> "* * *And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Thus it appears that while the court might, if it so desired, keep the jury in a misdemeanor case together, yet the above section makes no provision for the board and lodging of said jury. Our research has not disclosed any section which does attempt to provide board and lodging costs for the jury in misdemeanor cases, and we feel reasonably safe in asserting that there is no such statute.

However, such a situation as this is not without precedent. In the case of State ex rel. v. Smith, 5 Mo. App. 427, the proposition before the court was very similar to the instant question. In that case the Marshal of the Criminal Court in the City of St. Louis had presented a bill for board

of jurors kept together by the court. This bill had been incurred on order of the court directing the marshal to receive bids for that purpose. The City Auditor refused to audit said account and the suit was one to compel him to do so.

At that time there was a statute applicable, which authorized the payment of the board of jurors held together in murder trials. While the opinion is not clear on this point, we infer that the bill in question was not for the board of jurors in murder trials because, if otherwise, there could have been no question for the court to pass upon.

We quote from various parts of the opinion because of comments running throughout concerning the availability of mandamus. The court said at l. c. 429, 431, 432 and 433:

> "It is the duty of the judge of the Criminal Court in many cases to direct that the jury shall be kept together until discharged by him at the close of the case. McLean v. The State, 8 Mo. 153; 33 Mo. 483. Whilst kept together, they must be fed, in common with the officer in whose custody they are. Whilst the court has the right to direct that the jurors shall not choose, each for himself, where he shall eat, it has no power whatever to compel each juror to pay for his own meals. The feeding of the jurors is, therefore, a necessary expense, without incurring which the business of the court could not be carried on, and the administration of criminal justice must come to an end.
> * * * * * * * * * * * * * * * * * * *
> "To direct that a jury shall not be fed at the public expense, is to direct that it shall not be kept together during a protracted trial. This is a matter in the control of the judiciary department of the government; and will remain so, unless the

> people, in their sovereign capacity, shall change the organic law of the State in that particular.
>
> * * * * * * * * * * * * * * * * * * *
>
> "In Watson v. Moniteau County, 53 Mo. 133, the question came up as to which of two counties was liable for the board of a jury in a murder case. * * * The Supreme Court says that, though there is no express statutory provision for such an expense, there is no question of the power of the court to make an order keeping the jury together, and directing that they be provided with board and lodging, and cites Commissioners v. Hall, 7 Watts. 290, where Chief Justice Gibson held a county liable for the expense of boarding and lodging a jury, saying that such expenditures are, like light and fuel, incidental to the holding of a court, and raise an implied obligation on the part of the county to pay.
>
> * * * * * * * * * * * * * * * * * * *
>
> "The Criminal Court could not empanel a jury in a capital cause if it had no means of feeding them during the progress of the trial; because it would be error to permit the jurors to separate, and it might be the grossest cruelty to keep them together."

This case goes on the theory that the court has inherent power to incur any expense necessary for it to exercise its functions as a court and that even though no statute expressly authorizes the payment of such expense the county is bound to do so.

The situation on the instant question is, that where the court deems it necessary to hold a jury in a misdemeanor case together, as it is authorized to do, that, even though there is no statute providing for the payment of the board and

lodging of said jury, the county is bound to pay said bill because refusal to do so would impair the functions of the court.

Conclusion.

Therefore, it is our opinion that the county court should audit and allow any account presented by the sheriff for the board and lodging of jurors kept together on misdemeanor cases under the orders of the circuit court.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney-General

LLB:EG

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

OFFICERS: County treasurer cannot be appointed court reporter in the 21st Judicial Circuit, and he cannot appoint a first cousin of his wife as deputy county treasurer. The nepotism statute affects the office of treasurer.

January 7, 1939

FILED
43

1-12

Hon. W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We have your letter of January 5th requesting an opinion from this department, which reads as follows:

> "The man who just recently was elected and qualified as County Treasurer has been notified by the newly elected Circuit Judge of the 21st Judicial Circuit that he intends to appoint him Court Reporter for the circuit, and has asked him to attend court at Hillsboro Monday, January 9th, to serve temporarily as such reporter.
>
> "Ralph Keith, the Treasurer mentioned, has asked that I secure a letter of opinion from your office as to his right to serve in both capacities. He tells me that he intends to resign as Treasurer if the appointment as Reporter is made permanent but, while he is merely temporarily helping out, he does not feel like giving up the office to which he was elected.
>
> "I can find nothing in the law that covers the case. I read that the Treasurer shall maintain an office and be present during working hours for the transaction of the business, but I find nothing to indicate that he cannot at the same time do other county work, nor that he is prohibited from

holding two offices at the same time. At present he has, as an assistant paid by himself, a girl who is a cousin of his wife's in his employ.

"I should like an opinion from your office on the following points:

a. Can he accept the temporary work and keep his Treasurer's position?

b. Would he be permitted in law to transact the business of the Treasurer's office by agent?

c. Does the nepotism statute affect this office of Treasurer?

d. Is there anything in the law that would compel Keith to resign as Treasurer before he could do temporary stenographic work elsewhere on occasion?

"Since the matter is urgent and I would not like Keith's opportunity to fail him, I should appreciate an immediate reply so that I may advise him accordingly."

Section 12130a, Laws of Missouri, 1937, page 425, reads as follows:

"On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a county treasurer, who shall be commissioned by the county

> court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

Iron County, according to the 1930 census, has a population of 9,642 and comes within the bracket of this section.

As stated in your request, Ralph Keith was elected to the office of county treasurer at the last general election, and I am presuming that Iron County does not operate under township organization.

Section 12138, Laws of Missouri, 1937, page 427, reads as follows:

> "Unless otherwise provided by law, the County Court shall allow the treasurer for his services under this article such compensation as may be deemed just and reasonable, and cause warrants to be drawn therefor."

Section 11202, R. S. Mo. 1929, reads as follows:

> "Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, <u>who shall fail personally to devote his time to the performance of the duties of such office</u>, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal

> laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

Under Section 11718, R. S. Mo. 1929, a court reporter is an officer of the court and is appointed for the same period that the judge is elected for who appoints him. It was so held in the case of State v. Coon, 295 S. W. l. c. 823, where the court said:

> "The decision in the McKay Case was handed down April 8, 1913. The Legislature of 1919 (Laws 1919, p. 713) repealed sections 11231 and 11244, R. S. 1909, and in lieu thereof enacted section 12668, R. S. 1919, which provides that the official court reporter 'shall hold his office during the term for which the judge appointing him was elected.' It was evidently the purpose and intent of the Legislature to remove the ambiguity referred to in the McKay opinion, and to fix definitely the term of office of the official court reporter as the term for which the judge appointing him was elected."

The law does not provide for the temporary appointment of a court reporter.

Section 11719, R. S. Mo. 1929, reads as follows:

> "It shall be the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge thereof; to take full stenographic notes of the oral evidence offered in every cause tried in said court, together with all objections to the admissibility of testimony, the rulings of the court thereon, and all exceptions taken to such rulings;

> to preserve all official notes taken in said court for future use or reference, and to furnish to any person or persons a transcript of all or any part of said evidence or oral proceedings upon the payment to him of the fee hereinafter provided."

It will be noticed by this section that it is the duty of the official court reporter so appointed to attend the sessions of the court, under the direction of the judge. Under the duties as set out in this section, it would be necessary for the court reporter to leave the county in order to take the evidence in other counties in the judicial district.

It can readily be seen that the duties of both offices are incompatible and conflicting for the reason that the circuit would be outside of the county of Iron and the incumbent county treasurer could not attend personally to both duties.

In the case of State ex rel. Tilley v. Slover, 113 Mo. 202, l. c. 206, the court said:

> "In the light of the foregoing provision in the fundamental law of the state, it is immaterial whether the duties of stenographer of the circuit court of Buchanan county are so incompatible with those of the stenographer of division number 2 of the circuit court of Jackson county as that the acceptance of the former position by the relator would, at common law, have been held to have been such an abandonment of the latter as that the same became ipso facto vacant or not. The grave abuses that could, and did creep into the public service under that law, by which the honors and emoluments of an office could be accepted by one person and

> the performance of its duties 'farmed out' to another, for convenience or profit, furnished a cogent and sufficient reason for this constitutional enactment. The wholesome doctrine that 'public office is a public trust' was fortified by its provision, declaring it also a personal trust, and that no person should thereafter hold office in this state who did not personally devote his time to the performance of his official duties. That he may have deputies, who, under his supervision and control, may assist him in the performance of his official functions, does not dispense with, nor in any way lessen his obligation to personally devote his time to their performance. That this wise and salutary provision of the constitution may be enforced through the provisions of the statute under consideration as to this particular class of officers, we have no doubt."

And also at l. c. 208 the court said:

> "The phrase 'misconduct in office' is broad enough to embrace any wilful malfeasance, misfeasance or nonfeasance in office, and it cannot be doubted that an official stenographer who wilfully sets at naught this constitutional prohibition by refusing to personally devote his time to the performance of his official duties, whatever his reason therefor may be, is guilty of misconduct in office, within the meaning of the statute, and may be removed from office by the judge of the court of which he is such an officer."

In the case of State v. Yager, 250 Mo. l. c. 403, the court said:

"It was his duty under the law to be and remain in attendance upon the circuit court of his county when the same was in session (Sec. 11212, R. S. 1909), unless by other pressing official duties, or by illness, or some other lawful reason he was prevented therefrom. In other words, defendant had no right wilfully, without cause, to absent himself from his county and State, as the record shows that he did, during the two days mentioned in the instruction complained of in this case. If he had the right to so absent himself for two days, without any excuse whatever, and wilfully, as he did, then he had the right to absent himself for two months or two years, and it is no excuse that during his absence his deputies may have performed as well, or better than he, the duties made incumbent upon him by law. Especially upon the facts in this case was this instruction properly refused and the converse thereof properly given. This is so for the reason that the proof shows that the absence of the sheriff from his attendance on the court was due to the fact that he had fled to a foreign State with the intention and solely for the purpose of avoiding arrest upon a warrant for a criminal offense, to-wit, for assault and battery, which warrant was, as he well knew, in the hands of the coroner of Pike county for service on him. What is here said will dispose of the exceptions taken by defendant to the refusal of the court to permit him to show that during his absence certain deputy sheriffs properly performed the duties of his office. As we have said, it was no excuse for his dereliction that certain deputies appointed by him may have done the work for which he was elected. There are certain elements of personal selection and personal responsibility imputed as dominating the minds of the voters in the election of officers who shall perform the statutory duties

> in the several counties. To take the view of defendant would be tantamount to saying that the selection of the voters is transferable and delegable on the part and at the unrestricted will of the elected, a thing which the Constitution itself specifically negatives, by providing generally that officers shall devote their time personally to the duties of the several offices to which they have been elected. (Constitution of 1875, art. 2, sec. 18.) We must therefore rule these objections and all of them against defendant."

A public officer of Iron County does not come within the prohibition of Article IX, Section 18, Constitution of Missouri, because this section only applies to cities or counties having more than 200,000 inhabitants.

Article IX, Section 18, Constitution of Missouri, reads as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia."

In view of the opinion rendered in the case of State v. Slover, supra, and the case of State v. Yager, supra, the county treasurer cannot operate or carry out the duties of his office either by lawfully appointed deputies or by agents if he should absent himself from the county.

The appointment of the first counsin of the wife of the county treasurer as an assistant would be a violation of Article XIV, Section 13, of the Constitution of Missouri, which reads as follows:

> "Any public officer or employe of this State or of any political subdivision thereof who shall, by virtue of said office or employment, have the right to name or appoint any person to render service to the State or to any political subdivision thereof, and who shall name or appoint to such service any relative within the fourth degree, either by consanguinity or affinity, shall thereby forfeit his or her office or employment."

It was so held in the case of State ex inf. Norman v. Ellis, l. c. 164, where the court said:

> "The entire trend of recent legislation, the recent interpretation of the relation of husband and wife, is to make them different persons, each having individual rights independent of the other; each responsible for his or her conduct, independent of the other. The old fiction of oneness in a legal sense has been entirely abrogated by the statutes and by judicial interpretation. The only reason for saying that a man is not related to his wife has disappeared. With the disappearance of the reason the thing disappears; when the reason for a rule of law fails, the rule fails. When the reason for a definition of a legal term ceases, the definition is obsolete. Since at common law the reason a man was not related to his wife was because his wife had no separate legal existence, and since under modern interpretations and modern statutes she has come into existence and at law she is as distinct and individual as he is, then the fiction of no relationship vanishes. She is related to him

by affinity by reason of the engagement before the marriage, and that relationship of affinity continues after the marriage. The absurd fiction that he could not be related to her, but is related to her blood kin by marriage, disappears entirely.

"It is suggested that in using common-law terms lawmakers are presumed to use them in their common-law significance, and intend to have them applied as understood at common law. There is another rule superior to that, which is that the intention of the lawmakers and Constitution-makers must be gathered when interpreting an act or a constitutional provision. Lawmakers and the people adopting a constitutional provision have a right to put an interpretation on the words they use which meets their intention. They can define their language as they please and, if they see fit, can give a common-law phrase or word a meaning entirely contrary to its ancient usage. This the Legislature has done in Section 6632, Revised Statutes 1919, and the Constitutional Convention of 1924 and the people have done in adopting Section 13, Article XIV. The debates in the Constitutional Convention show that it was intended to apply to wives of officials, and as a matter of common knowledge the voters in 1924 so understood it.

"These respondents, having the opinion of the Attorney-General upon which to proceed, are not to be blamed morally for appointing their wives as their deputies. Nevertheless they have forfeited their offices, and therefore ouster is ordered in each case."

Also, in the case of State v. Whittle, 63 S. W. (2d) l. c. 101, the court in setting out the statement of facts, said:

> "Original proceeding in this court. Information in the nature of quo warranto. In substance it is alleged that, at a lawful meeting of the board of directors of a common school district in Miller county, Logan Stone was by said board employed and contracted with as teacher of the school in said district; that Stone is a first cousin by affinity of respondent Otto Whittle, a director of said district; that he was so employed by said board as the result of respondent Whittle and another director of the district voting in favor of him for the position; that the other director of said district voted against the employment of Stone to teach the school; that respondent Whittle, by voting to employ Stone as teacher, violated section 13, art. 14, of the Constitution, and thereby forfeited his office as director of the school district. The case was submitted on respondent Whittle's demurrer to the information."

And at l. c. 102 the court said:

> "It follows that respondent, Whittle, has forfeited his office of school director of said district, and therefore ouster is ordered against him."

Section 3, Laws of Missouri, 1933, page 376, provides as follows:

> "Every county official mentioned in this article, except the Circuit Clerk, shall be entitled to such number of deputies and assistants, to be appointed by such official, as he or she may deem necessary for the prompt and proper discharge of the duties of his or her office. * * *"

Under this section, deputy county treasurers are appointed by the county treasurer himself, but the county court fixes the compensation and number of such deputies or assistants.

If the county treasurer should appoint the first cousin of his wife, he would be violating Article XIV, Section 13, of the Missouri Constitution.

CONCLUSION

(a) In view of the above authorities, it is the opinion of this department that a county treasurer, duly elected, cannot accept temporary work as a court reporter outside of his county and still hold the position of county treasurer. He would be subject to ouster proceedings as set out in Section 11202, R. S. Mo. 1929, supra.

(b) It is further the opinion of this department that the county treasurer cannot abandon his office or absent himself from the county and transact the business of that office either by lawfully appointed deputies or by an agent.

(c) It is further the opinion of this department that the nepotism statute affects the office of county treasurer for the reason that the county treasurer himself appoints the deputies as permitted by the county court.

(d) It is further the opinion of this department that if Ralph Keith should act as court reporter in another county other than Iron county, he would be subject to ouster as set out in Section 11202, supra, and for the further reason that the law does not provide for the temporary appointment of a court reporter, but he must be appointed for the same period of time as that for which the circuit judge who appoints him is elected.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

PROSECUTING ATTORNEYS:
DUTIES: NOT REQUIRED TO REPRESENT SCHOOL DISTRICTS;
LIMITATION OF ACTIONS AGAINST COUNTY TREASURER:

Prosecuting attorney is not required to represent a school district in an action to recover moneys from county treasurer. Action against a county treasurer for money alleged to have been wrongfully paid out should be brought within three years.

January 24, 1939

1-27
FILED
43

Mr. Frank Huffhines
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which is as follows:

> "In Re: Opinion rendered December 21st, 1938-By Tyre W. Burton-To N. Elmer Butler, Pros. Atty. Stone Co.
>
> "In the above opinion, and in regard to the same subject, I would like to be informed as to whether or not it is the duty of a Prosecuting Attorney to represent a common school district in an action to recover money illegally paid out by the County Treasurer on warrants issued for a prior school year?
>
> "Is there any limitation on the time for recovering from a County Treasurer for money illegally paid out on such warrants?"

The duties of the prosecuting attorney in reference to representing the state and counties are set out in Section 11316, R. S. Missouri, 1929, which provides as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be con-

> cerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; and in all cases, civil and criminal, in which changes of venue may be granted, it shall be his duty to follow and prosecute or defend, as the case may be, all said causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses. * * * * * * * * * * * * * * "

By this section prosecuting attorneys are required to represent the state or county in all matters in which the interests of the state or county are involved.

Your request indicates that a school district is planning to institute an action against your county treasurer for the purpose of recovering moneys which the district claims the treasurer has wrongfully paid out.

The school district could maintain this action by virtue of the provisions of Section 9271, R. S. Missouri, 1929, which provides in part as follows:

> "* * * * * * * * * * * Such districts shall be bodies corporate under the numbers and designation thus given them by the county courts, and shall by such numbers and designation be capable of suing and being sued; * * * * * * * "

By this section a common school district may institute an action when the interests of the district are involved. In the case of School District v. Correll, 220 Mo. App. 322, 327, the school district had sued the county treasurer for moneys wrongfully paid and one of the defenses set up was that the school district had no authority to bring the action. The court, in passing on the defense, said at l.c. 327:

> "Under Section 11197, Revised Statutes

1919, plaintiff district is constituted a body corporate and is capable of suing and being sued. This cause of action, as we view it, being wholly independent of the statute requiring warrants to be first drawn, we are unable to discover any legal impediment to the maintenance of this action by the school district in so far as the statutes are concerned. (State ex rel. v. Chick, 146 Mo. l.c. 654, 48 S. W. 829; State ex rel. v. Henderson, 142 Mo. l.c. 605, 44 S. W. 737.)

"It is further contended that this action could be brought only by the county clerk or some freeholder. This contention is based on certain provisions found in section 11188, supra, as follows: 'On the forfeiture of such bond (of the treasurer) it shall be the duty of the county clerk to collect the same for the use of the schools in the various districts. If such county clerk shall neglect or refuse to prosecute, then any free-holder may cause prosecution to be instituted.' We construe this section to apply only to actions on the bond of the treasurer. There is not a word in the statute authorizing the clerk or freeholder to institute a suit except to collect the amount due on the bond. Since there was no bond no such action could be maintained. There is good reason for limiting the power of the clerk or freeholder to the bond itself. The bond required is given for the benefit of all the districts in the county. It is, therefore, proper that one person or official should have authority to bring the suit on the bond in order to avoid multiplicity of suits. But where there is no bond and the suit affects only one district, the reason for vesting the exclusive power in the clerk or freeholder vanishes. * * * * * * * * * * "

Following the ruling in the above case your school district, as a body corporate, may maintain the suit. Since the district, as a body corporate, is authorized to contract, we think the lawmakers have intended that a school district may employ an attorney to represent it either when it is sued or being sued. In School District v. Correll, supra, the district employed a firm to represent it and the question of prosecuting attorney being the necessary attorney and it being his duty to represent the district, was not even raised.

As Section 11316, supra, requires the prosecuting attorney to only represent the county and state in matters pertaining to them, and since the officer must look to the statute for his powers and duties, by applying the rule "The expression of one excludes all others", we think that if the lawmakers had intended for the prosecuting attorney to represent other subdivisions of the state, such as road districts, city school districts, etc., they would have so stated.

In the case of State ex rel. Affolder, 214 Mo. App. 500, an action by mandamus was brought by a law firm to compel a drainage district to issue a warrant for the fees which were earned in connection with a bond issue. The county court had ordered the district to issue the warrant. The defense of the district was that it was the duty of the prosecuting attorney to represent the district, and, therefore, the attorneys appointed by the county court had no authority to represent them, and that they had no authority to pay them. The district based this defense upon Section 11316, supra, and the court at l.c. 505, said:

> "Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular

cases, but the sections, supra, cover the field generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. The Act of 1917 provided that in a township bond issue thereunder the county court shall act for the township. The only recognition of township organization is that the act provides in section 10750 that the proceeds of the bond sale be turned over 'to the treasurer of the district or the county or township as the case may be.' In the reference quoted and in section 10748 it will be seen that not only was township organization taken into account, but also special road districts organized under sections 10800 et seq. and secs 10833 et seq., Revised Statutes 1919. Neither the act of 1917, nor the special road district acts, makes it the duty of the prosecuting attorney to advise or render service. There is nothing in the Township Organization Act, section 13164 et seq. Revised Statutes 1919, which makes it the duty of the prosecuting attorney to render the service rendered here by plaintiffs. The county court in the matters pertaining to the bond issue mentioned in this record was acting for Duck Creek township, and had the same authority in the premises as would the township have had, had the duty here placed upon the county court been placed upon the township board. Section 13169, Revised Statutes 1919, sets out the general powers of townships under township organization, and among them is that it shall have power to make such contracts as may be necessary to the exercise of its corporate or administrative powers. Section 13170 provides that no township shall possess any corporate

> powers, except such as are enumerated or granted by statute, or that 'shall be necessary to the exercise of powers so enumerated or granted.' By the act of 1917 Duck Creek township was granted the power to vote the bonds mentioned in this record. The county court in that instance by direction of the statute acted for the township instead of the township board which usually acts for it. It stands conceded that it was necessary that some attorney render the services which plaintiffs rendered. The conclusion, therefore, is that the county court had the power, acting for the township, to employ plaintiffs. Since there is no statute directing generally that the prosecuting attorney shall act for the township in counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

We find that nowhere in the statute is it stated that a prosecuting attorney shall represent a school district.

CONCLUSION.

Since the school district is authorized to employ and pay its own counsel, and since there is no statute directing generally that the prosecuting attorney shall represent the school district, it is our conclusion that it is not his official duty to render official services to school districts and represent them in litigation.

As to the limitations on the time for bringing an action against a treasurer for recovering money which is alleged to have been wrongfully paid out by him, we think Sections 860 and 863, R. S. Missouri, 1929, apply. These

sections read as follows (Section 860):

> "Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued: * * * * * * * * * "

Section 863 provides as follows:

> "Within three years: First, an action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution or otherwise; second, an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state."

In the case of Schaeffer v. Bernero, 11 Mo. App. 562, the court held that the cause of action against an officer for failure to pay money wrongfully retained does not accrue so as to set in motion the statute of limitations until there has been a demand of payment or a return or a report of the officer showing such money has been paid.

In the case which you have submitted the date the treasurer made his report showing that he paid the moneys out, which you claim were illegally paid, would be the date on which the statutes begin to run and would be in effect for three years from that period.

CONCLUSION.

It is, therefore, the opinion of this department that an action against a county treasurer for wrongfully paying out school moneys should be brought within three

years from the date the treasurer makes his report showing that such moneys have been paid out by him.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

TWB:DA

TAXATION: County assessor should file individual tax lists with the county clerk after making up his land and personal property books.

March 3, 1939

3-4 FILED 43

Mr. Shap R. Hunter, Jr.
Assessor, New Madrid County
New Madrid, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of February 24th, 1939, which reads in part as follows:

"I have always been under the impression that all the Assessor turned over to the County Court was the Assessment Books after they were completed and an abstract of the Books together with an affidavit that the Books are correct as far as the Assessor is able to ascertain, and that this must be done before the 20th day of January of each year. I have complied with the Law in that respect. Now the County Court claims I have to submit to them the assessment lists with Real Estate and Personal Property set forth together with the Valuation of the Real Estate all on one list. They claim the new Law passed by the Legislature in 1937 requires me to do this and also gives them the right to audit the Assessment lists.

"I have made all the Assessment lists according to my instructions with the exception that I have not placed Real Estate and Personal Property on the same blank. I have also made all Non Resident lists according to the instructions we have always followed.

"This new Law was submitted by the County Assessors Association and they had it passed because as I understand the Supreme Court held if the word Real Estate was not inserted in the Law we would not be allowed fees for taking the Non Resident lists. The Association

pushed and had this bill passed.

> "Section 9800 General Revenue Law compiled by The State Auditor says the Assessment list of Taxable Property whether made by the Tax Payer or the Assessor is only a memorandum for the personal use of the Assessor in making up the Assessment Books and are not required to be turned over to the County Court. State vs. Carr 178 Mo 229 77 SW 543. If this is correct I have complied with the Law and would like to have your Opinion."

Section 9756 R. S. Missouri, 1929, was repealed by the Session Laws of 1937, page 570 and a new section re-enacted with the same number as set out in the Revised Statutes of Missouri, 1929. The only difference being, in the re-enactment real estate is included on the blanks as furnished by the county clerk to the county assessor. The date of the assessment of course is changed and several items of property have been excluded which are not in use at the present time, such as hacks, carriages, etc. It will be noticed in this section that the first subject matter covered by the assessment list is a list of all the real estate and its value which should be listed and assessed on the first day of June, 1937. Under this section the real estate should be listed on the assessment list and then be followed by a list of the personal property as set out in said section.

In checking the case of State v. Carr, 178 Mo., 229, as set out in your request, we find that the court in that case only held that the list is a memoranda for the use of the county assessor and is secondary evidence for the reason that the property books as made out from the list are the primary and best evidence. This case does not hold that the county assessor is not required to turn the list over to the county court.

Section 9759 R. S. Missouri, 1929, which has not been repealed and has been in effect for many years, reads as follows:

> * * "The list and oath required by this section shall be by the assessor, after he

> has completed his assessor's books, filed in the office of the county clerk, and by him, after entering the filing of the same thereon, be preserved and safely kept. The courts having criminal jurisdiction shall, at each term, give this section in charge of the grand jury, who shall have authority to examine such lists, with a view of inquiring into the correctness of such lists; and no such list shall be altered, changed or amended after it is filed with the county clerk, except by order of the county court; and any person who shall alter, change or amend any such list without such order shall, upon conviction, be fined not less than ten nor more than one hundred dollars; and every county clerk or deputy county clerk who shall knowingly permit any such list to be altered, changed or amended without such order, shall forfeit one hundred dollars, to be recovered by suit upon his official bond."

It will be noticed by this section that the list and oath required by the section shall be filed in the office of the county clerk after the county assessor has made up his books and the county clerk is responsible for the preservation and safety of the lists.

CONCLUSION.

In view of the above authorities it is the opinion of this department that the lists as set out in section 9756 should cover the real estate and the personal property as set out in said section upon one list from each and every tax payer and reading other sections in reference to duties of the county assessor when the tax payer does not furnish a proper list it becomes the duty of the county assessor to make out a proper list. Each list should contain real estate as well as personal property.

It is also the opinion of this department that after the county assessor has made up the regular land and personal property books from the lists as turned in by the tax payer, or as made up by the county assessor, then the lists should be filed with the county clerk.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General.

SHERIFF: Sheriff of Franklin County can appoint a deputy approved by the judge of the circuit court and pay the deputy out of his own fees, but the county court cannot allow the deputy a salary.

March 8, 1939

3-9

FILED
43

Honorable Theodore P. Hukriede
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Sir:

This is to acknowledge your letter of March 6, 1939, requesting an opinion of this Department. Your letter reads as follows:

> "The Sheriff of Franklin County desires an opinion as to whether or not the County Court can under the law allow and pay a salary for a deputy to take care of the work in the Sheriff's office.
>
> "In this County there is a great deal of work, both civil and criminal, and it is practically impossible for the Sheriff himself to take care of his office duties and serve legal process."

The population of Franklin County according to the last Decennial Census of 1930, was 30,519. In view of that population the Sheriff of Franklin County does not come within the bracket which calls for a salary, but must depend upon fees solely. The fees under civil procedure are set out in Section 11789, R. S. Mo. 1929. The fees under criminal procedure are set out in Section 11791, R.S. Mo., 1929.

Section 11513, R. S. Mo. 1929, reads as follows:

> "Any sheriff may appoint one or more deputies, with the approbation of the judge of the circuit court; and every such appointment, with the oath of office indorsed thereon, shall be filed in the office of the clerk of the circuit court of the county."

Section 11514, R. S. Mo., 1929, reads as follows:

> "Every deputy sheriff shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff."

Under the two above sections, Sections 11513 and 11514, any sheriff may appoint one or more deputies to be approved by the judge of the circuit court and every deputy shall possess all the powers and perform the duties performed by the sheriff. Since the Sheriff of Franklin County is on a fee basis, so also must the deputy sheriff be paid out of fees collected by the Sheriff.

In the case of Scott v. Endicott, 38 S. W. (2d) 67, the court held:

> "There can be no doubt that a deputy sheriff appointed by the sheriff as provided by Section 11513, R. S. Mo. 1929, is a public officer. State ex rel. Walker v. Buss, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark County. * * *"

Under Section 11516, Revised Statutes of Missouri, 1929, in case of an emergency the sheriff may appoint deputy sheriffs without permission from the judge of the circuit court, and their salary shall be $2.00 per day. This section reads as follows:

> "Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

Under Section 11789, R. S. Mo. 1929, the fee of the deputy sheriff for attending each court of record or criminal court and for each deputy actually employed in attendance upon such court (the number of such deputies not to exceed three per day), shall be $3.00 per day. Bearing in mind Section 11513, as above set out, this deputy who attends court must be approved by the judge of the circuit court. In view of the fact that Franklin County only has a population of 30,519, the Sheriff of this county is only allowed fees as set out in Sections 11789 and 11791, supra.

Conclusion.

In view of the above authorities it is the opinion of this Department that the Sheriff of Franklin County may appoint a deputy sheriff, who is to be approved by the judge of the circuit court but must be paid out of the fees allowed the sheriff in accordance with the holding of Scott v. Endicott, supra, and the county court cannot under the law allow and pay a salary for a deputy to take care of the work in the sheriff's office.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General

WJB:EG

DEPUTY HEALTH COMMISSIONER: Appointment for one year; general duties.

March 15, 1939

3-17

FILED
43

Mr. W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

We have your request for an opinion, which in part is as follows:

> "a. Is the Deputy Health Commissioner in this county ex-officio the County Doctor who must be used in all cases of ministering to the medical needs of the poor?
>
> b. Section 9025 R. S. 1929, which was passed in May 1919, provides that at the first February term, that is, 1920, a Deputy Health Commissioner is to be appointed for three years. In this county, the court appointed each year, so the court record shows. The last appointment was made last February appointing Doctor J. H. Martin to serve as such for one year. Could the County Court rely on that time designation and appoint another person at this February term, even though the Statute sets out that the appointment should be for three years?"

The duties of the Deputy Health Commissioner are set out in Section 9027 R. S. Mo. 1929, and are principally concerned with the enforcement of the "rules and regulations"

of the State Board of Health. Some of these duties relate to the "quality of water" furnished to the public, Section 9031, R. S. 1929, to prevent the spread of infectious or contagious diseases, Section 9036, R. S. 1929. We are unable to find any requirement that the Deputy Health Commissioner shall render all medical services to the poor. It is the duty of the county court to support poor persons, including those who are sick and in need of medical treatment as set out in Sections 12950 and 12951, R. S. Mo. 1929. It is, therefore, the opinion of this office that the Deputy Health Commissioner may, or may not, render medical services to the poor, depending upon the orders or approval of the county court. The county court may employ any reputable physician to render medical services.

With reference to the second proposition in your letter, there is no authority now for the employment of a Deputy Health Commissioner for more than a one year term. Section 9025 R. S. 1929 has been repealed, Laws of 1933, page 271, and the appointment under the new law is limited to a term of one year.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

RECORDER INDEXING CONTRACTS: The party extending a loan agreement should be listed as grantor in the index of deeds.

April 5, 1939

4-6

FILED
43

Mr. D. J. Hudnall
Recorder of Deeds
Scotland County
Memphis, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department as to the manner of indexing an extension agreement. Your inquiry goes directly to the question of who is the grantor and who is the grantee in such agreement. It appears from the agreement which you have set out in your inquiry that the Connecticut Mutual Life Insurance Company, on a Missouri Extension Agreement form, has contracted to extend the time for the payment of a certain obligation which is secured by a mortgage of record in your county. We do not find any Missouri authority on the question you submitted, but in volume 28 C. J., at page 822, we find the word "grantor" defined as "a person who gives, bestows or concedes a thing, one who makes a grant, * * * ". In this extension agreement form which you have submitted, it appears that the Connecticut Mutual Life Insurance Company is the party who is agreeing that the time for the payment of the obligation described in the agreement may be extended. In other words, the company is the one who is granting an extension of time, that being the case, it would be considered the grantor in this instrument.

CONCLUSION

From the foregoing, it is the opinion of

this department that the extension agreement which you have described in your request should be indexed as follows:

"The Connecticut Mutual Life Insurance Company, grantor, and John Doe, grantee."

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:RW

CRIMINAL COSTS: Method of providing fee bill and payment of costs in misdemeanor cases.

May 11, 1939

5-20 FILED 43

Honorable Harold S. Hutchison
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Sir:

We acknowledge your request for an opinion, dated May 4, 1939, which reads as follows:

"I would like to have your opinion in the matter in which the facts are substantiated as follows:

"In January of this year, there was an information filed before Robert C. Terrill, Justice of the Peace of Jefferson Township, in which State of Missouri was plaintiff and J. R. May was defendant charged with stealing chickens in the day time, the value of which was less than Thirty Dollars ($30.00); that the same came on for trial January 7, 1939, before the above named Robert C. Terrill, Justice of the Peace, at which trial the defendant was acquitted. That sometime after the trial and before January 13th, the said Robert C. Terrill, Justice of the Peace submitted a cost bill to the County Clerk of Maries County in the amount of Seventy Eight Dollars and Ninety Five Cents ($78.95), part of which was not itemized. That on January 13th, the said Justice of the Peace submitted some additional costs and in his letter stated he had not specified what some of the costs was for but would submit a regular transcript if the County Clerk thought it necessary.

> That on February 10th, without ever submitting said cost bill to the Prosecuting Attorney for inspection and without his knowledge that the same had been filed, the County Court paid by warrant to Robert C. Terrill the amount of Eighty Dollars and Sixty Five Cents ($80.65) "As fees in the May case." That the Justice of the Peace paid the sheriff of Maries County his fees and has converted the rest of the amount to his own use and has failed and refused to pay the jurors, witnesses and constable fees in the above cause.
>
> "I would like your opinion first, whether or not the Justice of the Peace violated Section 4086 of the Revised Statutes of 1929. Second, if not, whether or not he violated any other criminal statute. Third, whether or not the County Court under that set of facts violated Section 3845. Fourth, whether or not the County Court would be individually liable to pay the jurors, witnesses and constable or whether the County would be liable.
>
> "The Justice is absolutely insolvent."

Section 3828 R. S. Mo. 1929 provides:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3851 R. S. Mo. 1929 provides that a Justice of the Peace upon issuing a fee bill shall certify same to the Circuit Clerk and reads:

> "Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Section 5844 R. S. Mo. 1929 provides the procedure for the Circuit Clerk when certifying fee bills to the State Auditor in felony cases and reads:

> "When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be, that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no

> costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

Section 3845 R. S. Mo. 1929 provides the procedure for Circuit Clerks when certifying fee bills to the County Court in misdemeanor cases, that they be in the same form and substance as felony cases, and reads:

> "Each and every bill of costs presented to any county court for allowance shall be examined and certified to by the judge and prosecuting attorney in the same manner, all necessary charges excepted, as provided for certifying bills of costs to the state auditor for payment; and any county judge who shall pay, or vote to pay, any cost incurred in any criminal case or proceeding, unless the same is so certified to, shall be adjudged guilty of a misdemeanor."

Section 3853 R. S. Mo. 1929 provides:

> "All criminal cost fee bills shall be certified for payment as hereinbefore provided, and in addition thereto the circuit clerks of each county and clerks of all criminal courts shall make copies of all original fee bills certified to the state auditor for payment, and shall file the same with the treasurers of their respective counties, and the city of St. Louis, at the time of transmitting the original for payment, and when certified to the state auditor for payment, he shall draw his warrant on the state treasurer and transmit the same to the treasurer of the county from whence the bill originated, or the city of St. Louis, and when any criminal cost fee bill shall be certified to the county court, or the auditor of the city of St. Louis, for payment, the county clerk, or the auditor of the city of St. Louis, shall, when the same

is allowed, draw a warrant on the county treasurer, or the treasurer of the city of St. Louis, in payment thereof, and deliver the same to the county treasurer, or to the treasurer of the city of St. Louis, together with a list of the names of the various parties to whom the fees are due, stating the amount due each person. The treasurers, on receipt of any such warrants and fee bills, shall record the fee bills in a well-bound book, arranged with appropriate headings, so that the same shall correspond, as near as may be, with the accounts required to be kept by other officers in section 11822, R. S. 1929."

Section 3854 R. S. Mo. 1929 provides:

"The county treasurers shall pay out of all such fees to the proper owners as the same may be called for: Provided, that before any such fees shall be paid the party to whom the same is due shall furnish satisfactory evidence to the treasurer that he or she, as the case may be, is not at the time indebted to the state or county, on account of delinquent back taxes, or is indebted to the state or county on account of any fine, penalty, forfeitures or forfeited recognizances, or costs for a violation of any criminal statute of this state, or for contempt of any court, no matter if the same shall have been paid by oath of insolvency as provided by law; or is indebted to the state or any county on account of any funds coming to his hands by reason of any public office: Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness of the claimant equals or exceeds the amount of

> his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 3853 to 3858, inclusive."

In the case of State ex rel vs. Heege, 40 Mo. Appeals 650 l.c. 651 in a mandamus suit against county judges to allow fees in speaking of a cost bill coming up from a Justice Court's misdemeanor case, this court said:

> "The cost bills were examined, approved and certified by the judge of the circuit court, and the prosecuting attorney of the county. * * * * * "

Thus we see that even in misdemeanor cases, the judges and the prosecuting attorney must certify the cost bills. We also see that county judges can be mandamused to pay statutory fees allowable in misdemeanor cases.

Section 3852 R. S. Mo. 1929 makes it a misdemeanor to knowingly violate the above statutes and reads:

> Every judge, prosecuting attorney, clerk or justice of the peace who shall knowingly violate any provision of this article, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding one thousand dollars."

On the question of whether or not the justice violated Section 4086, which is the statute under the general criminal code on embezzlement by a public officer, in the case of State vs. Bolin 110 Mo. 210 l.c. 211, the Supreme Court said:

> "No provision of the statute is pointed out, or found, which directs or authorizes the public school money of the state or county to be placed in the possession or under the supervision, care or control of a justice of the peace for safe keeping, disbursement, transfer, or other purpose, and we are unable to see how he, as a public officer, can be guilty of embezzling funds which never came into his possession, under any authority of law, by virtue of his office. If he had no right to the possession or control of this public money as an officer, he would have no greater right when acting merely under color or pretense of office.
>
> "We do not think the language of the statute, 'under color or pretense' of an office, can be construed to apply to an officer, who, having in fact no right to the custody of public money, obtains the possession of it by falsely representing that he is entitled to its custody by virtue of his office. The statute was only intended to make one, acting officially, under color of office only, equally liable for the misappropriation of the public money coming into his possession by virtue of his supposed official right to receive it, as he would have been had the title to his office been perfect."

The above case holds that there was no official embezzlement, because under the statute defendant Justice of the Peace was not authorized to collect the fines; hence, he did not receive the said fines by virtue of his office. In your case the fees likewise were not payable to or received by the justice under any statutory provision.

As to civil liability of officers for malfeasance, we quote from Knox County vs. Hunolt, 110 Mo. 67 l.c. 75:

> " * * * * * The use of the fund for the payment of ordinary county debts was an act in direct violation of the constitution and laws

creating that fund, and was, therefore, nothing short of malfeasance. That the judges would be liable in a private suit to persons especially injured for such a violation of law is clear, and we can see no reason why they are not liable to the county."

CONCLUSION

Answering your first question, we are of the opinion under the facts submitted and the holding in the Bolin Case, supra, that the justice of the peace did not violate Section 4086 R. S. Mo. 1929.

Answering your second question, we are of the opinion under the facts submitted, that the justice of the peace may be prosecuted for violating the provisions of Section 3851, and 3852, supra, for not certifying a fee bill to the Circuit Clerk.

Answering your third question, we are of the opinion under the facts submitted that any judge of the county court who voted to pay this fee bill without requiring the certificate of the Circuit Judge and Prosecuting Attorney violated Section 3845, supra.

Answering your fourth question, we are of the opinion under the facts submitted and the holding in the Knox County Case, supra, that the members of the county court would be personally liable to the county for replacement of such portion of the money paid to the justice of the peace which did not actually reach the parties entitled thereto. We would not be prepared to say that upon the facts outlined in your letter the judges of the county court would be personally liable to the jurors, witnesses, and counstables for payment of their respective fees. However, if the jurors, witnesses, and constables could show that they were especially injured by the improper payment to the justice of the peace, the judges might be personally liable to them. The question of whether these parties were especially injured is a question of fact which would involve more facts than are outlined in your letter. The Heege case holds that the county is liable for these fees when a proper fee bill is presented. We do not think that what has transpired in connection with these fees has discharged the county's liability, and therefore, we think the

the county is still liable to the jurors, witnesses, and constables.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

WOS/ww

SCHOOLS: County courts must either collect the amount of a school fund mortgage or foreclose such mortgage.

May 16, 1939

5/16

FILED
43

Mr. Henry B. Hunt
Prosecuting Attorney
Atchison County
Rock Port, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the follow-facts and question:

> "Some years ago Mrs. Emma Walkup took over a school loan and assumed the payment of the mortgage relating thereto, and in addition to said security, she gave as collateral security, a deed of trust on her undivided one-fourth interest in and to some real estate lying in the southeast part of this county; her said undivided interest amounts to about thirty acres of land, which is subject to a life estate.
>
> "As the interest has mounted on this land, the County Court in due form of law gave notice of foreclosure on the first deed of trust. Mrs. Walkup has come forward with a proposition that if the County Court will release the collateral security she can borrow enough money on her undivided interest in said land to pay a year's interest amounting to $402.00. The County Court

> deems that they can get more benefit from this collateral security by her proposed method than to foreclose the same in due time and trust to the amount secured by foreclosure sale."

Your question in the final analysis resolves itself into this--has the county court authority to proceed in the collection of school moneys in any manner other than that provided by the statutes?

In our search through the opinions written by this department we find that this office, on August 24, 1938, by an opinion written by Honorable W. J. Burke, Assistant Attorney General to Honorable Glen W. Huddleston, Prosecuting Attorney, Carroll County, Carrollton, Missouri, covered the question you have submitted to a certain extent. In that opinion Mr. Burke sets out the powers and duties of the county court with respect to county school funds and held in that opinion that the county court was not authorized under the Missouri statutes to compromise or extend a loan as provided under the Frazier-Lemke Act. We are enclosing a copy of this opinion for your information.

While we think Mr. Burke's opinion fairly covers the question which you have submitted we note another section of the statutes which would indicate that the county court must follow the provisions of the statutes as to collecting the amount of the money loaned together with interest thereon or to foreclose the loan, that is Section 9256, R. S. Missouri 1929. This section provides as follows:

> "Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of

> which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

It will be noted that after the county court has repossessed land under foreclosure it cannot then exercise its jurisdiction with respect to the disposition of such lands. In other words, the county court is authorized to dispose of lands which it has bought under the foreclosure of school fund mortgages and use its judgment as to what would be the most advantageous for the school or schools interested in the property.

In your request it appears that the security which the parties wish to release is collateral security.

We assume that this collateral security was demanded and given in accordance with the provisions of Section 9253, R. S. Missouri 1929, which are as follows:

> "The county court shall have power, from time to time, to require additional security to be given on said bond when they, in their judgment, deem it necessary for the better preservation of the fund. If such additional security be not given within ten days after an order to that effect shall be made and served on the principal in the bond, and in all cases of default in the payment of interest, the court shall proceed to enforce payment of both principal and interest by writ, or in a summary manner, as provided in this chapter."

Under some circumstances an individual or a body, other than the county court, in handling school funds, might be justified and authorized in releasing collateral security, but the Missouri statutes do not seem to make an exception to the rule requiring the county court to either collect the principal and interest or foreclose. Therefore, we think the same rule would apply to the collateral security as applies to the principal security.

CONCLUSION.

From the foregoing it is the opinion of this department that the only course for the county court to follow in handling this loan is to either collect the amount of principal and interest due or to foreclose the loan and the collateral.

Probably the proposition which has been submitted to the court in this case would be to the best advantage of the school fund, but as said in Montgomery County v. Auchley, cited in the Burke opinion the county court must follow the statute regardless of whether or not to do otherwise would be more advantageous to the funds

secured, and we are further of the opinion that the only time that the county court may exercise its discretion in the handling of this school fund is after it has foreclosed the school loan as is provided by Section 9256, supra.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

LIQUOR: Possession only of illegal intoxicating liquors constitutes a misdemeanor.

September 27, 1939

9-28

FILED
43

Hon. Frank Huffhines
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

We have received your letter of September 2 which reads as follows:

> "Please furnish me with an opinion as to the most severe penalty for possession of illegal whiskey. The whiskey has been confiscated (sixteen pints) and all of said corn whiskey had been put in legal abandoned bottles."

The only section of the Intoxicating Liquor Laws dealing directly with penalties prescribed for possession and possession only of illegal intoxicating liquors is contained in Section 8 of the Liquor Laws, Laws of Missouri, 1937, page 528. This section reads as follows:

> "No person shall possess intoxicating liquor within the State of Missouri unless the package in which such intoxicating liquor is contained and from which it is taken for consumption has, while containing such intoxicating liquor, been labeled and sealed with the official seal prescribed under this act and the regulations made hereunder; provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests."

The foregoing section states that no person shall possess intoxicating liquor unless the package in which it is contained has been labeled and sealed as prescribed by law. Since no penalty is prescribed in Section 8, supra, Section 43, Laws of Missouri, 1935, page 282, becomes effective. Section 43 reads as follows:

> "Any person violating any of the provisions of this Act, except where some penalty is otherwise provided, shall upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty ($50.00) Dollars, nor more than One Thousand ($1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence."

Therefore, as to the possession of illegal intoxicating liquor, it appears that this is a misdemeanor only and that a fine of One Thousand Dollars ($1,000.00) and imprisonment in the county jail for one year is the maximum which can be assessed.

Since you do not give us any of the details of the case you have in mind, and since it is possible that other laws might have been violated in connection with an illegal sale or the stamp laws, we are taking the liberty of quoting other sections which might possibly be applicable.

Section 21a1 of the Liquor Laws, Laws of Missouri, 1937, page 531, reads in part as follows:

> "(d) Any person who sells to any person within this state any intoxicating liquors mentioned in subsection (a) of this section, unless the same be contained in a container stamped or labeled as provided in this act, shall be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor

> more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment.
>
> *
>
> "(g) Any person who shall sell in this state any intoxicating liquor without first having procured a license from the Supervisor of Liquor Control, authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony and upon conviction shall be punished by imprisonment in the penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail, for a term of not less than three months nor more than one year, or by a fine of not less than one hundred ($100.00) dollars nor more than one thousand ($1,000.00) dollars, or by both such fine and imprisonment."

Therefore, if a person sells unstamped liquor, the crime is a felony. If a person sells intoxicating liquor without being licensed to do so by the Supervisor of Liquor Control, this likewise constitutes a felony.

Section 30a, Laws of Missouri, 1935, page 277, reads as follows:

> "It shall be unlawful for any person to open, or to remove therefrom the contents of, any bottle or other container containing intoxicating liquor without first destroying the state stamp on such container. Provided, that it shall not be unlawful for any duly licensed brewer or manufacturer of malt liquor to refill with malt liquor any such container originally containing malt liquor. Whosoever shall violate any provisions of this section with intent to defraud the

> state of its revenue shall be deemed to be guilty of a felony and shall be punished by imprisonment in the state penitentiary for a term of not less than two years nor more than five years, or by imprisonment in the county jail for a term of not less than one month nor more than one year, or by a fine of not less than fifty dollars nor more than one thousand dollars, or by both such fine and imprisonment."

Consequently, if the person should have attempted to use state stamps on a container which had been previously filled with legal liquor and properly stamped, that is, if an attempt is made to re-use stamps, then the crime is likewise a felony.

Section 36 of the Liquor Laws, Laws of Missouri, Extra Session 1933-34, page 90, has to do with the manufacture or use of labels by unauthorized persons and provides that the same shall constitute a felony. Section 36 reads as follows:

> "It shall be unlawful for any person to attempt to make or make, to attempt to sell or sell, to attempt to use or use, any of the certificates or labels, or both, provided for by this act, or limitations thereof, or have in his possession any counterfeit plates capable of being used to make the same, except such persons as by law are allowed to make, sell and use the same; and any person so offending shall be deemed guilty of a felony and upon conviction be punished by imprisonment in the penitentiary for a term not to exceed five years."

It may be that none of the above sections except Section 8 will be of any benefit to you, but since

you included few facts in your letter, we thought that some of the laws quoted above might have been violated.

CONCLUSION.

In answer to the specific question which you ask, that is, the most severe penalty for possession of illegal whiskey, we wish to say that the possession only of such whiskey constitutes a misdemeanor. The severest penalty that can be given, therefore, is a One Thousand Dollar ($1,000.00) fine, together with imprisonment in the county jail for a term of one year.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

MISSOURI STATE SCHOOL FOR DEAF: Not liable for assessment by Fulton, Missouri, for benefits derived from sewer or disposal plant.

February 18, 1939

FILED
44

Mr. Truman L. Ingle
Superintendent
Missouri School for the Deaf
Fulton, Missouri

Dear Mr. Ingle:

We are in receipt of your letter of February 9th, as follows:

> "The City of Fulton has made a request which places me in a quandary. I am writing to ask if you will give me an opinion regarding the legality of our complying with it.
>
> In explanation, may I say that some four or five years ago, the City built a sewage disposal plant for which bonds were authorized at an election. So far, the City has paid off the indebtedness on these bonds as it fell due and has maintained the plant without levying the tax authorized at the bond election. However, the cost of maintenance is now more than was anticipated, and it is my understanding that the City will probably not be able to carry the load without making this taxation which, of course, falls on all property owners throughout the City.
>
> Quoting from the letter in which the request is made that we contribute toward the maintenance of this plant, I give you the request as sent to us:
>
> 'In view of the fact that the City

finds the upkeep of the Disposal Plant to be so much greater than had been anticipated when it was installed, we are asking your Board to consider the possibility of making a permanent contribution on a monthly basis. We feel that your institution benefits largely from the Disposal Plant, and we are sure you will be willing to do your share, within your jurisdiction, toward m intaining this worthwhile project, which is so necessary for the health of all concerned. The operating expense since the plant was installed has averaged $180.00 per month, plus approximately $70.00 per month, which represents the electric current used for light and power at the Disposal Plant and lift stations. We feel that with some aid from The School for the Deaf and The State Hospital the City should be able to retire the remaining $52,000.00 of outstanding bonds, and the interest on same when due.'

As you see from the request, the statement is made '... that with some aid from the School for the Deaf and The State Hospital the City should be able to retire the remaining $52,000.00 of outstanding bonds, and the interest on same when due'. I infer that the City by seeking assistance from us is attempting to remove the need of levying the authorized tax.

May I ask that you give me an opinion as to whether or not this is a legal responsibility of the Missouri School for the Deaf and whether or not we can legally pay a portion of this indebtedness. In my opinion, we should keep in mind the fact that a tax levy has been authorized and that while this school does benefit from the sewage disposal plant, it does not do so any more than any property owner within the city limits.

> Our Board of Managers holds its regular monthly meeting on Tuesday, February 21. If it is possible and does not inconvenience you too much, I would appreciate having your opinion in time to present the matter to my Board at this regular meeting."

Section 9688 R. S. Mo. 1929 provides that:

> " * * * the Missouri School for the Deaf at Fulton shall be regarded, classed and conducted wholly as educational institutions of the state."

Section 9705 R. S. Mo. 1929 provides for the control of the school property:

> "The board of managers of each school shall have the care and control of all the property, real and personal, owned by such school, and the title to all real estate or personal property now owned by such school, or by the state for its use, or that may hereafter be purchased by or donated to such school shall be vested in such board of managers of the respective schools, for the use and benefit of the said school. The board of managers of either school shall not sell or in any manner dispose of any real estate belonging to the school without an act of the general assembly authorizing such sale or disposal of such real estate. The boards of managers shall provide their respective schools with an official seal."

There can be no question but that the Missouri School for the Deaf is a public school for a particular class of

children, and that the property belongs to the state, for the board of managers of said school has no authority to dispose of its real estate "without an act of the general assembly authorizing such sale or disposal of such property.

Section 6092 R. S. Mo. 1929 provides which cities or towns in this State may elect to become cities of the third class:

> "All cities and towns in this state containing three thousand and less than thirty thousand inhabitants, which shall elect to be a city of the third class, shall be cities of the third class."

The 1930 decennial census reports Fulton, Missouri, as containing a population of 6,105 people, and we therefore assume that Fulton is a city of the third class.

Section 6872 R. S. Mo. 1929 provides that cities of the third class may, by an election held for that purpose, adopt the provisions of Sections 6872 to 6889, inclusive, have power by ordinance to provide drains and sewers, and all necessary plants for the disposal of sewage.

Section 6875 R. S. Mo. 1929 provides that "the cost of constructing such sewers and disposal plants shall be paid in special tax bills, as hereinafter provided, against all lands, exclusive of highways, streets and alleys, embraced within the sewer district or districts in or for which the sewer or any part thereof may be constructed."

Section 6883 R. S. Mo. 1929 provides that the whole cost of acquiring the use of the drainage or water course, and of the right of way for any such sewer, including the land for the erection and maintenance of disposal plants, "shall constitute a lien on all the lands within the district or districts, exclusive of public highways, streets and alleys so declared to be deemed benefited in proportion to the area of each tract, and shall be collected by special tax."

Section 6885 R. S. Mo. 1929 provides that "the cost

of constructing all sewers, including the erection of all necessary disposal plants, in or for any district or districts as aforesaid, shall be paid for wholly in special tax bills against the lands embraced within such district or districts, exclusive of public highways, streets and alleys, in proportion to the area of each tract * * * * *."

Article 10, Section 6 of the Missouri Constitution, declares what property is exempt from taxation:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 9743 R. S. Mo. 1929 pursuant to the above constitutional provision states in part:

> "The following subjects are exempt from taxation: First, all persons belonging to the army of the United States; second, lands and lots, public buildings and structures with their furniture and equipments, belonging to the United States; third, lands and other property belonging to this state; * * * * *"

A question similar to the one presented in this case was determined by the court in the case of Normandy Consolidated

School District v. Wellston Sewer District 77 S. W. (2d) (Mo. App) 477. The court said:

"In this instance the specific point of inquiry is whether the Legislature, in the enactment of the sewer law in question, saw fit to make the property of school districts amenable to the special assessments for the local improvements provided for therein; such assessments being made pursuant to a taxing power conferred by the Legislature upon the boards of supervisors charged with the duty of administering the affairs of the sewer districts organized under such law.

It has been consistently held that neither the Constitution (article 10, Sec. 6, Const. Mo.) nor the statute (section 9743, R. S. 1929 (Mo. St. Ann. Sec. 9743, p. 7863), both of which provide for the exemption of certain kinds of property, including public property, from taxation, purport to refer to or include an exemption from special assessments for local improvements, and that it is therefore within the legislative power and will, in the passage of legislation providing for the making of local, public improvements, to require public property benefited by the improvement to pay its proportionate share of the expense thereof. City of Clinton v. Henry County, 115 Mo. 557, 22 S. W. 494, 495, 37 Am. St. Rep. 415; Thogmartin v. Nevada School Dist., 189 Mo. App. 10, 176 S. W. 473.

But even though the legislative body has the unquestioned power to require public property located in a benefit district to pay its proportionate share of the cost of the benefit, yet the rule is

> that public property, which is made use of as an integral part of government in the exercise of a governmental function, is nevertheless to be held exempt from any such special assessment unless in the enactment of the law the lawmakers have manifested a clear legislative intent that such public property shall be subject to the assessment. This doctrine traces its ancestry back to the ancient common-law principle that the crown was not to be bound by any statute, the words of which restrained or diminished any of his rights or interests, unless he was specially named therein; and the theory of the modernized restatement of the principle is that to require public funds to be paid out for taxes would necessarily divert such funds from the true public use which they are otherwise designed to serve. And of course, if a clear expression of legislative intent is to be required as the basis for the enforcement of special tax bills against public property strictly devoted to public use, then mere general language in a statute will not suffice to warrant such assessment, and public property will not be held included within the scope of any such statute unless by express enactment or clear implication. City of Clinton v. Henry County, supra; City of Edina, etc., v. School Dist., etc., supra; City of St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; State ex rel. v. School Dist. of Kansas City, supra; Thogmartin v. Nevada School Dist., supra."

Now as towhether the Legislature's intent to include state property is clearly to be implied from the all inclusive nature of the language used in Section 6875, supra, "against all lands", and Section 6883 Supra "a lien on all the lands within the district or districts," and Section 6885 R. S. Mo. 1929 "against the lands embraced within such districts."

The court in the Normandy Consolidated School District case (l.c. 479) in holding that such general language may not be held to constitute the expression of a clear intent

that public property should be liable to the tax along with all private property said:

> "Now in the case at bar there is no claim that the Legislature made any express mention of school property as being subject to assessment for the special taxes provided for in the law, but what the sewer district does insist is that such a legislative intent is clearly and necessarily to be implied from the all-inclusive nature of the language used. Suffice it merely to say that by section 11037 of the law (Mo. St. Ann. Sec. 11037, p. 7405) it was provided that a uniform tax should be levied 'upon all the lands' within any sewer district, and by section 11044 (Mo. St. Ann. Sec. 11044, p. 7411) that upon the assessment of benefits a tax of a portion of such benefits should be levied 'on all lots, tracts and parcels of land, railroad and other property in the district,' said tax to be apportioned to and levied 'on each lot, tract, or parcel of land or other property in said district' in proportion to the benefit assessed. No doubt similar expressions are to be found elsewhere in other sections of the act, but the provisions heretofore specifically referred to are enough to indicate the general character of the language used by the Legislature in designating the property it intended to be held subject to the tax.
>
> At first blush it might indeed seem that a legislative intent to hold public property subject to the assessment would be implied from the language requiring the tax to be levied upon all the lands, lots, tracts, and parcels of land in the district, and yet as the authorities run <u>such mere general language may not be held to constitute the</u>

expression of a clear intent that public property should be liable to the tax along with all private property."

The property of the Missouri State School for the Deaf being devoted to a strictly public use, and not having been made subject to assessment for benefits derived from sewer and disposal plants by a city of the third class, either by express enactment or by clear implication, we are of the opinion that the Missouri State School for the Deaf is not liable for assessment by the city of Fulton for benefits derived from a sewer or disposal plant.

As to whether the School could legally make a voluntary contribution to the City for benefits obtained from the disposal plant would, in our opinion, be dependent on the Appropriation Act of the Legislature now in session, appropriating funds to the School for such purpose.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General
MW:RT

BARBER
SCHOOL

Section 13529, page 188, Laws of Missouri, 1937, requiring a permit not applicable to Missouri School for the Deaf.

October 25, 1939

10-27

FILED
44

Mr. Truman L. Ingle,
Superintendent
Missouri School For The Deaf
Fulton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of October 16, 1939, which reads as follows:

"We have a situation here at the School for the Deaf about which I am quite concerned.

"In our vocational department we have a barber shop in which our boys are instructed in the barbering trade. In order to be recognized, it is necessary that a licensed instructor in barbering be employed. However, I understand there is some regulation which calls for two such instructors and that the number of pupils be limited to ten to an instructor. We do not have a sufficient number of students to employ two instructors. Our barbering class averages eight to ten, and therefore, we meet the requirements as to the number of students to an instructor.

"Also, I understand there is a fee of one hundred dollars to be paid into the state by the regular barber schools. I am writing to ask if you will be good enough to give me an opinion as to whether or not the Missouri School for the Deaf, which is a state department, is obligated to pay this one hundred dollar fee. It seems to me that we should be exempt from such payment.

"I will appreciate greatly such an opinion together with an opinion in regard to employment of two instructors in a school such as ours.

"If it is necessary for us to meet these requirements, we will be compelled to do away with this department, which is one of the most important phases of our work."

From your letter we gather that one of the most important phases of your work is the instruction in the barber trade. We assume the Missouri School for the deaf has carried this subject as part of its curriculum for many years, and to now hold that this school is required to pay a one hundred dollar permit fee to instruct in this trade would abolish such instruction in the institution.

The Missouri School for the Deaf is an educational institution of the State of Missouri as provided in Section 9688, R. S. Missouri, 1929, as follows:

> "The 'Missouri School for the blind' at Saint Louis, and the 'Missouri School for the deaf' at Fulton shall be regarded, classed and conducted wholly as educational institutions of the state."

Section 9696 R. S. Missouri, 1929, provides who may attend the Missouri School for the Deaf and reads as follows:

> "All blind and deaf persons under twenty-one (21) years of age, of suitable mental and physical capacity, who are residents of this state, shall be entitled to admission to the school for the blind and the school for the deaf, respectively. All admissions and discharges, and the length of the period of instruction of each pupil, shall be determined by the board of managers."

Section 9703, R. S. Missouri, 1929, explains the object for the Missouri School for the Deaf, as follows:

> "The object of the school for the deaf shall be to educate this class of persons in the use of written and spoken language, the elementary branches and in mechanical trades and industrial pursuits. Such training shall be given in such trades as shall fit the deaf boy or girl for the practical duties of life, and shall tend to render them self-supporting. The trades to be taught shall be such as the board of managers

> and the superintendent shall deem the most suitable to the school conditions and the needs of the pupils."

In view of Section 9703, supra, the board and superintendent have chosen the barber trade to be taught in this school, and as stated by you is considered as one of the most important phases of the work carried on.

Your request requires a construction of Section 13529, Laws of Missouri, 1937, page 188, which section repealed the same section in Chapter 103, Article 1, R. S. Missouri, and reads as follows:

> "Nothing in this chapter shall prohibit any person from serving as an apprentice in said trade under license issued by the board under a barber authorized to practice in the same, under this chapter, nor from serving as a student in any school or college for teaching said trade under the instruction of a qualified barber: Provided, that in no barber shop shall there be more than one apprentice to two barbers authorized under this chapter to practice said occupation; but all barber shops having but one chair shall be entitled to one apprentice; that all barber schools and colleges shall have not less than one teacher or instructor for every ten students: Provided, that all barbers, or barber schools or colleges, who shall take an apprentice or student, shall immediately file with said board the name and age of each of such apprentices or students, and the said board shall cause the same to be entered in a register kept for that purpose; for which registration a fee of five dollars

> shall be paid to the treasurer of the board by such apprentice or student; provided, that any firm, corporation or person, desiring to conduct a barber school or college in this state, shall first secure from said board a permit to do so, and shall keep the same prominently displayed. For such permit there shall be paid to and collected by said board an annual fee of one hundred dollars to be paid on or before January 31st of each year; provided further, that said board shall have the right to pass upon the qualifications, appointments, and course of study in said college or barber shops where apprentices are taught the occupation of barbering, and provided further, that said board shall have the right and power to revoke the certificate, permit or license of any such barber school or college, instructor or teacher therein or instructor in any barber shop, for any violation of the provisions of this section."

One of the fundamental rules of statutory construction is to determine the legislative intent. We consider this rule so well established that it is unnecessary to cite authorities.

We especially call your attention to the following words found in Section 13529, supra:

> "Provided that any firm, corporation or person desiring to conduct a barber college in this state, shall first secure from said board a permit to do so, * * * *"

None of the above underlined words include the Missouri School For the Deaf, since under Section 9688, supra, said School is an educational institution.

The general rule in regard to the application of general legislation to state and political subdivisions is best expressed in 59 C. J. 1103, and is as follows:

> "The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication. This general doctrine applies with special force to statutes by which prerogatives, rights, titles, or interests of the state would be divested or diminished; or liabilities imposed upon it; but the state may have the benefit of general laws, and the general rule has been declared not to apply to statutes made for the public good, the advancement of religion and justice, and the prevention of injury and wrong."

Also in Morris v. State, 88 Okla. 189, we find the following:

> "The presumption obtains that it is the legislative intent to exclude the state from the operation of a statute for the reason that the laws are ordinarily made for the government of citizens and not the state."

Therefore, evidently the General Assembly never intended that said school should be required to pay the one hundred dollar permit fee. Following that well established rule, "The Expression of One Thing is the Exclusion of Another", as stated in State ex rel. Kansas City Power and Light Company v. Smith, 111 S. W. (2d) 513, l. c. 514:

> "To uphold appellant in his contention would 'violate the well-known canon of statutory construction, viz, that the expression of one thing is the exclusion of another.' State ex inf. Conkling ex rel. Hendricks v. Sweaney, 270 Mo. 685, Loc. Cit. 692, 195 S. W. 714, 716."

Furthermore, while there is nothing to prohibit the Legislature requiring the Missouri School For the Deaf to take out this permit, it is unreasonable to think they would attempt to place the burden on the school when the said school is a state institution, and by such a requirement would be merely taking the money out of one pocket and placing it in another pocket. It is not likely the Legislature ever intended to do this, at least they did not specifically require this permit of the Missouri School for the Deaf. As stated in State ex rel. Missouri Portland Cement Company v. Smith, 90 S. W. (2d) 405, l. c. 408:

> "Undoubtedly it was within the power of the Legislature to make the tax applicable to the state and its agencies. But the theory underlying the presumption that property belonging to the state is not taxable; i.e., <u>that such taxation would merely be taking money out of one pocket, and putting</u>

> it in another, seems to us to have peculiar application here, notwithstanding the general rule hereinabove noticed with respect to the extent of the principle of exemptions. It must be remembered that the involved tax is levied and collected solely by and for the benefit of the state and not by any municipality or other subdivision. The legislative journals show a purpose to devote the proceeds to specific purposes, namely, relief, old age pensions, care of the afflicted, and support of the public schools. It is an emergency measure, and expires by limitation on December 31, 1937. If chargeable to the state and its agencies of the kind in question, it would merely collect the amount thereof from itself, and then pay over to itself the amount so collected."

We now refer to the appropriation by the Sixtieth General Assmbly for the present biennium for the operation of this institution. This will be found on pages 74-75, Laws of Missouri, 1939. There is no provision under this appropriation act whereby such a fee may be paid. Therefore, in the absence of such appropriation, the Missouri School for the Deaf under no circumstances could pay such a fee as required in Section 13529, supra. In view of the Legislature failing to make an appropriation for such a fee, knowing at the time that the Missouri School for the Deaf, under Section 9703, supra, is authorized to teach the barber trade and is so doing, it is our contention that the General Assembly never intended Section 13529, supra, requiring the payment of a one hundred dollar permit fee to teach the barber trade, should apply to the Missouri School for the Deaf.

In view of Section 13529, supra, requiring any firm, corporation or person conducting a barber school to take out a one hundred dollar permit, does not include the Missouri School For the Deaf, apparently the Legislature only contemplated that this tax should be assessed against private institutions, and such a requirement is in no manner applicable to public institutions. Also, the Sixtieth General Assembly, by failing to appropriate funds for the payment of such a fee, never contemplated the Missouri School For The Deaf should be required to pay this one hundred dollars for a permit. Furthermore, to require the Missouri School for the Deaf to pay for such a permit would be taking the money out of one pocket and placing it in another.

Therefore, it is the opinion of this department that the Missouri School for the Deaf is not required to take out a one hundred dollar permit to instruct in the barber trade.

In answer to your second inquiry, we fail to find in the law a requirement for a minimum of two instructors. Section 13529, supra, only requires an instructor for every ten students, and the school now meets that requirement.

Respectfully submitted,

APPROVED:

W. J. BURKE
(Acting) Attorney General

AUBREY R. HAMMETT, JR
Assistant Attorney General

ARH:RV

ELEEMOSYNARY INSTITUTIONS: Board may grant permission to an individual to copy data on insane patients.

1/24

February 20, 1939

FILED
45

Mr. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your letter of February 17, 1939, in which you request an official opinion as follows:

> "I enclose you herewith letter from Miss Elizabeth McQueen, representing a sociology class of the University of Kansas City, asking for permission to make certain examination of the records of Jackson County patients at our State mental hospitals. I am also attaching a copy of resolution passed by our Board instructing me to obtain opinion from your office before granting this privilege."

Section 8565, R.S. Missouri, 1929, reads as follows:

> "The board of each institution shall have authority to make all necessary rules, regulations and bylaws for the government, discipline and management of such institution not inconsistent with the laws of this state, and such rules, regulations and bylaws, when so made and adopted

> by the board, shall be binding upon all officers and employes of the institution, and shall remain in force and effect until changed or annulled by the board by an order entered upon the records of such institution."

It will be noticed under this section that the Board of each institution shall have authority to make all necessary rules and regulations in regard to their separate institutions. This section is under Article 1, general provisions, regarding state eleemosynary institutions, which governs State Hospital No. 1 at Fulton, State Hospital No. 2 at St. Joseph, State Hospital No. 3 at Nevada, State Hospital No. 4 at Farmington, the Missouri State Sanatorium at Mt. Vernon and the Missouri State School at Marshall. It will also be noticed under Section 8565 that the rules and regulations made by the Board of each institution shall not be inconsistent with the laws of this state.

After a research of all the laws in regard to state eleemosynary institutions, I find no law which would prevent a private individual from copying any record such as prohibitions set out in the sales tax law of the Laws of Missouri, 1935, Section 34, which prohibited the State Auditor or any person to divulge or give out any information relative to the contents of any return filed under the act. If the State Auditor had been granted the power to make rules and regulations as set out in the powers granted the State Eleemosynary Board, the separate law concerning returns would be a prohibition against giving out the information. Under Section 8565, the Board of each institution may grant the privilege of a private individual to inspect and copy the records of an insane inmate or it may refuse to allow a private individual to inspect the record of an insane inmate.

Section 8580, R.S. Missouri, 1929, provides: "The person appointed as superintendent of each of the several eleemosynary institutions herein named shall have complete charge, control and management of the entire institution * * *". Under this section, the superintendent may refuse to allow an individual to inspect the records of an insane inmate.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the superintendent of State Hospital No. 1 at Fulton, the superintendent of State Hospital No. 2 at St. Joseph and the superintendent of State Hospital No. 3 at Nevada may grant Elizabeth McQueen, a sociology student at the University of Kansas City, permission to examine and copy the records of the Kansas City patients.

It is also the opinion of this department that the respective superintendents, under the rules and regulations enacted by the Board of each institution, may refuse to grant that privilege or permission.

Respectfully submitted,

W.J. BURKE
Assistant Attorney General

APPROVED By;

HARRY H. KAY
(Acting) Attorney General

WJB:VAC

ELEEMOSYNARY INSTITUTIONS: City of St. Louis only required to pay expenses as set out in Section 8636, 1935 Session Laws.

February 21, 1939

FILED
45

Mr. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request of February 17, 1939, for an official opinion, which reads as follows:

"I enclose you herewith letter that I have just received from the deputy comptroller of the City of St. Louis with reference to charges for county indigent patients, together with copy of resolution passed by our Board instructing me to refer the matter to your department.

"At a meeting of our board sometime ago we made a list of the following articles that should be charged the county patients, some of which you will notice the City of St. Louis is declining to pay.

"Tooth brushes & powder	$1.00 yr. (25¢ 4 times a year)
Tobacco	$1.00 per month
Telephone & telegrams	Yes
Mending	25¢ to 40¢ month
False teeth	$1.00 per plate $6.00 set
Spectacles	when patient cannot be fitted at institution."

Section 8636, R.S. Missouri, 1929, which provided the payment of $18.00 per month for each insane patient, etc., was repealed and a new section, 8636, was reenacted by the Session Laws of 1935, page 388, which reads as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor, as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the mangers (managers) of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

This section is not ambiguous and does not provide for the payment of any items except $6.00 per month for each patient; and in addition thereto, the actual cost of their clothing and the expense of removal to and from the hospital; and if they die therein, for burial expenses. This section does not provide for the payment by the county courts or the City of St. Louis of any other expense, and needs no construction.

It was so held in the case of State ex rel. v. Thompson, 5 S.W. (2nd) 57, l.c. 59, where the court said:

> "The rule is well stated, as follows:
>
> "'A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' 25 R.C. L. 957; Trefny v. Eichenseer et al., 262 Mo. 436, 171 S.W. loc. cit. 932; Grier v. Ry., 286 Mo. 523, loc. cit. 534, 228 S.W. 454; State ex rel. Brown v. Board of Education, 294 Mo. 106, loc. cit. 115, 242 S.W. 85; R.S. 1919, Sect. 7058.
>
> "A standard text states the rule as follows:
>
> "'If the words (of the statute) are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation. The statute itself furnishes the best means of its own exposition; and if the sense in which words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail without resorting to other means of aiding in the construction.' Lewis-Sutherland Stat. Const. vol. 2 (2d Ed.) p. 698."

The reason of the reenactment of Section 8636 was to reduce the expense upon the county and the City of St. Louis on account of other funds being allowed to the support of the state eleemosynary institutions. The section clearly states the amount that each county and the City of St. Louis shall pay for each patient, and even if it were ambiguous, the reason and sense will control in determining its meaning. It was so held in the case of Dahlin v. Missouri Commission for the Blind, 262 S.W. 420, l.c. 423, where the court said:

> "A statute that is clear in its terms, and leaves no room for construction must be enforced as written, but if it is not clear, and there is any room for construction, then the reason and sense of the statute will control in determining its meaning. Keeney v. McVoy, 206 Mo. 42, 65 et seq., 103 S.W. 946; Stack v. General Baking Co., 283 Mo. 396, 411, 223 S.W. 89; * *."

If the City of St. Louis or any county would pay to the account of the state eleemosynary board for the maintenance of insane patients from their city or county, miscellaneous accounts such as tooth brushes, tobacco, telephone and telegrams, mending, false teeth, spectacles, etc., it would be a violation of Section 4090, R.S. Missouri, 1929, which reads as follows:

> "Any member of the county court, common council or board of trustees, or officer or agent of any county, city, town, village, school township, school district, or other municipal corporation, who shall, in his official capacity, willfully or corruptly vote for, assent to or report in favor of, or allow or certify for allowance, any claim or demand, or any part thereof, against the county, city, town, village, school township, school township, school district or other municipal corporation, of which he is such officer or agent, or against the county court, common council or board of trustees of which

> he is a member--such claim or demand, or part thereof, being for or on account of any contract or demand or service not authorized or made as provided or required by law--every such person so offending shall, on conviction, be punished by imprisonment in the penitentiary not more than five years, or by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment in the county jail not less than two nor more than twelve months, or by both such fine and imprisonment."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the separate counties and the City of St. Louis shall only pay an amount not exceeding $6.00 per month for each patient; the actual cost of their clothing and the expense of removal to and from the hospital; and if they shall die therein, for burial expenses.

Respectfully submitted,

W.J. BURKE
Assistant Attorney General

APPROVED By:

HARRY H. KAY
(Acting) Attorney General

WJB:VAC

INSANE PATIENTS: When law requires that patient be served by process personally, regardless of the effect upon the patient the insane asylum must permit such service.

March 18, 1939

3-21

FILED
45

Honorable W. Ed. Jameson
President Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We herewith submit the following as our opinion, as requested in your letter of February 16th, concerning question set out in letter addressed to you from State Hospital No. 3, Nevada, Missouri, dated February 15th, which is as follows:

> "The question has been raised in our Institution-- Is it within our rights as Physicians, to refuse the Sheriffs and Deputy Sheriffs as Servers, to serve papers on our patients -- of divorce proceedings, law suits or estate settlements, when the effects on our patients is delerterious to the therapy under which our patients are being treated? Can we legally refuse these papers being served on our patients, or does the Law require that they be served, when we rightfully know the bad effects it will produce on our mental patients?
>
> "If I am informed correctly, in private practice, papers cannot be served on patients in which the effect would be to the detriment of the patient under treatment. Insofar as we are a State Institution, do we have to allow this to be done? "

Section 488, R. S. Mo. 1929, relates to process served on an insane person after a guardian is appointed. Said section reads as follows:

> "In all actions commenced against such insane person, the process shall be served on his guardian; and, on judgment against such insane person or his guardian, as such, the execution shall be against his property only."

In the decision of Graves v. Graves, 255 Mo. 468, l. c. 481, the court sets forth the rules with reference to service on insane persons before and after a guardian is appointed. The decision, in conformity with the plain wording of the statute, holds that after a guardian is duly appointed all service should be had on the guardian. We herewith quote extensively from said decision for the reason that we believe it contains a complete answer to your question and on which we ultimately base our conclusion:

> "Under Chapter 2, article 19, which deals with 'Guardians and Curators of Insane Persons,' we find this section 514, supra, which reads:
>
> "'In all actions commenced against such insane person, the process shall be served on his guardian; and, on judgment against such insane person or his guardian, as such, the execution shall be against his property only.'
>
> "This section, as the context of the chapter shows, has reference to lunatics who have been adjudged insane, and had guardians appointed. It has no reference to lunatics without guardians. The general rule is, that a lunatic without a guardian, although having been adjudged insane, can be sued. Thus in 22 Cyc. 1224, it is said:

"'An insane person not under guardianship may be sued the same as a sane person. At common law the rule was the same after inquisition of lunacy and the appointment of a guardian or committee; but now if there be a committee or guardian it is generally necessary to join him as a party defendant, and in some states plaintiff is required to obtain leave of court before instituting suit against an adjudged incompetent. After restoration to sanity the former lunatic may of course be sued the same as any other person.'

"And in such case, where there is no guardian, the court can appoint a guardian ad litem to make the defense. Thus in 22 Cyc., 1231, the rule is stated:

"'But where no guardian or committee has been appointed, or if appointed refuses to qualify or has been removed, the action may be prosecuted or defended in his name, with the sanction of the court, by any competent person as the insane person's next friend, even though the lunatic has not been judicially declared insane, if it otherwise appears that he is insane. A next friend may prosecute a writ of error in his insane defendant's behalf, or may bring a suit to protect the lunatic's estate through a receivership until a guardian can be appointed; but a suit brought by a next friend is substantially that of the insane person, and he has no authority to bind the lunatic or his estate, and is subject to removal at any time by order of the court.'

"And on page 1233 it is further announced as the rule:

"'Likewise where a guardian or committee has not been appointed, or if appointed refuses to qualify or has been removed, a guardian ad litem should, upon a proper suggestion or petition, be appointed to defend in the name of the insane person, even though defendant has not been judicially declared insane, if the fact of insanity is shown by affidavit or otherwise. A guardian ad litem so appointed is under the direct control of the court, and may make any defense either by way of answer or cross bill or both that occasion may require or the court may order.'

"This court has specifically recognized the rule in the case of Bensieck v. Cook, 110 Mo. l. c. 183, whereat we said:

"'The trial court pursued the right course in appointing a guardian ad litem for defendant, Joseph Cook. (Mitchell v. Kingman, 5 Pick. 431; Buswell on Insanity, sec. 132; Sturges v. Longworth, 1 Ohio St. 544.) And the power of the court to appoint such a guardian, of necessity, concedes the power of the court, upon the proper basis of facts being presented, to render a judgment as binding on the lunatic and his property interests, as a similar judgment would be upon a sane person.'

"In that case, like this, Cook was in confinement for insanity when service of summons was had. In Cyc.

under the paragraph quoted will be found a collection of the cases supporting the rule. It is safe to say that an adjudged lunatic without a guardian, may be sued, by having personal service of summons upon him, but upon suggestions of insanity, a guardian ad litem should be appointed, to conduct his case under the supervision of the court. When such is done, then the judgment binds the lunatic. But the trouble with the case at bar is that this petition seems to aver that this judgment in the original case was rendered without such steps. If so it states a good cause of action. If no guardian ad litem was appointed, then the lunatic never had his day in court in the full sense of the term, and a judgment rendered against him after a suggestion of lunacy as here, would smack of legal if not actual fraud. It may be that this petition has been artistically drawn for the purpose of withholding the fact of a guardian ad litem, but if so the defendant should have cast her anchor windward, and not contented herself with a demurrer. As it stands, we think this petition stated a cause of action, and the trial court erred in sustaining the demurrer."

Conclusion.

We are of the opinion that you cannot legally refuse to permit officers to serve process on any patient in an insane asylum, even though it has a disturbing effect on the patient. This conclusion applies mainly to patients who have been committed to the institutions without guardians. The decision and the statute, quoted supra, explain fully

this exception. In matters relating to divorce petitions the service must be had on the patient personally. In ordinary lawsuits or estate settlements, mentioned in your letter, the facts in each individual case will have to govern. In other words, when the law requires that the patient be served personally in any matter, regardless of the condition of the patient, sheriffs, constables and process servers are within their rights when they serve any process on said patients if the process is legal on its face.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

ELEEMOSYNARY: STATE HOSPITALS: May not decline to take patients of county if payments required by law have been made, even though county has outstanding debt for former patients.

September 2, 1939

95

FILED
45

Mr. W. Ed Jameson, President
Board of Managers
State Eleemosynary Institutions
Jefferson City, Missouri

Dear Mr. Jameson:

We are in receipt of your letter of August 31st wherein you state as follows:

> "I enclose you herewith statement of an account of $145.17 that has been due to State Hospital # 1 from Worth County, Missouri for several years.
>
> I would, first, like to ask if it is within the province of the Eleemosynary Board or the superintendents of the State Hospitals in Missouri to deny admittance of any other patients until this account is paid.
>
> If it is not within our province to decline to take patients from this county until their just debts are paid, we would be interested in having one of your Attorney Generals collect this account through legal process.
>
> I would be very glad indeed if you would advise me in regard to this matter."

Section 8636, Laws of Missouri, 1935, page 388, provides as follows:

> "The several county courts shall have power to send to a state hospital such of their insane poor as may be entitled to admission thereto. The counties thus sending shall pay semi-annually, in cash, in advance, such sums for the support and maintenance of their insane poor as the board of managers may deem necessary, not exceeding six dollars ($6.00) per month for each patient; and in addition thereto the actual cost of their clothing and the expense of removal to and from the hospital, and if they shall die therein, for burial expenses; and in case such insane poor shall die or be removed from the hospital before the expiration of six months, it shall be the duty of the mangers (managers) of such hospital to refund, or cause to be refunded, the amount that may be remaining in the treasury of such hospital due to the county entitled to the same; and for the purpose of raising the sum of money so provided for, the several county courts shall be and they are hereby expressly authorized and empowered to discount and sell their warrants, issued in such behalf, whenever it becomes necessary to raise said moneys so provided for."

Under the above section, the county courts may send such of their insane poor to a state hospital as may be entitled to admission thereto, provided they pay semi-annually in cash in advance for such patients.

Attached to your letter is a statement showing Worth County owing a balance of $145.17 for the years 1933 and 1934.

You inquire whether you may decline to take patients from Worth County until their just debts are paid.

Section 8672, R. S. Mo. 1929, provides as follows:

> "It shall not be lawful for the superintendent or other chief officer of any state hospital to receive any person as an inmate in any such institution until the sum or sums required by law to be paid by any county, municipality, guardian, trustee or person for the support of such inmate has been paid into the treasury of such institution in the manner and within the time prescribed by law: Provided, that whenever any person has been received as an inmate of any such institution, and thereafter the county, municipality, guardian, trustee or person responsible for the support of such inmate shall neglect or refuse to pay, within the time and in the manner required by law or the rules and regulations of such institution, any installment required to be paid for the support of such inmate, it shall be the duty of the superintendent or the chief officer of such institution to return such inmate to the sheriff of such county or municipality, or to the guardian, trustee or person responsible for the payment of such installment, and at the expense of such county, municipality, guardian, trustee or person: Provided further, that it shall be the duty of the superintendent or other chief officer of such hospital to notify the proper authority or person thirty days in advance of the date when any such installment required for the support of such inmate is due."

Under the above section, the superintendent or chief

officer of the state hospital may only decline to take a patient sent by Worth County when the necessary sum required by law to be paid by the county has not been paid "for the support of such inmate." The fact that the county has an outstanding debt of long standing, could not be interposed under the statute as a defense for failure to accept such patient, provided, the requirements as to "the support of such inmate" had been met. Under Section 8672, supra, the superintendent or chief officer of the state hospital had authority in 1933 and 1934 to return the inmate or inmates to the sheriff of Worth County at the expense of said county for failure to pay the installments provided by law upon the giving of proper notice.

From the foregoing, we are of the opinion that it is not within the province of the superintendents or chief officers of the respective state hospitals to deny admittance of patients to state hospitals where proper payments, under the statute, for said patients have been made for them by the county, even though said county may have an outstanding account for care of former patients.

If the county refuses to pay the outstanding account upon demand it will be necessary to resort to legal process, and if you desire, we will be pleased to handle this matter for you.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

PENAL INSTITUTIONS: The Record Clerk of the penitentiary must follow the law in classifying the prisoner for service of two sentences, one of which was for the conviction on a case while a convict.

September 13, 1939

9-14

FILED
45

Hon. Lamkin James
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. James:

This department acknowledges receipt of your letter of some time ago, wherein you requested an opinion based upon certain facts. Your letter is as follows:

"On October 11, 1938, at the September Term of the Circuit Court of Saline County, Missouri, one A was convicted of grand larceny and immediately thereafter paroled by the Circuit Judge. A short time thereafter and before the completion of his parole, he was charged with robbery from the person and, upon ascertaining that the prosecuting witness was reluctant to testify, I, as prosecuting attorney, agreed with the attorney for A that upon a plea of guilty I would recommend to the Circuit Judge a sentence of three (3) years on the robbery charge, and would recommend that the same run concurrently with the grand larceny charge of which he was theretofore convicted. The matter was handled in that manner and upon my recommendation the Circuit Judge made an order ordering the two sentences to run concurrently. This was done at the January Term, 1939, and a commitment was ordered by the Circuit Judge in which commitment it was specifically set out that the three year sentence was to run con-

currently with the two year sentence. A was received by the warden of the penitentiary under that commitment of January 19, 1939.

"Thereafter I was informed by one R. J. Mitchell, Record Clerk of the penitentiary, that the concurrent portion of the commitment was disregarded by the warden and that A's term was fixed at a term of five (5) years and that he was registered to serve two terms consecutively rather than concurrently.

"Under date of July 18th I addressed a letter to the Record Clerk of the penitentiary relating to this matter and in response thereto on July 20th he wrote me that the action of the penitentiary in disregarding the concurrent portion of the commitment was based upon an opinion from your office under date of June 9, 1938, written by Mr. Buffington, I am thoroughly of the opinion that Mr. Buffington's opinion does not cover this set of facts and is not applicable. My thought is that irrespective of the right of the Circuit Judge to make an order ordering terms to run concurrently, that that matter can only be questioned and raised by the attorney for the state, and that irrespective of whether there would be any authority by the state to question the commitment and the Circuit Court's order, the warden of the penitentiary, being purely a ministerial officer, would have no authority to disregard the terms of the commitment."

We are enclosing two opinions which cover the main points involved in your request. One of the opinions was addressed to the Board of Probation and Parole, dated August 24th, 1939, the other opinion was rendered to Hon. J. E. Matthews, Director, Department of Penal Institutions, and was dated June 9th, 1938. The only question

not passed on in the two opinions is, whether or not the Record Clerk had the power to change the commitment of the prisoner so as to make two sentences run consecutively.

In the two above opinions this office has held that under Section 12969, R. S. Mo. 1929, which applies to a person sentenced, and while under sentence was convicted and sentenced under another crime, it is mandatory that the convictions shall run consecutively, and that the sentence of the convict under the second charge shall not commence to run until the expiration of the sentence under which he may be held, or, in other words, the first conviction.

This Section, 12969, supra, was passed upon in Ex parte Green, 17 S. W. 2d 939, where the court in discussing the warden's power, said:

> "The Warden is mistaken when he states in his return that the petitioner when again confined in the penitentiary first served his sentence under the commitment issued by the circuit court of Lafayette county.
>
> "When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be served. That question is determined by section 2292, R. S. 1919, as follows:
>
> "'* * * And if any convict shall commit any crime in the penitentiary, or in any county in this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to

run until the expiration of the sentence under which he may be held.'"

In that case the warden of the penitentiary saw fit to change the time of the beginning of the two consecutive sentences, which was in conflict with the order of serving sentence, as set out in Section 12969, supra. This power of the warden, of course, was governed by the law as set out in said Section 12969, and the court held in that case that the warden had no authority to change the order of the serving of the two consecutive sentences, in violation of said section.

Your case bears solely upon Section 12969, and the court had no authority to cause the sentences to run concurrently. The Record Clerk in your case received two commitments; one of them committing the defendant to the penitentiary for a term of two years in the state penitentiary on a charge of grand larceny, and also a separate commitment for a term of three years, on a charge of robbery from the person. The commitment for a period of two years on a charge of grand larceny on its face would show that he had been paroled and that the parole had been revoked, and at the time of the commitment of the robbery from the person, he was a convict in accordance with Section 12969 and it was mandatory on the part of the court to sentence him on both charges to run consecutively, and it was mandatory on the part of the warden of the penitentiary to have the sentences run consecutively, and the order of the court stating that the sentences should run concurrently was of no effect but did not invalidate the two separate commitments.

We of course realize that a grave injustice has been done the defendant who plead guilty on the recommendation of the prosecuting attorney and the trial court, that the sentences did run concurrently; but, under the law it is mandatory that they run consecutively and under the statement of facts, as set out in your request, I believe it is too late at this time to file a motion to set aside the plea of guilty for the reason that the term has passed.

That it was mandatory upon the court, and mandatory for the defendant to serve the two separate terms consecutively, was also upheld in the case of Ex parte Simpson, 300 S. W. 491, where the court said:

> "Petitioner had been convicted of grand larceny in Jackson county and, while at large in Jackson County under bond pending disposition of his appeal, was convicted of the crime of burglary. The circuit court of that county had the power, and indeed it was its duty, to make his term of imprisonment for the burglary commence at the expiration of his term of imprisonment in the grand larceny case. Section 2292, R. S. 1919; Ex parte Allen, 196 Mo. l.c. cit. 233, 95 S. W. 415; State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1; Ex parte Brunding, 47 Mo. 255."

A very analagous case was passed upon by the Supreme Court, which passed upon Section 4456 R. S. Missouri, 1929, which section held that sentences should be consecutively, and it was mandatory upon the court to have the sentences run consecutively, in cases where a person is convicted of two or more offenses before sentenced, and then when sentenced he should be sentenced on two or more terms to run consecutively. This case is State v. Harris, 336 Mo. 737, l.c. 743, where the court said:

> "The record certified here as a whole shows conclusively and it is conceded that defendant pleaded guilty to all five informations at the same time and before he was sentenced on either plea. The result is that under the statute, if we treat the judgments as being correctly shown by the transcripts of the record proper, the sentences are cumulative, i. e., they run successively, not concurrently, and the defendant has been sentenced to two hundred and fifty years' imprisonment. If, on the other hand, we were to disregard the transcripts of the record proper and treat the bill of

exceptions as correctly setting out the judgments, we think the same result follows, this because the statute appears to be mandatory in its terms, leaving to the court in situations falling within the express terms of the statute no authority to make the imprisonment to which defendant is sentenced on a second or other subsequent conviction commence before the termination of the imprisonment to which he is adjudged upon the prior conviction; in other words, it leaves the court no authority in such situation to make the sentences run concurrently. Such is the contention of the State and we believe it is the only possible construction of the statute without adding to it under the guise of construction further provisions or exceptions not contained in its language nor clearly appearing to have been within the intendment of the Legislature. This statute is discussed in State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1, where, after pointing out that it had evidently been taken from a New York statute, enacted at a time when it was generally held that courts had power to impose cumulative sentences but that in order to do so it was necessary for the subsequent sentence to contain a specific direction to that effect, the court said, 304 Mo. l.c. 404, 264 S. W. 1. c. 7:

"'Courts sometimes inadvertently omitted the direction and at other times did not make it sufficiently certain to be effective. This statute was devised to put an end to miscarriages of the kind in so far as situations described in the statute are concerned. The purpose of the statute was merely to provide that in the cases it covered the sentences should run successively by force of the statute itself and not be dependent for their cumulative character upon any action of the trial court specifically referable to that matter.'

"After discussing the origin and purpose of the New York statute from which ours was taken the court further said, 304 Mo. l.c. 405, 264 S.W. l.c. 7:

"'The statute did not purport to give the courts any power to impose cumulative sentences. It took from them the power, in certain cases, to impose any sentence other than a cumulative one. It did this by writing itself into every sentence, in the kind of cases it described, as a part of such sentence.' (See, also, Ex Parte Durbin, 102 Mo. 100, 14 S. W. 821; Ex parte Turner, 45 Mo. 331.)"

In the above case the Prosecuting Attorney of Jackson County, and the Judge of the Circuit Court of Jackson County, believed that upon accepting a plea of guilty on five different charges of robbery, and then sentencing the defendant to fifty years in the penitentiary on each separate charge, and having the commitment and record entry read that the sentences should run concurrently, that the defendant would only be sentenced to a period of fifty years in the penitentiary. The court ruled that the order stating the sentences were to run concurrently were in violation of the mandatory terms of Section 4456 R. S. Missouri, 1929. In their finding, the court held that under Section 4456, supra, the defendant had been sentenced to a term of two hundred and fifty years in the penitentiary, and not fifty years in the penitentiary. In that case, which is a very similar case to the one stated in your request, the attorney for the defendant in due time had filed a motion to set aside the plea of guilty which motion had been denied by the court. The Supreme Court of this state upon the appeal of the ruling to set aside the plea of guilty reversed and remanded the case on that point, where, I presume, a proper sentence was made. The proper way of pleading a defendant guilty to two charges to run concurrently (where he is not out on parole or is not a convict) would be to accept the plea of guilty on the first charge and then sentence

him, and then accept a plea of guilty to the second charge and then sentence him, to run concurrently with the first charge.

CONCLUSION

In view of the above two opinions, and other authorities herein cited, it is the opinion of this department that a person convicted of grand larceny, sentenced and paroled by the Circuit Judge, and then pleads guilty to a charge of robbery from the person and is sentenced on that charge, it is mandatory that the Circuit Judge issue the commitments and that under section 12969, supra, the sentence of the convict shall not commence to run on the second charge until the expiration of the sentence under the first charge.

It is further the opinion of this department that the warden of the penitentiary, through the Record Clerk, should follow the order of sentence as set out in Sec. 12969, supra, under the record as set out in the two separate commitments on the two separate sentences of the trial court. The fact that the trial court should state in the commitment that the sentences on the two different charges should run concurrent is of no effect, and in violation of Sec. 12969, supra, but that comment in the two commitments does not invalidate the two commitments in total. The two commitments on their face show that on the first charge that the defendant was a convict, and comes within Sec. 12969 on the commitment under the second charge.

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

WJB:RW

PENAL INSTITUTIONS: Sentences of a defendant who has appealed and later convicted on another charge, shall run concurrently.

August 24, 1939

8-25

FILED
46

Board of Probation and Parole
Jefferson City, Missouri

Attention: Mr. H. S. Johnson, Member.

Dear Sir:

Answering your request for an opinion from this office concerning a letter from the Hon. J. Arthur Francis, State Representative from Iron County, Missouri, we are herein setting out the facts stated in his letter to you, and are also giving the following opinion:

"In re: Berthold McBride, No.42930. McBride was convicted in St. Charles County May 26th, 1932 was held in jail until May 8th, 1933 trying to give bond. Was received at the Penitentiary May 10th, 1933. He was released on bond by the Supreme Court June 16th, 1933. The case was appealed to the Supreme Court. During the time he was waiting for a ruling of the Supreme Court he was tried for an offense committed in the City of St. Louis and was convicted and given a sentence of 5 years. His former sentence was for 20 years. But before he was tried on the second charge the Supreme Court affirmed the former or 20 year sentence and the Marshall of the Supreme Court called on the Authorities to turn McBride over to him and they refused, wanting to try him on their charge, and convicted him. When he was received at the Penitentiary he was admitted in on the 5 year sentence and given the No. 44692 after serving until January 18th, 1937 on the 5 year term then he was dressed in on his old Number 42930 on his 20 year sentence.

The 20 year sentence states that it is to run from the date of his conviction May 26th, 1932. Do these sentences run concurrently or consecutively?"

Section 12969, R. S. Missouri, 1929, reads as follows:

"The person of a convict sentenced to imprisonment in the penitentiary is and shall be under the protection of the law, and any injury to his person, not authorized by law, shall be punishable in the same manner as if he were not under conviction and sentence; and if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held: Provided, that if such convict shall be sentenced to death, such sentence shall be executed without regard to the sentence under which said convict may be held in the penitentiary."

It will be noticed under the above section that it specifically states:

" * * * * if any convict shall commit any crime in the penitentiary, or in any county of this state while under sentence * * *"

Under the statement of facts set out in your request it will be noticed that Berthold McBride at the time he committed the crime in the city of St. Louis, was out under bond by the Supreme Court on an application for appeal. An appeal does not lie until after the defendant has been sentenced.

As set out above under section 12969, supra, the defendant under that section must be under sentence and the section does not state final judgment. Under the facts, as set out in your statement, at the time the defendant was tried in the city of St. Louis on one charge, the former charge against him had been affirmed by the Supreme Court of this state. The fact that the defendant at the time that he committed the second crime had appealed the conviction for the previous crime, does not change the manner of the sentence of the defendant, under section 12969, supra.

The question was well settled in the case of Ex parte Simpson, 300 S. W. 491, l.c. 493, par. 3, where the court said:

> "Petitioner had been convicted of grand larceny in Jackson county and, while at large in Jackson county under bond pending disposition of his appeal, was convicted of the crime of burglary. The circuit court of that county had the power, and indeed it was its duty, to make his term of imprisonment for the burglary commence at the expiration of his term of imprisonment in the grand larceny case. Section 2292, R. S. 1919; Ex parte Allen, 196 Mo. loc. cit. 233, 95 S. W. 415; State ex rel. Meininger v. Breuer, 304 Mo. 381, 264 S. W. 1; Ex parte Brunding, 47 Mo. 255."

Section 2292 R. S. Missouri, 1919, is now section 12969, R. S. Missouri, 1929. Under the holding in the above case it was the duty of the trial court to sentence the defendant in such a manner as to make his term of imprisonment for which he was sentenced on his previous trial. Also, in the case of Ex parte Green, 17 S. W. 2d, 939, l.c. 940, the court said:

> "When the petitioner was returned to the penitentiary, he was there under commitments from the circuit courts of both St. Charles and Lafayette counties. The warden and other officials were without authority to determine the order in which the sentences should be

served. That question is determined by section 2292, R. S. 1919, as follows:

' * * * And if any convict shall commit any crime in the penitentiary, or in any county in this state while under sentence, the court having jurisdiction of criminal offenses in such county shall have jurisdiction of such offense, and such convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of such convict shall not commence to run until the expiration of the sentence under which he may be held.'

"It follows the petitioner is remanded to the custody of the Warden to serve the sentences imposed in accordance with the views herein expressed."

The holding in the above case specifically stated that the warden and other officials of the penitentiary were without authority to determine the order in which sentence should be served.

CONCLUSION

In view of the above authorities it is the opinion of this department that the sentences of Berthold McBride No. 42930, which sentenced him to twenty years in the state penitentiary on May 26th, 1932, and also which sentenced him to five years in the state penitentiary should run consecutively and not concurrently.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

TAXATION AND REVENUE: Construction of Senate Bill No. 311 in relation to Senate Bill No. 94 as to the first, second and third sale and the resale provided in Section 9953b of said Senate Bill No. 94, the powers of the trustee and the rights and duties of junior lienors.

October 12, 1939.

10-14

FILED
46

Mr. R. L. Jones
County Court Clerk
New Madrid, Missouri

Dear Mr. Jones:

On October 9, 1939 we received a letter from you requesting an opinion on matters relating to Senate Bill No. 94, known as the Jones-Munger Law and a construction of Senate Bill No. 311 of the 60th General Assembly in relation to said Senate Bill No. 94, which is as follows:

> "We desire to have your opinion as to secondary liens on lands being sold for delinquent taxes. Does the present Jones-Munger law clear or knock out all deeds of trust, mortgages, school fund loans, and special improvement liens, if any, under the first or second offering, third offering, or fourth offering, if any. We presume that they have a right to redeem the land on the first or second offering, but are worried about the third and fourth offering. The third offering, as it now stands sells the land without any redemption and we want to know what effect this has on secondary liens, as above mentioned. Also our collector in offering redeemed land at a fourth offering this year, includes the 1938 taxes on the land. The drainage district would not have sufficient time to file a suit and sell for their lien before he sells the land. Would this fourth offering wipe out the drainage lien for those years, as well as all other secondary liens?

"Then if all of these offerings wipe out secondary liens, and they only have a chance to redeem on the first and second offerings, would, in your opinion, the drainage districts organized under the County Court have authority to bid at sales under the Jones-Munger to protect their liens on the land? This would come up in case they had failed to file suit, obtain a judgment and dispose of the land prior to the third offering, and if they would have authority to purchase such lands, would they have authority to purchase at either of the offerings?

"The third question relates to Section 9953b, Laws of Missouri, 1939. Would the trustee appointed by the County Court have authority to make a bid of the taxes, costs, interest and penalties at the first or second offering, or must he wait and bid only at the third offerings? It would seem to us that if he had authority to purchase at the third offering the total amount of taxes and etc., due, that he should have the same right to purchase at either the first or second offering, and save the necessary expense of the two additional advertisements, which is in itself a large item.

"We would appreciate your opinion as soon as possible so that we may be able to govern ourself accordingly on the first Monday in November."

Section 9952a, 9952b and 9952c of Senate Bill No. 94, Laws of Missouri 1935, provide for the publication and sale of lands for delinquent taxes. In event there is no bid of a sum equal to the delinquent taxes thereon with interest, penalty and costs, such lands shall not be sold

but must be reoffered for sale the following year. If at such reoffering no person shall bid a sum for such lands equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact upon his record of sale and the county collector shall enter a recital of such fact in his record book containing the list of delinquent lands and lots.

Section 9953a of said Senate Bill No. 94, is as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9953b, is as follows:

> "Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemd from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Section 9956a is, in part, as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, * * * * * "

Section 9953a of Senate Bill No. 311, Laws of Missouri 1939, at page 51, is as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. If any lands or lots are not sold at such third offering, then the Collector, in his discretion, need

not again advertise or offer such lands or lots for sale oftener then once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. A purchaser at any sale subsequent to the third offering of any land or lots shall be entitled to the immediate issuance and delivery of a collector's deed and there shall be no period of redemption from such sales; provided, however, before any purchaser at a sale to which this section is applicable shall be entitled to a collector's deed it shall be the duty of the collector to demand, and the purchaser to pay, in addition to his bid, all taxes due and unpaid on such lands or lots that became due and payable on such lands or lots subsequent to the date of the taxes included in such advertisement and sale.

"In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lotspurchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs." (Underscoring ours)

Section 9953b, thereof, is, in part, as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis,

> to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * "

Section 9953f is, in part, as follows:

> "Any drainage, levee or any other special improvement district having a lien on any land or lot, upon which there has been issued a certificate of purchase, may, if authorized by the law creating such drainage, levee or other special improvement district, at any time within the period of redemption applicable to any certificate of purchase, deposit with the collector the amount necessary to redeem such lands. * * * "
> (Underscoring ours)

Section 15, Article II of the Constitution of Missouri, is as follows:

> "That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be passed by the General Assembly."

Notices of sale of lands and lots for delinquent taxes have been or will be given under the provisions of Section 9952b, supra.

The first matter to determine is whether Section 9953a, supra, operates retrospectively, within the terms of the Constitution. The words "have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder", clearly indicate that the legislature intended the above - which is an amendment of Senate Bill No. 94 - to operate retrospectively.

The rule in Missouri is that a law is not retrospective in its operation, within the terms of the Constitution, unless it impairs some vested right.

The court has defined vested rights in the case of State ex rel. vs. Hackman, 272 Mo. 600, 607, as follows:

> " * * * By a vested right we mean one which is absolute, complete and unconditional (Orthwein v. Insurance Co., 261 Mo. l. c. 665), to the exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent upon a contingency. (Young v. Jones, 180 Ill. l. c. 221; Bailey v. Railroad, 4 Harr. (Del.) l. c. 400; Day v. Madden, 9 Colo. App. 464; Royston v. Miller, 76 Fed. l. c. 53.) * * * "

The Supreme Court of Arkansas, in the case of Matthews vs. Bailey, 131 S. W. (2nd) 423, 428, gave the following definition of a vested interest:

> " * * * 'A vested right "must be something more than a mere expectation based upon the anticipated continuance of existing laws. It must have become a title * * * to the present or future

> enjoyment of property," in some way or another. * * * But parties have no vested rights in remedies or matters of procedure.' It is also well settled that no one has a vested right in a public law. Roberson v. Roberson, 193 Ark. 669, 101 S. W. 2d 961."

A statute which is remedial or procedural, and especially one providing for the enforcement of the lien of county and state for delinquent taxes on real estate already assessed and levied, may be retroactive and not come within the above constitutional inhibition.

In construing this question, the Supreme Court in McManus vs. Park, 287 Mo. l. c. 115, says:

> " * * * This, however, applies only to statutes which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. (Schuermann v. Union Cent. Life Ins. Co., 165 Mo. l. c. 652; Roenfeldt v. St. L. & Sub. Ry. Co., 180 Mo. l. c. 564; State v. Taylor, 134 Mo. l. c. 144-145; State ex rel. v. Taylor, 224 Mo. l. c. 464; St. Louis v. Calhoun, 222 Mo. l. c. 52.)
>
> "This court said in case of Mainwaring v. Lumber Co., 200 Mo. l. c. 732-733:
>
> "'Acts changing remedies in any way that do not destroy or impair vested rights, are excluded from the rule invalidating retrospective laws, even when they are intended to retroact.'"

In the course of said opinion, the court further said:

> " * * * A statute may retroact without being retrospective in the sense that it is inimical to the Constitution. So far as remedies are concerned, it may operate upon property rights and interests which are already vested, but the remedial action authorized by the statute of course applies to the future. It has been many times held by this court that a statute is not retrospective in its operation, within the terms of the Constitution, unless it impairs some vested right. * * * "

Also:

> "'This, because the retrospective laws forbidden by that instrument are laws impairing existing vested civil rights. The law must take away such vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to gone-by transactions, in order to be retrospective and under the constitutional ban. There is no vested right in a particular mode of procedure.'
>
> "The amplification of the principle in the last sentence of the first paragraph quoted, only particularizes what is meant by existing vested rights. A law which does not impair any vested right is not retrospective in the constitutional sense, although it may change the remedy or provide new remedies for enforcing or defining such a right. * * * "

Sales of lands and lots to be held November 6, 1939 and thereafter, will be held under notices given prior to the date that Senate Bill No. 311, supra, becomes effective, but the sales thereunder will be had after the date that Senate Bill No. 311 becomes effective. Said Senate Bill No. 311 amended Section 9953a and 9953b of Senate Bill No. 94.

The question arises as to whether a third sale on November 6th and thereafter will be governed by the provisions of Senate Bill No. 94 or Senate Bill No. 311.

On this question the court, en banc, in the case of Brown vs. Marshall, 241 Mo. l. c. 727, 728, says:

> "Clearly there was nothing inconsistent between section 9 of the Act of 1855, and section 7 of the Act of 1877, both of which have been previously quoted. Each in express terms and almost in the same language authorize the various probate courts of the State, by order, to change the stated terms thereof, to such times as the judges thereof may deem best and most convenient for the transaction of the business therein.
>
> "But independent of that, there is another sound rule of statutory construction which governs this case, and that is, a subsequent act of the Legislature repealing and reenacting, at the same time, a pre-existing statute, is but a continuation of the latter, and the law dates from the passage of the first statute and not the latter. (State ex rel. v. Mason, 153 Mo. 23, l. c. 58-59; State ex rel. v. County Court, 53 Mo. 128, l. c. 129-130; Smith v. People, 47 N. Y. 330.)"

In the case of Smith vs. Dirckx, 283 Mo. l. c. 198 the court, in applying the above rule to an amendment of 1919

which undertook to assess an additional 1% upon that portion of the net income for the calendar year of 1919, which was received by the appellant prior to going into effect of said amendment, held that, it did create a new obligation or impose a new duty, but pointed out:

> "However, this should not operate to prevent the collection of a tax not exceeding one-half of one percent for the period above mentioned. This for the reason that since the old law imposed a tax of one-half of one per cent upon that portion of his income which appellant received prior to the taking effect of the 1919 amendment, that portion of the amended rate which did not exceed the old rate did not create a new obligation or impose a new duty. It therefore follows that a tax not to exceed one-half of one per cent may be collected under the amendment with reference to the net income received by appellant prior to the going into effect of the amendment, without violating the Constitution."

I.

REDEMPTION

Sections 9953a and 9953b, supra, were the only subdivisions of Senate Bill No. 94 that were repealed by Senate Bill No. 311, which will be in effect prior to the sales of lands and lots for delinquent taxes beginning on November 6th. Said Section 9953a, supra, provided for a third sale. Said Section 9953b, supra, provided for a dificiency or resale for all delinquent taxes, penalty, interest and costs not paid by such sale. This obviously could only refer to the third sale because lands and lots could not be sold at a first and second offering or sale unless a bid were made on the same in a sum equal to the delinquent taxes thereon, interest, penalty and costs.

Then sales can not be consummated under the above Sections because Senate Bill No. 311 becomes effective before the date set for such sales.

Senate Bill No. 311 makes the third sale, and a sale subsequent to the third offering in case sale is not made at the third offering, final by requiring the delivery of a deed by the collector. The bill, therefore, makes such sales final and nullifies the equity of redemption from the same of all parties interested including all junior lienors. There could then be no resale for the deficiency after such third or subsequent final sale under the provisions of Senate Bill No. 311 of the Laws of 1939 because such resale for a deficiency could be executed only after a third sale was had under the 1933 Act and a redemption therefrom, which will be repealed on the effective date of Senate Bill No. 311.

Redemption is further provided in Section 9956a in the 1933 Act, supra and, Senate Bill No. 311 repealing the equity of redemption as to the third and subsequent sale, leaves the right of two years redemption, under the provisions of said Section 9956a, available with reference to the first and second offerings or sales. The two years redemption as to such first and second offerings or sales is unaffected by Senate Bill No. 311 except that such redemption is limited in case of a third or subsequent sale thereunder.

II.

Under the provisions of Senate Bill No. 94, any party in interest may redeem from or buy in at a tax sale but it is, of course, necessary that such party have such a legal status and entity or charter right that it may avail itself of such privilege.

In the case of Drainage District v. Hetlage, 102 S. W. (2nd) 709, the Springfield Court of Appeals in construing the right of a drainage district organized by the county court to bid in or redeem from a tax sale for general delinquent taxes on real estate, said:

> "but no such power or authority is vested by said section in county court districts."

This is the only decision we find on this question and is conclusive until overruled.

The title to Section 9963f of Senate Bill No. 311, Laws of Missouri 1939, at page 852, would indicate that drainage districts would, thereunder, be given the right to redeem

lands sold at a tax sale but therein we find the following limitation:

> "if authorized by the law creating such drainage, levee or other special improvement district."

Therefore, the status of such county and other drainage, levee and improvement districts is exactly the same after the effective date of Senate Bill No. 311 as before and the right of county drainage districts to redeem and bid in lands and lots from and at a tax sale for general taxes is still controlled by said decision.

III.

The right of a trustee appointed by the county court to purchase lands at a general delinquent tax sale is purely statutory and he can exercise no more authority than is expressed or implied by the statute creating such right. Under the provisions of Section 9953b, Laws of Missouri 1939, such trustee shall have "authority to bid at all sales to which Section 9953a is applicable".

An examination of said Section 9953a shows that it refers to the sale of lands and lots for delinquent taxes <u>at the third sale only</u>:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder,* * * ".

Therefore, the trustee can bid only at the third sale or subsequent sale thereto provided in the above section.

Such trustee does not have authority to bid on such lands and lots at such sales, however, if any other person bids a sufficient amount to pay in full all delinquent, taxes, penalties, interest and costs and, when he buys, he takes the deed "for the benefit of all funds entitled to participate in the taxes".

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

TAXATION AND REVENUE: Offerings for sales of delinquent tax lands must be successive. Unless such offerings are made successively, sales thereunder will be void.

October 30, 1939

FILED
46

Honorable Alvin H. Juergensmeyer
Prosecuting Attorney
Warren County
Warrenton, Missouri

Dear Mr. Juergensmeyer:

I desire to acknowledge your letter addressed to the General on October 26, 1939, relating to an inquiry with respect to the construction of Senate Bill No. 94 or the Jones Munger Law, which is as follows:

"In the year 1935 the County Collector advertised and offered for sale certain lands on which the taxes were delinquent. There was no bid for the amount of the delinquent taxes and the property was not sold in 1935. The Collector did not advertise the property in 1936 but in 1937 this tract was again advertised for sale and no one bid the amount of delinquent taxes and cost of advertising. The land was not offered for sale in 1938 but this year the Collector is offering this tract for sale for a third time.

"Question: Is it the intention of the law that the third sale shall be the last of three successive advertisements and sales, or does it merely mean three advertisements as in this case?

"Question: If the property is sold this time, will the purchaser obtain a good deed under the above procedure?

"In 1935 the taxes on the above lands were advertised as delinquent for the years 1930-1931-1932-1933-1934. Would the Collector have the right to advertise and collect taxes for the years 1930 to

1938 inclusive, at this sale?

"Please let us have an opinion on the above not later than Saturday, November 4th so that the Collector will know whether to sell this land as advertised."

Section 9952a, Laws of Missouri, 1933 at page 430 is in part as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, * * * * * * * * * The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Section 9952b thereof, provides for the publication of the list of delinquent lands.

Section 9953 thereof, providing for the reoffering of delinquent lands, is in part as follows:

"If at the first offering of sale of any tract of land or lot under the provisions of this act no person shall bid therefor a sum equal to the delinquent taxes thereon with interest, penalty and costs, then the clerk of the sale shall note such fact in his record of sale and the county collector shall note a recital thereof in his record containing the list of delinquent lands and lots, and said tracts of land or ~~lots shall be again offered for sale, at the next sale of delinquent lands and lots~~ as in this act provided, if such lands or lots be at such time delinquent. * * * (Under-scoring-ours.)

Section 9953a thereof, at page 432 was repealed by Senate Bill No. 311, Laws of Missouri, 1939 at page 851, and is in part as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, * * * * * * * * " (Under-scoring ours.)

A review of the above statutes clearly indicate that it was the intention of the legislature that all the delinquent lands and lots be offered "successive years" until sold. Section 9952a supra says, "All lands and lots on which taxes are delinquent and unpaid shall be subject to sale etc."

Section 9953 supra provides for a reoffering or second sale. It provides that in event all the taxes, penalty, interest and costs are not bid at the first sale "lands or lots shall be again offered for sale, at the next sale of delinquent lands and lots."

Section 9953a provides that "whenever any lands have been * * * * offered for sale * * * for any two successive years * * * then such county collector shall at the next regular tax sale of lands * * * sell same to the highest bidder * * * * * ."

CONCLUSION

Therefore, it is the conclusion of this department that the third offering for sale for delinquent taxes must be successive to the second sale or reoffering, and that the second sale or reoffering must be successive to the first offering. That unless such offerings for sale of such lands for delinquent taxes are successive, sales thereunder will be void.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM/ww

COUNTY COURTS:
TOWNSHIP BOARDS:
ROAD AND BRIDGES:
SPECIAL COMMISSIONERS
AND TAXATION:

The seven questions pertaining to the rights of the county courts, township trustees and special road commissioners of taxation for road and bridge purposes in counties under township organization.

May 11, 1939

5-13

FILED
47

Mr. George B. Kautz
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you set out a number of questions to be answered by this department. Since your request is quite lengthy we have divided it and will answer the questions as you have submitted them.

I.

Answering your first question which is as follows:

> "Under the present budget law, 1933, and re-enacted in part, 1937, the county court understands, under its classification of expenditures, Class 3, that it has no right to contribute to the upkeep, repair or replacement of bridges in this special road district. Is this correct?"

By Sections 7890 and 7891, R. S. Missouri 1929, means have been provided by which taxes may be levied and collected for the purpose of acquiring, maintaining, building and repairing of roads and bridges in this state. These sections provide as follows:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof

in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed

> to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

Section 8042, R. S. Missouri 1929, requires that the taxes collected under Sections 7890 and 7891, supra, shall, on application being made therefor, be turned over to the commissioners of the special road districts containing the property on which such taxes are collected. This section is as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected

> for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

In your request you refer to Section 8039, R. S. Missouri 1929, as authority of the court to appropriate funds to special road districts for certain purposes. This section only applies to special road districts organized under Article IX, chapter 42, R. S. Missouri, 1929. From the cases which are reported it does not seem that the lawmakers, at the time Sections 7890 and 7891, supra, were enacted, contemplated that the taxes

collected under these sections on properties in the road districts would belong to such districts when demanded as ruled in State ex rel. v. Burton, 266 Mo. 711, 182 S. W. 746. Section 8039, supra, was probably included in the Special Road District Act because the lawmakers did not contemplate that all of the taxes collected under Sections 7890 and 7891, supra, on properties in a special road district would go to such special road district.

After it was determined that such taxes would go to the commissioners of the special road district on timely application being made therefor, then we think the lawmakers, when they were considering the County Budget Act, Laws of Missouri, 1933, page 341, especially intended to prohibit any other tax moneys from going to the special road district for the reason that they were getting all of the taxes collected on the properties in their districts and for that reason Class Three of the County Budget Act was inserted which is as follows:

> "The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

The language of this clause is plain and there is no doubt that the lawmakers intended to prohibit the county court from using any of the other county revenue which is budgeted in Class Three for the purpose of the upkeep, repair or replacement of bridges in special road districts.

Therefore, in answer to your first question we are of the opinion that the county court is not authorized to apportion or use any of the moneys which have been placed in Class Three of the budget for the purpose of upkeep, repair or replacement of bridges in a special road district.

II.

On the second question which you have submitted you make the following statement:

> "The county has been making a levy of 30 cents annually over the entire county for all county purposes. In the classification under the budget law, the county apportions .06 for road and bridge purposes. But you will understand that in this special road district the county court, under the present budget law, is of the opinion that it has no right to take any part of this levy for bridge purposes in this special road district."

It appears from the statement which you have made that the county court, in making its levy for county purposes, has included in the levy a tax at the rate of six cents on the one hundred dollars valuation for road and bridge purposes. This tax is authorized by virtue of the provisions of Section 7890, supra. The tax for road and bridge purposes under Section 7890, supra, is a part of the county revenue tax. This question was before our Supreme Court in State to Use of Covington v. Wabash Ry. Co., 319 Mo. 302, 305, wherein the court said:

> "* * * * * We are, therefore, of the opinion that the levy for road purposes under amended Section 10682 in the instant case was a levy for county purposes within the meaning of the reenacted Section 12865, and that as a matter of construction the ten-per-cent restriction applies."

Under Section 7890, supra, it is mandatory on the court to make some levy for road and bridge purposes. Under Section 8042, supra, if the court collects the road

and bridge tax on properties in a special road district it is the duty of the court to apportion such taxes to the district including the properties on which the tax is collected, and if application is made therefor by the commissioners of such special road district to turn these taxes over to the commissioners. Therefore, in answer to your second question we will say that the county court not only has a right to, but is required to, turn over to the commissioners the road taxes collected on properties in the special road district provided the commissioners make timely application therefor. In your case it would be the duty of the county court to turn the amount of the taxes raised by the six cent levy for road and bridge purposes which was collected on properties in the special road district.

III.

In answer to your third question on whether or not the special road district is entitled to be reimbursed for the road and bridge taxes, we are enclosing a copy of an opinion dated August 17, 1937, to Honorable L. B. Shuck, Prosecuting Attorney of Shannon County, written by Assistant Attorney General, Mr. Olliver W. Nolen. We think this opinion answers that question except as to whether the application for the moneys by the commissioners is timely. Whether or not the application is timely made would depend upon circumstances. However, for a treatment of this question we refer you to the Little Prairie Special Road District et al. v. Pemiscot County et al., 249 S. W. 599, l.c. 601, which held that the tax must be demanded in the year that it is levied. See also Holloway to Use v. Howell County, 240 Mo. 601.

IV.

Answering your fourth question which is as follows:

> "It seems that Section 8039, R. S. 1929, permitting the court to build

> bridges in a special road district has been repealed by the budget law, 1933, page 340, and 1937, Page 422, On the matter of upkeep, repair or replacement of bridges in the special road district, and that the county can no longer contribute to these bridges. Is this correct?"

We think this question is answered in Division One of this opinion which holds that the court is not authorized to appropriate any of the funds to special road districts which have been properly placed in Class Three of the budget. If any of the road and bridge taxes collected under Sections 7890 or 7891, supra, are in Class Three of the budget, and if they have been collected on properties in the special road district, then under the holdings in Division Three of this opinion they should be turned over to the special road district if timely application is made therefor.

V.

Your next question which is as follows:

> "On the other hand, Section 8042, R. S. 1929, anno. statutes 6842, provided for reimbursing special road districts is not in express terms repealed by the budget law. Does this section 8042 still remain effective, and is the county required to reimburse this special road district thereunder? If so, from what fund or classification will this reimbursement be taken?"

Section 8042, R. S. Missouri, 1929, was not repealed by

the Budget Act. It requires the county court to apportion all taxes collected for road and bridge purposes to the districts to which they belong as they are collected. While the taxes under Section 7890, supra, have been held to be a part of the county revenue (State to Use of Covington v. Wabash Ry. Co., 319 Mo. 302, 305), yet we think that holding was only for the purpose of determining what taxes would be considered in fixing the amount of the levy in order to be within the limitations of the Constitution. Therefore, if the county court has not apportioned the taxes belonging to the special road districts to such districts as they were collected and has placed them in other funds, then it would be the duty of the county court, if timely application for these taxes is made by the commissioners, to take these taxes out of the funds in which they have been wrongfully placed. If they have been placed in Class Three of the budget, then they should be taken out of that class and paid to the commissioners provided the commissioners have made timely application therefor.

VI.

Your sixth question and the statement in relation to it is as follows:

> "Included in this special road district are parts of five townships. Harrison county has township organization. These townships make levies that is, i. e., township levies for ordinary road purposes and then a special road and bridge fund. For instance, Hamilton township makes a 20-cent levy for road purposes and a 25-cent levy for special road and bridge fund. Should these township levies include the property of this township that is in this special road district, or should the township levy simply cover the property of the township not in

> the special road district? You will understand that the special road district makes a levy of its own for road and bridge purposes. The present levy is 25 cents."

From the statement which you have made in connection with this question it appears that the levies which have been made or are being contemplated to be made by the county court, township board and commissioners of the special road district might be in excess of the levy authorized by Sections 11 and 22 of Article X of the Constitution.

Your inquiry does not go to that question, but from the statement which you have made that there are probably excessive levies, for your information we are enclosing two opinions rendered by this department touching on this subject which might be of some benefit to you in advising the various bodies in the amount of levy that they may make. These opinions are written by Mr. W. W. Barnes to Honorable Forrest Smith, State Auditor, dated July 2, 1934, and Mr. Charles E. Hassett, dated May 3rd, 1939, written by Mr. Drake Watson, Assistant Attorney General.

On the question "Should the township levies include the properties of the township which are in a special road district, or should the township levies simply cover the property of the township in the special road district?" Section 8161, R. S. Missouri, 1929, which relates to the power of the township board to make a levy provides as follows:

> "The township board of directors of any township may, annually, in their discretion, at the same time and in the same manner as taxes are now required by law to be levied for county purposes, levy an annual tax in addition to those now authorized by law, in any amount not exceeding twenty-five cents on each one hundred dollars valuation on all prop-

> erty subject to taxation in such township, to be known as a special road and bridge fund. Provided that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the order of the township road and bridge fund and be used in construction and maintenance of roads and improving or repairing any street in any incorporated city or village in the township, if said street shall form a part of a continuous highway of said township leading through such city or village."

Another section of the statute authorizing township boards to request a levy for township expenses is Section 12308, R. S. Missouri 1929, which provides in part as follows:

> "The township board of directors shall make out an account of the amount of money necessary to defray the township expenses during the next ensuing year; said account shall be made out not more than sixty nor less than twenty days prior to the meeting of the county court at which the assessment for county purposes is made; said account shall be signed by the president of the board, and attested by the clerk, and filed with the clerk of the county court on or before the first day of said court, who shall cause the same to be placed upon the tax books of said township: Provided, that said expenses shall not, together with the amount levied for road purposes and special bridge tax, exceed in any one year twenty cents on the one hundred dollars valuation; * * * * "

It seems that by the two foregoing sections the plan for taking care of the expenses of the township is set out. It will be noted that Section 8161, supra, requires that the levy under that section be made on all property in the township. Section 3, Article X of the Constitution provides as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

We are, therefore, of the opinion that any tax levied by the township board in order to comply with the foregoing sections and provisions of the Constitution should be on all property in the district. However, we think that the same rule applies to the township board as applies to the county court to turn over to the special road district commissioners, on timely application therefor, the taxes collected for road and bridges and special road and bridge purposes on properties in the special road district.

VII.

Answering your seventh question of your opinion request which is as follows:

> "If the township levy should include the property in the special road district, should the township then contribute to or maintain the roads in the special road district? It would seem that if the property in the special road district is subject to levy for township levies and also the general county levy and then has a special tax of its own, all for road

> and bridge purposes, that the property in the special road district has been taxed two or three times for the same purpose."

Having answered in Division Six of this opinion that the taxes levied by the township board should be on all of the properties in the township including those of a special road district, then as stated in the conclusion of said Division Six of this opinion we think that the road and bridge and special road and bridge taxes which are collected by the township board on properties in the special road district should be turned over to the commissioners of the special road district if timely application is made therefor.

In conclusion we will say that if the sections of the statutes hereinbefore set out are followed by the county court, township board and special road district commissioners, the taxes levied and collected therefor will be within the constitutional provisions of Sections 11 and 22 of Article X of the Constitution.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

FISH AND GAME: Possession of squirrels between June 1st and November 30th is not a violation of section 8277 R. S. Missouri, 1929.

July 20, 1939 7/22

FILED 47

Hon. O. A. Kamp
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of July 14th, 1939, which reads as follows:

"I am writing you for an opinion construing Section 8285 R. S. Missouri, 1929.

"Charles L. Horner, one of the Game Conservation Agents, has filed with a Justice of the Peace, complaints charging a colored boy with selling six squirrels for ten cents each to one person, and two squirrels for ten cents each to another person, on or about June 5th, 1939.

"I have filed the information on the complaint against the party who sold the squirrels, under the provisions of the above section prohibiting the sale of same, and he entered a plea of guilty.

"The conservation agent also filed complaints against the individuals for buying the squirrels, and insists that I file informations, contending that said section 8285 also prohibits the buying of such game.

"This sale was made to individuals, and in no way comes under the provisions of said section prohibiting the serving or storage

of such game, as prohibited by said section.

"I am of the opinion that said section does not operate against the buyer, reading as follows. 'Any person, firm, or corporation, who shall, at any time of the year, barter, sell or offer for sale, . . .' I do not feel that an information should be filed on said complaints, for as I construe said section the buyers did not violate the law under the provisions thereof. I am holding the complaints for the time being and would like to have your opinion on this matter in order to get this adjusted with the Game Conservation Agent. * * * * "

Section 8237 R. S. Missouri, 1929, reads as follows:

"No person shall pursue, capture, injure, kill, or destroy any grey squirrel, fox squirrel (American squirrel) or black squirrel, except from June 1st to November 30th each year, both dates inclusive; not to exceed ten in any one day, nor shall any person pursue, injure, capture, kill or destroy any such squirrels at any time in any public or private park: Provided, that any person may protect his or her premises from the ravages and depredations of animals named in this section at any time and in any way. Any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor."

It will be noticed by implication that the date of open season on squirrels is June 1st to November 30th of each year.

Section 8247 R. S. Missouri, 1929, reads as follows:

> "Any person who shall have in his possession or under his control any variety of fish, game or birds, during the closed season prescribed by law therefor, and any person who shall have in his possession, or under his control, the carcass, pelt, or flesh of any animal, fish or game protected by this article, except when such possession or control is permitted thereunder, shall be guilty of a misdemeanor and the game warden and his deputies are hereby permitted and authorized to take and confiscate any fish, game, birds, or wild animals, or the carcass, pelt or flesh thereof, from any person who may be holding the same, in violation of this article."

According to the facts stated in your request, the game warden is probably proceeding under this section, and if this is so, the season not being closed, the possession of a squirrel is not in violation of this section, for the reason that the defendants did not buy the squirrels until June 5th, 1939. If the possession was at a time the season was closed on squirrels, the possession of same would be a violation of section 8247, supra. It was so held in the case of State v. King, 97 S. W. (2d) 153.

Section 8285 Session Laws of 1931, page 225 is a new section repealing section 8285 R. S. Missouri, 1929. The only change being the omission of the words "whether taken within or without this state". Section 8285 Session Laws of 1931, page 225, reads as follows:

> "Any person, firm or corporation, who shall, at any time of the year barter, sell or offer for sale, or who shall store or serve in any commission house, cold storage house or commercial establishment, in this state, either under the name used in this article, or under any other name or guise whatever, any animal or bird protected in this article, unless the same be fur-bearing animals, lawfully taken shall be punished by a fine of not less than fifty dollars ($50.00) nor more than one

> hundred dollars ($100.00), and an additional fine of five dollars ($5.00) for every bird or animal or part of every bird or animal bartered, sold or offered for sale, stored or served: Provided, that nothing in this section shall be construed to apply to the pelts or parts of fur-bearing animals lawfully taken, or as otherwise provided for taxidermists, or scientific specimens in this article: Provided, nothing in this section shall be construed to prohibit the storing, and serving, in any eating establishment, of deer and elk, raised in captivity, as provided for in section 8310."

Under this section, which deals with the possession of protected animals, it is specifically stated "who shall store or serve in any commission house, cold storage house or commercial establishment in this state." It can readily be seen that it was the intention of the legislature in enacting this section that it apply only to commercial interprises and not to a private individual. In rendering this opinion, this office is taking into consideration that the statute of 1929 and 1931, also any law in regard to the conservation of fish and game, as applied in 1937, is governed by amendment number four which was voted in 1937, and which gave the conservation commission much authority in regulating the conservation of fish and game. Under that amendment the conservation commission was empowered to make rules which would invalidate any statutory law which would be in conflict with any rules made by the newly created conservation commission. It was so held in the case of Marsh v. Bartlett, 121 S. W. (2d) 737, pars. 15,16, where the court said:

> "It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. There was much discussion by counsel in their oral arguments, and much appears in their brief, with reference to the meaning of the words definitive of that authority. In the aspect of the Amendment now under consideration there is no need to go into

definition of the various terms. They take color and significance from the context.

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A., N. S., 186. Regulation and legislation are not synonymous terms. In re Northwestern Indiana Tel. Co., 201 Ind. 667, 171 N. E. 65, 70. Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. Southern R. Co. v. Russell, 133 Va. 292, 112 S. E. 700, 703.

"It will be remembered that in the body of the Amendment the word 'laws' occurs twice and is therein definitely related to the Legislature or to the legislative power, while the word 'regulate' and kindred words are attributed to the administrative power and duty. Also, as pointed out in our citation of the Grimaud Case, supra, punitive laws or laws fixing punishment as for violations of administrative rules are solely referable to the legislative power and function, and, on the other hand, administrative rules may have the force of law in that violations thereof are punishable as public offenses. Hence it follows that unless there be existing statutes that are not inconsistent with the Amendment but which do in effect fix punishment for acts or conduct that may fairly come within the purview of some rule or rules established by the Conservation Commission, it cannot be said that the Amendment is completely self-enforcing; if the situation be the opposite, our conclusion will be the opposite."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that any private individual who purchases squirrels between June 1st and November 30th, in any year, is not subject to criminal prosecution unless the purchase is made for the purpose of commercial business and not for private consumption of the squirrels.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

SCHOOLS:
DIRECTORS AND CLERKS: Different questions relating to school directors, their qualifications and election of the clerk and their records.

May 18, 1939

FILED
48

Mr. Earl C. Kearbey
County Superintendent of Schools
Carter County
Ellsinore, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement of facts in your request:

"At the annual school meeting Apr. 4, two directors were legally elected. A Meeting was called by the President of the old board for Friday night Apr. 7 to qualify the new members.

"Before Friday night the two new members went to the home of the old member and proceeded to have a meeting without due notice to the two retiring members or the district clerk.

"An outsider was appointed clerk of the new board, and the old director swore in the two new members. They ignored the meeting that was called by the president of old board for Friday night. The new board had no clerk record book, but kept a record on scrap paper withheld from district clerk.

"I am wondering if their meeting was legal as there was only one member of the old board present. Perhaps it is not necessary for the old out-going members to be present.

"The new board has hired a teacher, signed a contract, but a copy of the contract is not in the dist. Clerk's record book as they had no record book. They would not give the minutes of the board meeting to the regular clerk who serves until July 15, 1939.

"The new directors did not sign their oath in a record book at the time.

"They have by this time made arrangements for a clerk's record book I am informed.

"Both school boards are trying to hold their organization and both are transacting business. Which clerk shall I recognize as the official officer? Would you care to give me some advice and state your opinion? The county attorneys seems to recognize the new board but there seems to be two sides to me. I would appreciate any information you might give."

To begin with we have the rule that the office of school district director is a creature of the statute and we must look to the statutes to ascertain what such duties are. Your question particularly relates to the organization of the school board. There seems to be no question but what two directors were duly elected to the

board in which the controversy now exists.

With respect to the duties of directors in relation to their organization we find these are set out in Section 9289, R. S. Missouri 1929, which are as follows:

> "The directors shall meet within four days after the annual meeting, at some place within the district, and organize by electing one of their number president; and the board shall, on or before the fifteenth day of July, select a clerk, who shall enter upon his duties on the fifteenth day of July, but no compensation shall be allowed such clerk until all reports required by law and by the board have been duly made and filed. A majority of the board shall constitute a quorum for the transaction of business: Provided, each member shall have due notice of the time, place and purpose of such meeting; and in case of the absence of the clerk, one of the directors may act temporarily in his place. The clerk shall keep a correct record of the proceedings of all the meetings of the board. No member of the board shall receive any compensation for performing the duties of a director."

While this section requires the directors to meet within four days after the annual meeting, I find that by an opinion from this department dated May 17th, 1933, written by Honorable George B. Strother, Assistant Attorney General, to Honorable Melvin Englehart, Prosecuting Attorney, Fredericktown, Missouri, which holds that the time requirement for the holding of the meeting

is merely directory and that the directors could qualify at any time thereafter. I am enclosing a copy of this opinion for your information.

By Section 9287, R. S. Missouri 1929, the law provides that the directors shall hold their office until their successors are elected or appointed and qualified. It appears from your letter that it is the contention of the old directors that the new directors have not legally qualified, and for that reason they are attempting to hold over.

Section 9288, R. S. Missouri 1929, requires the directors, after they have been elected, to take and subscribe an oath before entering upon his duties of their oath. This oath is to be spread upon the records of the district. The oath may be administered by any member of the board. I note from your letter that the old member of the board who was not up for reelection administered the oath to two newly elected directors. It also appears that this new board met within four days after the election as is provided by said Section 9289, and after being sworn in by the old directors elected the clerk and their oaths were administered and spread upon a paper which was kept for a record of that meeting.

In regard to the selection of the clerk it seems that by Section 9289, supra, that the clerk shall be elected on or before July fifteenth and shall enter upon his duties on July fifteenth following. The duties of the district clerk are set out in Section 9308, R. S. Missouri 1929, which provides in part as follows:

> "The district clerk shall keep a record of the proceedings of all annual and special meetings of the qualified voters of the district; also, the proceedings of the board of directors. He shall make copies of the election notices, contracts with teachers, certificates and all other papers relating to the business

> of the district, and securely keep the same. He shall transmit to the county superintendent, on or before the fifteenth day of July in each year, a report embracing the following items: * * * * * * * * * * * * "

Section 9309, R. S. Missouri 1929, requires the district clerk to procure the necessary record books for the proper transaction of the business of the district.

By Sections 9289 and 9308, supra, we think the lawmakers intended that the clerk would hold his office until July fifteenth, unless he resigned or is removed as is provided by Section 9291, R. S. Missouri 1929, which is as follows:

> "The board shall have power to remove the district clerk from his office for dereliction of duty and appoint another in his place, to whom the former incumbent shall immediately deliver his books and papers pertaining to the office."

It is the duty of the clerk to keep the record of the meetings of the board as is provided by said Sections 9289 and 9308. If the clerk is absent from any meeting of the board, then some member of the board may keep the record. Section 9289, R. S. Missouri 1929.

From the statement which you have submitted it also appears that the new board, at their first meeting, attempted to elect a new clerk who kept the record of that meeting. Since the old clerk who had been elected for a term expiring July fifteenth had not resigned nor had he been removed as is provided by Section 9291, supra, we do not think the action of the board in selecting a new clerk was valid. Apparently the new board did not follow the statute in this matter and since the statute is their guide the old clerk is the one who should have kept the record of the meetings. The rule on this question is

stated in Volume 56 C. J., page 334, at Section 205:

> "A board of education, or of directors, trustees, or the like, of a school district or other local school organization can exercise its powers in no other mode than that prescribed or authorized by statute. * * * * * * * * * * * * "

This brings us to the question if the clerk who acted at the meeting of the new board was not the duly elected official, are the proceedings of the new board at its meetings void? Volume 56 C. J., page 338, Section 211, provides as follows:

> "As a general rule, and, in some states, under statutes expressly so requiring, a board of education, or of directors, trustees, or the like, of a school district or other local school organization should keep written minutes or a written record of its proceedings and official acts, but its unrecorded acts are not thereby void.
>
> " * * * * * * * * * * * *

> "As a general rule a school board should keep a record of their proceedings at each session and their acts relative to the execution of a contract should appear therein; but their unrecorded acts as to contracts are not void."

According to this rule, if the contract with the teacher has been properly entered into with the new board, even though it is not spread upon the records of this district, still the contract with the teacher would not be void.

If the district clerk, whose term is to expire July fifteenth, fails to meet with the new board, then one of the members of the board could act as clerk and make up the proper records including in the minutes of such meeting the actions of the board which have taken place heretofore and which have been recorded by the party whom the board attempted to select as the clerk before the old clerk had been removed or had resigned.

If the old district clerk refuses to act as clerk for the new board, then under Section 9291, supra, the new board would be authorized to remove him and select a new clerk.

CONCLUSION.

From the foregoing we are of the opinion that the newly elected members of the school board, together with the old member who held over, are the duly elected and qualified members of the school board; that they were authorized to meet within four days after the school meeting and organize without notifying the outgoing members of the board; that it was the duty of the clerk of the district who had been selected for a term ending July fifteenth to attend their meetings and record their action in the record books for the district; that his failure so to do, if informed of

the meeting, would constitute a ground for his removal; that in the absence of the clerk of the board a member of the board can act as clerk; that the new board is not authorized to select another clerk whose term will begin before July fifteenth unless the old clerk resigns or is removed; that the new board may keep its records on a sheet of paper and later enter them on the records of the district book for that purpose; that if the new directors were duly sworn in by the old member of the board, their oaths may be entered on the records of the district at any time thereafter; that if the new board has entered into a contract with the teacher and the contract is not spread on the records of the district it is not void for that reason.

We are further of the opinion that in conducting the affairs of the school district you should recognize the acts of the newly elected directors with the old director who held over as the acts of the school district.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SCHOOL: Treasurers of city, town or village districts not entitled to compensation until annual reports have been filed.

3/22

March 22nd, 1939.

FILED 49

Honorable Lloyd W. King,
Superintendent,
Department of Public Schools,
Jefferson City, Missouri.

Dear Mr. King:

We are in receipt of your inquiry of recent date which reads as follows:

"Inquiry has come to this department from the school board of University City concerning the proper method of paying the school board treasurer for his services, both for the ordinary duties and the special duties in the payment of bonds and interest.

"Section 9360, R. S. 1929, provides that the treasurer shall not be paid in excess of $50 for his regular services. Section 9329 provides that such compensation shall not be granted until his annual report has been approved and filed with the board.

"The special duties of the treasurer are set out in Section 9336, R. S. 1929. This law makes the treasurer custodian of all money collected for liquidating any bonded indebtedness and interest on same; - - also, makes him responsible for the payment of such bonds and interest that may become due. As special compensation for such services, he

> shall be paid not to exceed one per cent on the amount by him paid out in the redemption of bonds and payment of interest on same. There seems to be nothing in this law which would prohibit the board from paying the treasurer for the special services required in Section 9336 at the time bonds are redeemed and interest paid.
>
> "The school board of University City desires to know whether or not it has the legal authority to pay its treasurer for his special services in liquidating bonded indebtedness and the payment of interest immediately after such services have been performed, or wait until the close of the year and pay the special fee at the time the $50 is paid for his regular services."

From the memorandum submitted with your inquiry we assume that there is some contention that Section 9336, R. S. Mo. 1929, does not really belong in Article 4 of Chapter 57 of the statutes. We have, therefore, traced the history of this section of the statutes. We find that at page 37, Laws of 1877, an act was passed applicable to all schools and contained a provision similar to Section 9336 of the present statutes. This act authorized school boards to issue renewal funding bonds to be sold or exchanged for the purpose of meeting and paying matured or maturing bonded indebtedness, and to levy a special tax to pay the bond indebtedness of the districts. The act provided that the money raised by the special levy therein authorized should constitute a sinking fund, and it provided that if the outstanding bonds could not be obtained, the sinking fund could be invested in certain designated securities until the outstanding bonds could be obtained. The act provided that

a treasurer of the district should receive for his services in safe keeping the sinking fund and investing and handling the same not to exceed one per cent on the amount. This act carried an emergency clause reciting that there were no provisions then existing tb authorize issuance of renewal bonds or the levying of a special tax for redemption of outstanding bonds. This act appears in the Revised Statutes of 1879 as Section 7039, but does not appear in the revisions thereafter.

However, at page 249, Laws of 1889, appears an act entitled: "An Act to revise and amend Article 2, Chapter 150, of the Revised Statutes of Missouri of 1879, entitled 'of city, town and village schools; and all acts amendatory thereof'". At page 252, of said Laws, appears Section 7149a as a part of said act, which section is marked as a new section. Said section reads as follows:

> "The treasurer of the board shall be the custodian of all moneys collected for liquidating any bonded indebtedness and interest on the same, and shall be responsible on his official bond for the safe keeping and proper appliance of such sinking fund and interest as may be by him received, and also for any loss incurred or damage resulting from his failure to burn any and all redeemed bonds, as required in section 7036; he shall promptly pay the interest on bonds when due, and pay off, cancel and burn the bonds as rapidly as possible; and he shall receive as full compensation for his services under this section, one-half of one per cent on amount by him paid out in the redemption of bonds and payment of interest on same.

Article 2, Chapter 150, R. S. 1879, dealt with city, town and village schools and contained Section 7149, which dealt with the office of treasurer. It would seem clear, therefore, that when the foregoing section 7149a was passed, the Legislature had in mind the office of treasurer of city, town and village school districts. The later section does not purport to be the same section as Section 6, page 39, Laws of 1877, heretofore referred to. The Act of 1877 referred to all schools irrespective of classification.

When, therefore, in 1889, the Legislature passed Section 7149a, there was no longer any need for that part of the Act of 1877 referring to the same subject matter, since there were no treasurers of school districts other than treasurers of the districts covered by the Act of 1889. This perhaps explains why Section 6 of the Act of 1877 was not carried forward in the revision of 1889.

Section 7149a was carried forward in the various revisions until in 1909 it was repealed along with Article 2, Chapter 154, R. S. 1899, and in its place a new section was adopted. The Act of 1909 has been carried down in the revision and is now Section 9336, R. S. Mo. 1929. In view of the fact that this later section has been definitely enacted along with other laws affecting schools and under the titles of bills which pertain to schools, we must conclude that the Legislature intended these statutes to apply to the particular school set forth in Article 4, Chapter 57, of the present statutes.

Section 9321, R. S. 1929, as amended by Laws of 1931, page 333, provides:

> "No compensation shall be granted to either the secretary or the treasurer until his report and settlement shall have been made and filed or published as the law directs."

This same provision has been in the statutes for many years. The words "No compensation" would seem to be all inclusive

Under Section 9336 the treasurer shall:

> "receive as full compensation for his services under this section not to exceed one per cent on amount by him paid out in the redemption of bonds and payment of interest on same."

The remuneration under this section is distinctly referred to as compensation, and we see no reason why the payment of his compensation under this section is not covered by the restriction in Section 9329, supra.

Section 9338 of the present statutes requires the treasurer of city, town and consolidated school districts to settle annually with the Board of Education, and account to said Board for all school moneys or funds received, from whom and on what account, and the amount paid out for school purposes in such districts. If the said settlement is approved by the Board, it is then filed with the County Clerk, who shall likewise examine the same, and if said county official finds the settlement correct he shall certify the same, which certification shall be prima facie a discharge of the liability of the treasurer for the funds expressed in the vouchers.

Section 9338, supra, could well have a two-fold purpose: (1) to make sure that the treasurer filed his settlement as the law required; and (2) to make sure that the treasurer did not receive any compensation until it was definitely determined that he himself was not indebted to the district. Until the treasurer filed this annual settlement the Board could not know just how he

stood with his accounts, and, therefore, the Legislature has forbidden them to pay the treasurer any compensation until they have determined that the treasurer does not owe the district anything.

CONCLUSION.

It is, therefore, the opinion of this department that the treasurer of city, town or village school district is not entitled to compensation under Section 9336, R. S. 1929, until he has filed his report and settlment as required by law.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

HHK:RV

SCHOOLS: City, town and consolidated school districts may change their boundaries in the same manner as common schoolsdistricts under Section 9275, R. S. 1929, even though such change takes a part of the territory of the city and puts it into an adjoining district.

April 3, 1939.

46 FILED 49

Hon. Lloyd W. King, Superintendent,
Department of Public Schools,
Jefferson City, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of March 17th, 1939, which reads as follows:

"Inquiry has come to this Department from the school board of Flat River concerning the change of their school district boundary lines. The facts, as related to this office, are as follows:

During the last part of the year, 1938, the incorporated city of Flat River extended its city limits. The new territory included by the extension of the corporate limits of Flat River was located within the Esther School District boundary lines. Section 9325, R. S. 1929, provides that the extension of the limits of any city, town, or village shall have the effect to extend the limits of such town or city school district to the same extent, and such extention of the limits of any city or town school district shall take effect on the first day of July next following.

Therefore, beginning July 1, 1939, the new territory included in the Flat River municipal corporation would also become a part of the Flat River School District and thereby be detached from the Esther School District. The Esther School District has no incorporated town or village within the district boundary lines.

The two school districts herein affected are giving serious consideration to some possible solution of their school problems and need advice in answer to the following questions:

1 - Granting that the extension of the Flat River City corporate limits has automatically extended the school district boundary lines, which, after July 1, 1939, will include a considerable portion of the present Esther School District, would it be legal, under the provisions of Section 9275, for these two districts to authorize, at the annual election April 4, 1939, a change of school district boundary lines back to the original boundary, while, at the same time, the Flat River municipal corporation would contain the territory in question and lie within the present Esther School District?

2 - If the boundary lines could be restored under the provisions of Section 9275, R. S. 1929, and, at the same time, the corporate limits of Flat River could legally extend across school district boundary lines, would it be legal to submit a proposition for the changing or restoring of school district boundary lines at the April 4, 1939, annual election, since the extension of the corporate city limits does not become effective until July 1, 1939?

3 - May territory lying within an incorporated city legally belong to another school district for school taxation and attendance purposes?

4 - If it is not legal for the Flat River and Esther School Districts to re-arrange their boundary lines back to the original location, and, at the same time, permit the Flat River incorporated municipal limits to extend into the school district of Esther, would the proper legal procedure to restore the original school district boundary lines be the giving up by the Flat River municipal corporation the territory that extends into the Esther School District?

I shall appreciate an early reply giving your opinion in answer to this

> inquiry, as all propositions for the changing of school district boundary lines this year must be submitted at the annual election on April 4, 1939."

Your letter assumes that the extention of the corporate limits of Flat River automatically will extend the limits of the School District of Flat River to coincide with the new boundaries of the city. We think this is a correct assumption in view of the plain provisions of Section 9325, R. S. 1929, as amended at page 449, Laws of 1937. See also the case of State ex rel. v. Brown, 31 S. W. (2d), 215.

The question, therefore, is whether a city or town school district and an adjoining school district can change their boundary in such a manner that part of the territory of the incorporated city or town can be placed in the adjoining school district.

It must be borne in mind that every organized school district is an independent corporate body. Where such school district is a city or town district, it nevertheless is a separate corporate entity, wholly independent of the corporate entity known as the city or town. The independent relationship between city school districts and the cities themselves is illustrated in the following language of our Supreme Court in the case of State ex Inf. v. Henderson, 145 Mo. l. c. 335-336:

> "Counsel concede that a school district is not a department of the municipal government like the fire department, police department or water-works whose existence is an incident of the city

government. On the contrary each organized school district is an independent body corporate under the laws of this State. Their characteristics and powers are well defined by the Kansas City Court of Appeals in Waterworks Co. v. School District, 23 Mo. App. 241, as follows, speaking of the school district of Kansas City: "By this act, I am of the opinion, the divorcement of the school district of Kansas City from the municipal government is complete. It is an independent corporation in every vital particular. The title and control of the school buildings are effectually vested in the board of school directors, the school district corporation. The school board determines all questions as to the raising of money for revenue. The county officers are the agents by which the revenue is collected. The city government has no voice nor agency in the matter. It has nothing whatever to do with the school buildings or other property of this incorporated district. . . . . This affords additional evidence, to my mind, of the purpose of the legislature to make the school district a separate legal entity from the municipal organization."

A case further illustrating the fact that a city and a school district are separate entities was the case of School District v. Goodding, 120 Mo. 67, decided in 1894. In that case, the city of Macon extended its corporate limits. Thereupon the School District of Macon brought a suit asking the court to order the County Clerk to extend the taxes on the territory thereby added to the city at the rate provided for the city school district. The school district contended that the extension of the city limits automatically extended the limits of the school district on the theory that the law contemplated that the boundaries of the city and those of the school district must be the same. The court held that the extension of the city boundary did not automatically extend the boundary of the school district, and in the course of the opinion the court said, l. c. 72:

> "Chapter 143 (R.S.1889) prescribes the course to be followed for altering the boundaries of school districts. It is not necessary to set forth the particulars of the statute in relation to that subject. It is enough to say that the enlargement of a city or town composing such a district does not, of itself, effect a change in the boundaries of the district. The latter retains its integrity as a body corporate until changed in the manner prescribed by the law."

The above case was decided before the provisions now appearing in Section 9325, supra, providing that extension of the city limits automatically extended the limits of the school district was passed, but it illustrates the fact that the territorial

limits of the city and those of the school district of such city do not necessarily have to be the same. The automatic extention provided in Section 9325, supra, was passed in 1895.

Since school districts are separate entities created by statute, it follows that we must look to the statutes governing them to ascertain when and how the boundaries may be changed.

Section 9275, R. S. Mo., 1929, sets out the method by which two or more common school districts may change their boundaries. Section 9343 R. S. 1929 reads as follows:

> "All the provisions of Section 9275, relating to the changes of boundary lines of common school districts, and all the provisions of sections 9278 and 9279, relating to the division of property between common school districts, shall apply to town, city and consolidated districts."

Section 9343 specifically provides that the portions of Section 9275 which relate to boundary lines between common school districts shall apply to town, city and consolidated districts. This is but another way of saying that if two or more school districts, one or all of which may be a town, city or consolidated district, desire to change their boundary lines, they shall proceed in the same manner as two or more common school districts are required to proceed to change their boundary lines.

Section 9343, supra, has been before the courts several times. For instance, in the case of State ex inf. v. Sweaney, 270 Mo. 685, was a case where there had been an attempt made to divide a town school district under the pretext of changing its boundary lines under the provisions of said section. In the course of the opinion the court said, l. c. 691:

> "Plaintiffs in error contend that the above section authorizes the division of a town, city or consolidated school district into two new school districts, while defendants in error contend that it merely provides for changing the boundary lines of such school district, but does not provide for dividing the same into two new districts. After careful consideration of the statute, we have reached the conclusion that the above section does not provide a way for dividing a town, city or consolidated school district into two new districts. If Section 10881, supra, had provided that all the provisions of section 10837, Revised Statutes, 1909, should apply to town, city and consolidated districts, then there could be no question but that provision had been made for so dividing such districts, because Section 10837, supra, expressly provides for dividing one common school district into two new districts. But instead of the Legislature saying that all the provisions of section 10837 should apply to town districts, it merely said that "all the provisions of section 10837 relating to the changes of boundary lines of common school districts" should apply. Referring

then to Section 10837 we find that the only express provision therein for changing boundary lines is the provision for changing "the boundary lines of two or more districts."

While the foregoing case decided that Section 9343 did not authorize division of a town district under the pretext of changing its boundary lines, we think it strongly infers that town school districts could change the boundary lines between them and other school districts by complying with the provisions of this section. Such was the interpretation given to the opinion in the Sweaney case by our Supreme Court in the later cases of State ex inf. v. McKown, 315 Mo. 1336, 290 S. W. l.c. 128; and State ex rel. v. Thompson, 19 S. W. (2d) l.c. 719.

In the case of State ex rel. v. Thurman, 274 S. W. 800, the Supreme Court held that Section 9343 authorized a consolidated school district and another school district to change their boundary lines by taking part of the territory from the consolidated district and adding it to the other district. There would seem to be no reason for a court holding that Section 9343 was applicable to consolidated school districts, but not to city or town school districts, since the language plainly says that it is applicable to town, city and consolidated districts, and since, as we have seen, the corporate entity of the city is entirely separate and distinct from that of the city school district.

CONCLUSION

It is, therefore, the opinion of this department that two or more town, city or consolidated school districts, or one or more town, city or consolidated school districts and one or more common school districts, may change their boundaries by complying with the provisions of Section 9275, R. S. 1929, even though such change of boundaries takes some of the territory of an incorporated city and puts it into a school district which adjoins such city.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

COUNTY RECORDS: Section 12116, R. S. 1929, only authorizes destroying, by burning, "assessment lists," and does not authorize the burning of township tax books.

January 30, 1939

FILED
51

Honorable Charles F. Lamkin, Jr.,
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Mr. Lamkin:

This office is in receipt of your letter of January 26th, wherein you request an opinion based on the following facts:

> "Chariton County is under township organization. There are preserved in the courthouse a great number of township tax books, assessment books and tax receipt books more than five years old. I will appreciate an opinion from your office touching the proper disposition to be made of these records and whether or not they may now lawfully be destroyed."

There appears to be a general statute applying to all counties, Section 12116, R. S. Mo. 1929, which specifically authorizes burning or destroying of certain papers and books of the county after five years; said section being as follows:

> "The county courts of the several counties in this state are hereby authorized to direct the sheriff of their respective counties to destroy, by burning, during the session of and in the presence of

> the county court, the papers hereinafter designated, after a period of five years after the filing thereof, to wit: Assessment lists, dramshop petitions, dramshop receipts and statements, dramshop bonds, merchants' and manufacturers' statements, school enumeration lists, school estimates, poll books, annual settlements and bonds ofroad overseers, canceled county warrants, settlements of county treasurer, settlements of superintendent of poor farm, canceled school district warrants, justice of the peace papers, estray papers, appointment of deputies, reports and receipts of the collectors of the revenue, certificates of fines, statements of compaign expenses, quarterly statements of fees received by county officers, income tax reports, birth and death reports, settlements of village school district treasurers, road overseers' reports, road commissioners' reports, poll tax lists and accounts, and bills allowed against the county."

The only words in the statute which are applicable to your inquiry are, "assessment lists." If any of the records mentioned in your letter properly come under "assessment lists," then the same may be destroyed, but we do not think that the township tax books could properly be classified under the "assessment lists." We know of no legal obstacle or handicap which might result from the destroying of assessment books and tax receipt books. While we are mindful of the fact that any actions for taxes are barred after five years, yet it may be possible that the township tax books are valuable for other matters, independent of

this fact. However, the main reason for concluding that township tax books should not be destroyed is due to the fact that there is no section that we can locate which authorizes it.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

OWN:EG

TAXATION: County board of equalization can not raise valuation on part of a tract, but must raise or lower valuation on whole tract.

April 25, 1939

5-3

FILED
51

Honorable Marion E. Lamb
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Mr. Lamb:

This will acknowledge receipt of your letter of April 19th, in which you submit the following inquiry:

"The board of equalization of Randolph County is now meeting, and they have a question submitted to them that they have requested an opinion from your office on.

A coal company owns thousands of acres of coal rights here in Randolph County. Last year this company only paid on a certain part of this land, and let the rest go. In other words say that a tract of 240 acres was assessed all in one piece at $3.00 per acre, and only on 40 acres of this coal land did they desire to pay taxes, so they gave the collector a description of this 40 acres and gave him the money for that 40 acre tract, the taxes on the balance remains unpaid. Now this land has all been assessed again this year, and the board wants to know whether or not they can just raise the assessment on the part that the coal company will pay taxes on, or must they raise the whole tract just as the assessor has assessed it. The reason that they do not want to raise the entire tract is because they do not

> want the Counties total assessment to include a large amount that they know in advance that the taxes on which will not be paid.
>
> Please advise me whether or not the board can raise a portion of a tract which the assessor has assessed as a unit, or whole. Could the 40 acres be raised to $6.00 per acre, and the remaining 200 left at a valuation of $3.00 per acre or lowered."

The assessment of property for taxation is a matter regulated by statutes. We must, therefore, turn to the statutes to ascertain the proper procedure to be followed in assessing property.

Section 9780, R. S. 1929, provides, among other things, as follows:

> " * * and when any person shall be the owner or original purchaser of a section, half section, quarter section or half quarter section, block, half block or quarter block, the same shall be assessed as one tract, and the name of such person placed opposite thereto, the lowest numbered range, township, section, block, lot or survey always to be placed first in the 'last list.' The assessor shall consolidate all lands owned by one person in a section, and all town lots owned by one person in a square or block, into one tract, lot or call, when it is practicable; * * * "

Again, Section 9792, R. S. 1929, provides in part as follows:

> "Each tract of land and town lot shall

> be assessed and valued separately; but all land in a section and lots in a square or block, owned by one person, which are contiguous, or which can be consolidated into one tract, lot or call, shall be valued as one tract, lot or call, as contemplated in section 9780."

It would seem that the foregoing sections definitely define the unit of real estate upon which valuation shall be calculated for the purpose of assessment. That unit is a "tract" which is defined to be all of the land owned by one person in a section. It is apparent that some unit would have to be used as a basis of assessment, and the Legislature has declared that unit to be a tract composed of all the land a person owns in one section.

In the case of Yeaman vs. Lepp, 167 Mo. 61, the court was considering statutes corresponding to the statutes quoted above. In the course of the opinion, the court said at l.c. 70:

> "So that, the provisions of section 7703, providing that each tract of land or lot shall be chargeable only with its own taxes, must be read and construed in connection with section 7553, defining what constitutes a tract or lot, and with section 7564 which requires the assessor to value each tract or lot, as defined by section 7553, separately, and with sections 7682 and 7683, which govern the manner of bringing suit to collect back taxes and the form of the judgment to be rendered, and the duty of the sheriff in executing the special fi. fa.
>
> In other words, section 7553 requires all land owned by the same person in the same section, or all lands so owned in the same block, to be consolidated and

> treated as one tract or one lot, and section 7564 requires each consolidated tract or lot to be assessed separately, when the land lies in the same section or the lots lie in the same square or block, and if they are contiguous or can be consolidated into one tract, lot or call. It is in this sense that the terms tract or lot as used in section 7703 and in section 7683, were employed by the lawmakers when they enacted those sections.
>
> The defendant's contention that each forty acres is liable for its own taxes is therefore untenable."

If then the assessor must assess as one tract all of the land owned by one person in a section, what can the board of equalization do when they come to review the valuation of such tract? By Section 9812, the board of equalization has power to "hear complaints and to equalize the valuation and assessments on real and personal property * * * * so that each tract of land shall be entered on the tax book at its true value * * *." By Section 9813, the board of equalization is directed to "raise the valuation of all such tracts or parcels of land and any personal property, such as in their opinion have been returned below their real value, according to the rule prescribed by this chapter for such valuation; * * * ."

The word "tracts" as used in Sections 9812 and 9813, supra, must evidently refer to the tracts as defined in Sections 9780 and 9792, supra. If, therefore, the board is to equalize the valuation on the tracts returned by the assessor, it must equalize the values as returned by the assessor by either raising or lowering those values.

It was held in the case of State ex rel vs. Bethards 9 S. W. (2nd) 603, that the board of equalization has no power to assess, but that its duty is to equalize, among the separate tracts, the valuations fixed by the assessor. The assessor puts a value on an entire tract. The board of equalization therefore must raise or lower that value. If the board of equalization can break up into parts the tract

as returned by the assessor and put a value on each part, it would in effect be basing valuations upon different units than the Legislature has provided for.

CONCLUSION

It is, therefore, the opinion of this office that the county board of equalization can not raise or lower the valuation on a part of a tract of land, which has been assessed by the assessor, but can only change the valuation of the entire tract, assuming, of course, that the assessor has based his valuations upon tracts as provided in Sections 9780 and 9792, R. S. Mo. 1929.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RT

NURSES: Examination fee determined by law as of date applicant takes examination.

July 7, 1939

7-8

FILED
51

Miss Laura Layher, R. N.
Secretary, Mo. State Board of Nurse Examiners
State Office Building
Jefferson City, Missouri

Dear Miss Layher:

We are in receipt of your request for an opinion under date of July 1st, as follows:

> "The Board in meeting June 28th instructed me to obtain an opinion from you concerning the amount of the examination fee to be charged for the October examination.
>
> Under the old law, which expires September 22nd, the examination fee is $15.00 and under the new law which goes into effect on September 22nd, the fee is $10.00. The applications will be received throughout August, September and October.
>
> The Board desires an opinion from you as to the proper fee to be charged for all applications."

Section 13488, R. S. Mo. 1929, provides in part that:

> "The board shall admit to examination for license to practice as a nurse any applicant who shall pay a fee of $15.00 and who shall submit to the board satisfactory evidence * * *."

The above section has been amended by the Laws of Missouri, 1939, providing for a fee of $10.00.

The fee required for examination for license to practice as a nurse is to be determined not by the law on the date the application is received by the board but by the law on the date the applicant is to take the examination. We fail to see how any other possible interpretation could be reached.

We therefore are of the opinion that applications now being received by the Missouri State Board of Nurse Examiners for examinations to be given in October require only a payment of a $10.00 fee.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

Approved:

J. E. TAYLOR
(Acting) Attorney General

TAXATION: The School District is a "Municipal Corporation" and all its lands are exempt from taxation under Section 6, Article 10, Constitution of Missouri.

September 13, 1939

9-14

FILED
51

Hon. Marion E. Lamb
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of September 7, 1939, which reads as follows:

> "Some time ago one of the banks in Moberly failed in which the Moberly School District had money deposited. In the final wind-up, the Moberly School District took over several hundred acres of land, which they now hold and which has raised the point in reference to taxation. The land is farming land, situated in Randolph County. The income from the land is applied to the regular school funds; that is, the amount over and above actual expenditures for up keep of the farm. The County Court of Randolph County has taken the position that this land, even though it is owned by the Moberly School District, is subject to taxes.
>
> "Will you please give me your opinion as to whether or not this land is subject to taxes?"

Section 6, Article 10, Constitution of Missouri, reads as follows:

"The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Section 9742, R. S. Mo. 1929, reads as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9743, R. S. Mo. 1929, partially reads as follows:

" * * * fourth, lands and other property belonging to any city, county or other municipal corporation in this state, including market houses, town halls and other public structures, with their furniture and equipments and all public squares and lots kept open for health, use or ornament; * * * "

A school district is a municipal corporation, and any land held by it is exempt from taxation. The definition of a "municipal corporation" is set out in the case of Harris v. Bond Company, 244 Mo. 644, l.c. 689, where the court said:

> "'A municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the Legislature. That body may place one part of the State under one municipal organization and another part of the State under another oganization of an entirely different character.' (Williams v. Eggleston, 170 U. S. 310, per Mr. Justice Brewer.)"

In the case of State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, l. c. 79, the court said:

> " * * * In its strict and primary sense the term 'municipal corporation' applies only to incorporated cities, towns and villages, having subordinate and local powers of legislation (Heller v. Stremmel, 52 Mo. 309). But in the larger and ordinarily accepted sense the term is applied to any public local corporation, exercising some function of government, and hence includes counties, school districts, townships under township organization, special road districts and drainage districts. (Wilson v. Trustees of Sanitary District, 133 Ill. 433, 464; Rathbone v. Hopper, 57 Kan. 240, 242.) It is in this latter sense that the term is used in the constitutional provision under consideration, because its language is 'counties and other municipal corporations.'

"It is argued, however, that the term 'municipal corporations' is used in its technical and not in its commonly accepted sense, because, as it is claimed, the succeeding language of the section makes a separate, and distinct provision with reference to the property of school districts. This, it is contended, shows conclusively that school districts were not intended to be included within the designation, 'other municipal corporation.' But a reading of the section as a whole make it entirely clear that its latter provisions, in dealing with lots and buildings used exclusively for schools, have no reference whatever to the property owned and used by the school districts of the State in the conduct of its public schools. It is plain that if the property not only of school districts, but of organized townships and special road districts as well, are expressly exempted from taxation by the Constitution, it is because they are 'other municipal corporations.'"

Clearly, a school district is a municipal corporation under the Constitution and the statutes, to such an extent referred to under Sec. 6, Art. 10, of the Constitution, for the reason that it also exempts the property, real and personal, while under the second part of the same section it does not state the property real and personal, but limits the exemption to certain quantities of land, and does not exempt personal property.

Sec. 6, Art. 10, of the Constitution of Missouri is followed in the enacting Section 9743, supra. It will be noticed that the exemption reads "lands and other property," meaning that the personal property of a municipal corporation is also exempt. The fourth paragraph of Section 9743, supra, should be distinguished from the sixth paragraph of Section 9743, for the reason that the sixth paragraph applies to other entities or private individuals, except municipal corporations, in

that it confines the exemption to be limited to the land or buildings thereon when the same are used exclusively for schools.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the several hundred acres of land received by the Moberly School District in the liquidation of one of the banks in Moberly, which land is farming land and situated in Randolph County, is exempt from taxation.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

WJB:RW

DENTISTRY: Chiropractor who examines a patient's teeth and recommends a treatment therefor, or that such teeth be extracted, violates Section 13582, R. S. Mo. 1929, amended by Laws of Mo. 1937, page 492, relating to the practice of dentistry.

October 11, 1939 10/13

FILED 51

Honorable Henry C. M. Lamkin
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads as follows:

"I would appreciate the opinion of your office in the following matter:

A chiropractor examines a patient and diagnoses that the patient's teeth are in bad condition, naming which teeth that should be extracted.

For this examination which is conducted by an electrical machine of some sort and for this diagnoses he charges a fee. He then directs the patient to a dentist (always the same dentist) for the extraction.

QUESTION: Would the foregoing be practicing dentistry in violation of Section 13582 of the Revised Statutes of Missouri, for 1929, or, would it be in violation under any other section dealing with the unlawful practice of dentistry?"

At the outset your attention is directed to Section 13546 of R. S. Missouri, 1929, relating to the practice of chiropractic and reads as follows:

> "The practice of chiropractic is hereby defined to be the science and art of palpating and adjusting by hand the movable articulations of the human spinal column, for the correction of the cause of abnormalties and deformities of the body. It shall not include the use of operative surgery, obstetrics, osteopathy, nor the administration or prescribing of any drug or medicine. The practice of chiropractic is hereby declared not to be the practice of medicine and surgery or osteopathy within the meaning of article 1, chapter 53, or chapter 102, R. S. 1929, and not subject to the provisions of said chapters."

It will be particularly noticed from the above definition that the "science of chiropractic" is the art of palpating and adjusting by hand the movable articulations of the human spinal column for the purpose of correcting any deformities of the body, and such art does not extend to the use of operative surgery, obstetrics, osteopathy, or the administration of drugs. This section of the statutes we believe to be plain and unambiguous, therefore, no room for the construction of the same exists.

In the case of State v. Smith, 233 Mo. 242, the Supreme Court of this state had occasion to consider whether or not the "science of chiropractic" was the practice of medicine. The court, in reaching its conclusion, made this observation respecting the science at page 251, et seq:

"'The theory of this science is that the center and seat of all intelligence and bodily controlling force is in the brain; that all function depends upon this nerve force - universal intelligence, or whatever it may be, that is seated in the brain; that it is transmitted from the brain to the muscles and organs through, first, the spinal chord, and thence through the nerves radiating from the spinal column; that while it is not impeded, all bodily function is normal and the body is well; that when it is impeded, function is not normal, and the organ or muscle cut off from, or not in free communication with the brain, becomes diseased; that it can be impeded only by presure or pinching of the nerves, known to the chiropractic as impingement; that nerves are impinged only where passing between bones; that they pass between bones in going through the intervertebral foramina, and are impinged when the vertebrae are from a blow, contraction of muscles, as by draught of cold air or other cause, more or less displaced or subluxated, as the chiropractor terms it. The slightly misplaced bones pinch or impinge the nerves, impeding the flow of mental impulse. The effect is the same as the introduction of a rheostat or other resistance on the circuit between an electric dynamo at a power station and an electric motor supplying power for a factory. The motor represents a vital organ; not receiving the required amount of electricity, it is hindered in its work, just as a vital organ becomes diseased by not being in free communication with the brain. When all

> mental impulse is cut off, for example by what laymen term a broken back, the portion of the body and the organs beyond the point where the impulse is cut off become paralyzed, just as the motors of a huge shop, beyond a break in a wire leading from a dynamo, stop when the break is so complete as to cut off all or nearly all electricity coming to it. The experienced chiropractor, by passing his hand up and down the spinal column, is able to detect these subluxations or slight dislocations, and by a swift downward movement places the vertebrae back in their normal position, removing the pressure on the impinged nerve, and again opening up free communication between the brain and the organs controlled by the nerve so impinged.'"

The above observation relative to the "science of chiropractic" was taken from the definitions as contained in the brief. The court, at page 252, made a further observation, as follows:

> "In actual practice the chiropractor makes no physical examination outside of the spinal column. He does not feel the pulse, take the temperature, prescribe any diet, or use any instruments. He simply examines the spinal column, determines whether or not a subluxation, as he calls it, exists, and if he finds it, adjusts the same."

We believe that the observations made by the Supreme Court in the above case are properly included within the definition of the "science of chiropractic" as laid down by the Legislature. We direct your further attention to Section 13582, R. S. Missouri, 1929, as amended by Laws of Missouri, 1937, at page 492, which reads in part as follows:

> "Any person shall be regarded as practicing or attempting to practice dentistry, within the meaning of this chapter, * * * * who shall diagnose, or profess to diagnose or examine * * * *."

From the above definition of the term dentistry, one particularly notices that it includes those persons who shall diagnose or profess to diagnose or examine teeth for the purpose of correcting any deformity which may exist, or to supply artificial teeth or to administer anesthesia.

Attention is also directed to Section 13560, R. S. Missouri, 1929, as amended by Laws of Missouri, 1937, at page 482, relating in part as follows:

> "From and after the passage of this article it shall be unlawful for any person to practice dentistry in the State of Missouri, * * * * until said person or persons shall first comply with the following requirements; be examined and registered by said Board, and after receiving a certificate of registration, the person receiving same, shall file such certificate of registration with the clerk of the county court of the county or counties in which he or she resides or desires to practice dentistry, and shall have the same recorded and a certificate showing the filing and recording of the same with the book and page where recorded, indorsed thereon under the hand of the clerk and the seal of said court; and thereafter any such person shall apply for a license from said Board, which license shall attest the qualifications of the person therein named and permit the person named therein to practice dentistry for the term mentioned in said license, * * * * *."

From these statutory considerations, which we believe to be plain and without ambiguity, it follows that before any person may practice dentistry as above defined, such person is required to be examined by the Dental Board and to be registered by such Board before practicing, or attempting to practice, dentistry. Obviously, from these considerations, when a chiropractor examines a patient's teeth and diagnoses that such patient's teeth are in a bad condition, naming them and advising that such teeth should be extracted, such chiropractor ceases to practice the art of palpating and adjusting by hand the movable articulations of the human spinal column for the correction of the cause of abnormalties and deformities of the body.

This observation is fortified by an expression by the Supreme Court in the Smith Case, supra, wherein this Court, at page 264, said:

> "When the practitioner makes such examination of the patient as he regards sufficient to indicate to him the cause of the trouble, and to indicate its proper treatment, he has diagnosed the case."

If, therefore, the chiropractor, as has been suggested by your request for an opinion, advises the patient to have certain teeth extracted, he has, by such action, indicated a proper treatment which we believe to be without the realm of the "science of chiropractic", and therefore, such diagnoses would violate Section 13582, supra.

We direct your further attention to Section 13577, R. S. Missouri, 1929, as amended by Laws of Missouri, 1937, at page 491, which reads in part as follows:

> "Any person who shall practice, or attempt to practice dentistry or dental surgery within the State of Missouri, without having been registered and licensed for that purpose, or during the period of revocation or suspension of his or her license or

> certificate of registration, or who shall violate any of the provisions of this chapter, shall upon conviction thereof, be adjudged guilty of a misdemeanor * * * *. It shall be the duty of the Attorney General or of the Prosecuting Attorney of the county in which such offense shall occur, at the direction of the Attorney General, to prosecute every case to final judgment whenever his attention shall be called to a violation of this Chapter."

CONCLUSION

In view of the above, it is the opinion of this department if any chiropractor examines and diagnoses that a patient's teeth are in a bad condition and designates the teeth to be extracted, that such chiropractor violates Section 13582, supra, and is subject to prosecution under Section 13577, supra.

Very truly yours,

APPROVED:

RUSSELL C. STONE,
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

RCS:RV

CRIMINAL LAW: Distributors of wire service and distributors of printed racing news in gambling establishment, or hand-book operators are not guilty or any crime under the statutes of Missouri.

October 13, 1939

10-30

FILED
51

Mr. A. B. Lambert, President
Board of Police Commissioners
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated October 6th, 1939, which reads in part as follows:

"We have in St. Louis and have had for some years past a so-called News Service identified with the operation of local hand-book makers.

"The primary function of this news service is to assemble the daily racing data from various racing tracks throughout the country and to transmit said data over telephone lines or wire service to the local hand-book operators. This data so transmitted is in the form of flash news, so to speak, giving the last minute entries, scratches, withdrawals, track conditions, more specifically quoting the odds as they vary or not until the race starts, followed by the results as to winners and place.

"This information, as provided by said news service, is essential to any hand-book operator conducting a betting service on a fairly large scale. The system resorted to by the news service in question is rather integrate in its telephone and wire service to about two hundred and twenty hand-book operators located throughout the city, including sub-operators and individuals who subscribe to their service. This service apparently is outgoing only, in that no bets or wagers are accepted by them in competition with their subscribers.

"The said news service rents space in a large building and uses this space as a base of operations. They have an elaborate system of telephones. They do not issue or circulate any racing news in published or printed form."

Your first query reads as follows:

> "No. 1. In view of the facts set forth above - Are the owners or operators of any such news service guilty of a violation of Section 4286 making it unlawful, among other things, for any person to occupy any building, room, shed, etc. with any telephone or telegraph instrument or device for the purpose of communicating information to any place for the purpose of there recording or registering bets on horse races?"

That part of Section 4286 R. S. Missouri, 1929, referred to in this query of your request is one of the disjunctives in the section, and reads as follows:

> " * * * * * any person who occupies any room, shed, tenement, tent, booth, building or enclosure, or any part thereof, in this state with any telephone or telegraph instrument, or any apparatus or device of any kind whatsoever, for the purpose of communicating information to any place in this or any other state, for the purpose of there recording or registering bets or wagers or selling pools upon the result of any trial or contest of skill, speed or power of endurance of man or beast, which is to be made or to take place within or without this state, * * * * * "

Section 4286, supra, was first enacted in the laws of 1907, page 232, and is almost exactly the same section as section 4285 R. S. Missouri, 1929, except it has added the word "enclosure" in the fourth line of this section, which is not in section 4285. The above disjunctive set out refers to bets registered by telephone or telegraph instruments and was included in section 4285, and section 4286, supra, by reason of an opinion handed down by the Supreme Court in the case of State v. Oldham, 200 Mo. 538. In this case at page 557, the court said:

" * * * According to the testimony of Mr. Halpin, the chief of detectives, no such book as this was kept by the defendant Oldham or his employees in his booth on this race track on the 19th of May, 1906. The blackboard used was in no sense such a book. Was the telephone used by the defendant, as already indicated in the statement, such an instrument as to bring it within the purview of the statute? Recurring again to the language of the act, it must be observed that the instrument which the occupant of the booth used, was 'for the purpose of recording or registering bets or wagers or selling pools.' Testimony shows that the only purpose which the telephone subserved was to report to the book-maker and register in Kansas the offer which the player would make, and to report back the book-maker's acceptance in Kansas of the amount he was willing to bet upon the race. There was no evidence showing or tending to show that the telephone was an instrument used for the purpose of recording bets or wagers or was adapted to such a purpose, and unless it was such an instrument then there was no proof that any such instrument was used by the defendant. The Attorney-General in his printed brief expresses the same view of the statute that we have just indicated. He says: 'Under the subdivision under which the fourth count was drawn, the crime consists, not in the actual recording of the bets, but the occupation of the booth with an instrument or device designed for the purpose of recording bets.' Without doing violence to the ordinary meaning of the words, a telephone wire with a transmitter and receiver cannot be said to be an instrument or device for the purpose of recording or registering bets. It may be said that the construction of the telephone line and the pre-arrangement for having the bets registered and recorded in Kansas City, Kansas, was a perfectly obvious trick and subterfuge to evade the law, and we agree with the counsel for the State that such was the obvious purpose, and that the disguise was too thin, but after all the question is not whether the defendant has successfully evaded the statute, but whether he has violated it."

In accordance with the above opinion it can readily be seen that the mention of telephone and telegraph instruments refer to the registration of the bet or wagers only, and does not apply to the furnishing of sport news.

Therefore, it is the opinion of this department that the owners or operators of such news service set out in your statement in the request is not guilty of a violation of section 4286 R. S. Missouri, 1929.

II

Your second query in your request reads as follows:

"No. 2. Upon the facts set forth above- Are the owners or operators of such a news service guilty of a violation of Section 4285, making it unlawful to telephone or telegraph a bet on a horse race to another state when so registered at the destination or local place of sending?"

Section 4285, supra, contains the same disjunctive, as hereinabove set out, as appearing in section 4286, supra. This section, 4285, originally was a new section appearing in the laws of 1905, page 131, and did not contain the above disjunctive phrase; but in the laws of 1907, page 232, the new section which is now 4286, supra, was enacted which includes the word "enclosure" after the word building, and the section, which is now section 4286, was reenacted and amended in Laws of Missouri, 1907, to contain the above disjunctive. It is apparent that the word "enclosure" was included in the new section of the laws of Missouri, 1907, page 232, by the reason of the opinion of the Supreme Court in the case of State v. Oldham, supra, for the reason that under the facts in that case the telephones were in a fenced compartment, and not in a room, shed, tenement, tent, booth or building. Section 4285, supra, as it now appears was enacted in the laws of 1907, page 233, to include the above disjunctive, and amended the original laws of 1905, page 131, which did not include the above set out disjunctive. The disjunctive in section 4285, supra, reads as follows:

> "* * * * or to register a bet on a horse race, either on a blackboard or any other substance, or to telephone a bet on a horse race to any other state to be registered there, or telegraph a bet for such purpose, or to use any other instrument or device to accomplish or register the bets, * * * "

This is the exact phrase as set out in section 4286, supra.

According to the facts stated in your request the operators of the news service are not registering the bets, but only furnishing the news obtained at the different race tracks. In view of the history of both sections, and the authority as set out in the opinion in the case of State v. Oldham, it is the opinion of this department, that it was the intention of the legislature in both sections to prevent the subterfuge of accepting money at a betting establishment and telehponing the bet out of the state to another establishment, where the bet would be registered, and, in that way avoid the section of the crime of registering bets. It was not the intention of the legislature that the use of a telephone furnishing the news of racing events to bookmakers would be considered the registering of bets.

It is therefore the opinion of this department that the owners and operators of such new service are not guilty of registering a bet as set out under section 4285 R. S. Missouri, 1929.

III

Your third query in your request reads as follows:

> "No. 3. Does the rendition of said service, as outlined above, coupled by the use of the same service by their subscribers, subject the operators of the news service to prosecution under the law of Missouri relating to conspiracy? And likewise the prosecution of any subscriber as a principal or accessory?"

In view of the fact that the wire news service is not registering bets and is not a party to the actual act of the bookmaking statute, they are not guilty, under the conspiracy section. Their only function is transferring the information and is not made under any agreement to

register or make bets with the general public. The conspiracy section 4243, R. S. Missouri, 1929, specifically says:

> "If two or more persons shall agree, conspire, combine or confederate: First, to commit any offense; * * * * * * * * * * "

The telephone in itself is not per se gambling equipment. It was so held in State v. Joynt, 110 S. W. 2d 737, l.c. 740, which was a St. Louis case involving the (claw) prize machine, when the court said:

> "In claiming that the true character of the device must be ascertained by a judicial hearing, counsel for respondent rest heavily on the case of Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420. There this court had under consideration the statutes then applicable to the board of police commissioners of the city of St. Louis providing for the seizure and destruction of gambling devices. An extension dining table had been seized and destroyed by the police on the charge that it was kept as a prohibited gaming table. We held that a summary mode of judicial proceedings should be provided in order to determine whether such property was used or held for purposes condemned by the statutes. That case is clearly distinguishable from the one now before us. <u>There the property under the scrutiny of the court was in its very nature lawful and harmless.</u> It was only by proof of its unlawful use that it became subject to destruction. The table in itself constituted no offense, but it was its employment in gaming which was unlawful, and proof of that fact, we held, required judicial determination."

Also, in the case of State v. Oldham, 200 Mo. 538, at page 558, the court said:

> " * * * * * * * * * * * * * *
> There was no evidence showing or tending to show that the telephone was an instrument used for the purpose of recording bets or wagers or was adapted to such a purpose, and unless it was such an instrument then there was no proof that any such instrument was used by the defendant. * * * "

If the news service used the telephone to register bets, it would be a violation of both sections 4285 and 4286, R. S. Missouri, 1929. The telephone in itself is not a gambling device per se, as said before. It is true that in the case of State v. Joint, 110 S. W. 2d, 741, par. 14-15, the court said:

> "This court has recognized the rule that a court of equity generally will not interfere with the authorities charged with the enforcement of the criminal law. Wellston Kennel Club v. Castlen, supra, 331 Mo. 798, 55 S. W. 2d 288; Kearney v. Laird, 164 Mo. App. 406, 144 S. W. 904. Furthermore, courts generally will not sustain actions in regard to property which has for its object the violation of the law as such property is 'outlawed.' Spalding v. Preston, 21 Vt. 9, 50 Am. Dec. 68. And certainly a court of equity will not listen to a man who asks the court to protect an unlawful device. * * * "

This ruling only applies to a device that can be of no use except gambling, but under the facts stated in your request the news service is only telephoning news and it has no control of the use of that news unless it also participates in the registration of the bets. The only mention of the use of telephone in both sections 4285 and 4286 refers to the registering of bets either in the state or out of the state. The two sections do not mention telephone and telegraphs in any other connection.

In the case of State v. Chaney, 106 S. W. 2d 483, the court, in holding that the device not mentioned in the

statute is a gambling device per se, such as a slot machine etc., the device must be alleged and proven that it is a device for gambling only. The court in this respect said:

> "Omitting formal parts, the information charges that 'on or about the 1st day of February, A. D., 1936, at the County of Butler and in the State of Missouri, then and there being, the defendant, Vernie Chaney, did then and there unlawfully and feloniously set up and keep a certain gaming table and gambling device, to-wit: one crap table, commonly so called and upon which dice were thrown and used; which said gambling table and gambling device was adopted, devised and designed for the purpose of playing games of chance for money and property, and did then and there unlawfully and feloniously entice and permit divers persons, whose names are to the Prosecuting Attorney unknown, to bet and play at and upon and by means of said gaming tables and gambling device; against the peace and dignity of the State.'
>
> "In the recent case of State v. Herndon, 96 S. W. (2d) 376, we held the information fatally defective because a crap table is not one of the devices enumerated in the statute, pointing out that it would be necessary to show in what manner the table was or could be adapted to the playing of craps. The information in the case at bar is practically identical with that in the Herndon Case, supra; therefore, we hold the information herein fails to state an offense under section 4287, supra."

In other words, dice and cards which can be used for a lawful purpose and which are not used in gambling are not gambling devices per se, but must be used in a gaming transaction to be considered a gambling device.

In view of the above authorities, it is the opinion of this department that the rendition of the wire service as outlined in the statement in your request, which is simply furnishing news obtained from race tracks for other places, is not a crime under the conspiracy act as to the actual registors of said bets unless a conspiracy can

be shown, showing that they are connected with the actual registering of the bets or gain some part of the profits of the registering establishment, other than the regular price of the service.

IV

Your query number four in your request reads as follows:

> "Is a telephone or a telegraph company leasing wires or service to the operators of said news service subject to prosecution for violation of any law in the State of Missouri? "

As said before, sections 4285 and 4286 R. S. Missouri, 1929, in reference to the use of telephones and telegraph only apply to the registering of bets by use of the telephone or telegraph. This point of furnishing telephone or telegraph use to bookmakers or wire service corporations, or partnerships, in reference to racing news, has not been before the Supreme Court of this state.

In the State of Kentucky there is a criminal statute known as the nuisance section which covers a multitude of crimes. This state has no such section, but in the case of Commonwealth of Kentucky v. Western Union, 57 L. R. A., page 611, l.c. 615, the court said:

> "The indictments charge the appellee with the offense of unlawfully keeping and maintaining a common nuisance. It is averred in them that Ed. Alvey and others had a house in the city of Louisville, commonly called 'The Kingston,' in their occupation and under their control, and habitually sold pools upon horse races run at various cities and places in the United States, and did habitually suffer, permit, and procure divers idle and evil-disposed persons to habitually assemble in that house, who engaged in betting, winning, and losing money on horse races, to the common nuisance and common

annoyance of all good citizens of the neighborhood, and those passing and repassing, etc. As to the appellee it is averred that it is a corporation organized for the purpose of conducting the business of common carrier of intelligence by telegraph in the United States; that it, unlawfully designing to assist and aid and abet Alvey and others in the pool selling in the house mentioned, habitually received from divers race courses in the United States messages and intelligence concerning horse races, to wit, the names of horses entered in races, names of owners, trainers, riders, drivers, and distances of the races, terms, conditions, and state of betting at the races, condition of the weather and tracks of race courses, with the design to enable the persons assembled at the house of Alvey and others to bet upon races. It is further averred that the appellee transmitted and delivered to Alvey and others, at the Kingston, the information as to the result of races, with the view of enabling him and others to pay the bets made on races; that the information and intelligence transmitted and services rendered by the appellee was a necessary and essential service and means of carrying on and maintaining the existence of pool selling by Alvey and others, of which fact the appellee was aware."

The court further said:

"* * * Common carriers are not the censors of public or private morals. They cannot regulate the public and private conduct of those who ask service at their hands. It was certainly no wrong per se for the appellee to transmit over its line the information which it is charged to have transmitted. The simple fact that persons who received the information, and as a result of it, were guilty of unlawful acts, does not make the appellee a violator of the penal or criminal law. If in doing so it violated the penal or criminal law, it would be likewise guilty in

> transmitting information to the newspapers of the country as to prospective prize fights and horse races, because the information thus published induced persons to engage in betting on their results. * * * "

In view of the fact that the statutes of this state do not contain any section which holds that the distribution of race news by telephone is a crime, and in view of the fact that the state of Kentucky has held under their nuisance section that a distributor of race news is not guilty of any transactions in a separate place where bets are registered, it is the opinion of this department that a telephone or telegraph company leasing wires or service to the operators of said news service are not subject to prosecution for violation of any law in the state of Missouri.

V

The fifth query in your request reads as follows:

> "If the rendition of any such service, as outlined in Item No. 4, is unlawful, are the officers, managers, directors, stockholders, and employees thereof subject to arrest and prosecution?"

In view of our holding upon your query number four, it is not necessary for this department to render any opinion under your query number five.

VI

Your query number six in your request reads as follows:

> "Is the rendition of any service, as outlined herein, a violation of any law of Missouri relating to lotteries?"

After a diligent search this department is unable to find any law in which the service set out in the statement in your request is a violation of any law of Missouri, relating to lotteries.

VII

Further, as a part of your statement you say as follows:

> "In addition to the News Service in question there are various publications in St. Louis, local and national, that print, publish and sell by circulation detailed information relative to horse races, supplying the fundamental data, such as the names of horses, jockies, positions, selling prices, weight, etc. This data, published in advance, forms the basis, in conjunction with the follow up telephone or wire service, of the said news service."

Your query number seven, in this respect, reads as follows:

> "Are such publications printing and circulating said racing news, by mail or otherwise, liable to arrest and prosecution in violation of any law or statute of this state?"

After careful and diligent research we are unable to find any statutory law declaring the publishing of racing news as a crime.

Article 2, section 14, of the Constitution of the State of Missouri, provides as follows:

> "That no law shall be passed impairing the freedom of speech; that every person shall be free to say, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and that in all suits and prosecutions

> for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

The principal case in this state concerning free speech and publication is Ex parte Harrison, 212 Mo. 88, l.c. 93, in which the court said:

> "The General Assembly under the legislative power granted it by the people subject to the limitations of the State and Federal Constitutions unquestionably has the power to enact penal statutes and prescribe civil remedies, 'for all abuses of that liberty' of speech, or publication. If a publication is neither blasphemous, obscene, seditious or defamatory, then under the Constitution of this State, no court has the right to restrain it, nor the Legislature power to punish it. * * * "

It is obvious that none of the news service publications printing racing news only contain any article that would be considered blasphemous, obscene, seditious or defamatory.

In view of the above authorities, it is the opinion of this department, that any publication in St. Louis, either printed locally, or nationally, that prints, publishes and sells by circulation detailed information relative to horse races and which supplies fundamental data, such as the news of horse races, jockey, positions, selling prices, weights etc., do not violate any law or statute of this state.

You further ask if there are any other laws or statutes not specifically covered in this request, which can be resorted to as to basis for the arrest and prosecution and elimination of hand-book operators. We find no other laws applicable to hand-book operators, except the regular gambling law. In the pamphlet attached to your request, which is called "The Hand-Book Situation in St. Louis as of September, 1939", you state, or assume, that there are two hundred, fifteen hand-book operators and individuals who professionally, or from sporting point of view are identified with horse racing and tracks. All

that can be said by this office, if these men are known, and we assume, from the exact number of two hundred, fifteen, that they are known, that after the evidence is obtained against them, they should be prosecuted under sections 4285 or 4286, R. S. Missouri, 1929.

It appears by Sections 4285 and 4286, supra, that the Legislature had in mind the prosecution of persons engaged in bookmaking, that is, the person who actually registers the bets, accepts the money, records the same, or pays out after the race or athletic event. It may be that the News Service is a carefully guarded, astute method of evading the law, as is said by the court in the Oldham case, quoted supra:

> "It may be said that the construction of the telephone line and the pre-arrangement for having the bets registered and recorded in Kansas City, Kansas, was a perfectly obvious trick and subterfuge to evade the law, and we agree with the counsel for the State that such was the obvious purpose, and that the disguise was too thin, but after all the question is not whether the defendant has successfully evaded the statute, but whether he has violated it."

The functions of this Department are in many respects very similar to that of the Supreme Court, that is, to interpret the laws as enacted by the Legislature. In construing statutes we cannot broaden their terms beyond the plain words as contained therein.

If the News Service referred to in your letter is contrary to good morals and evades the statutes as they are now written, the remedy lies at the doorstep of the Legislature and it alone can correct the evil.

APPROVED:

J. R. BAKER
Of Counsel

ROY McKITTRICK
Attorney-General

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

OLLIVER W. NOLEN
Assistant Attorney-General

WJB:RW

TAXATION AND REVENUE: Certificate-holder at a third sale under the provisions of Senate Bill No. 94, Laws of Missouri 1933, is entitled to a deed and possession after the redemption period unless he fails to pay subsequent taxes and permits October 28, 1939. the property to be sold under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, at page 851, and in such event he loses all rights obtained under the certificate of purchase.

Honorable Henry C. M. Lamkin
Prosecuting Attorney
Callaway County
Fulton, Missouri

11-✓ FILED 51

Dear Mr. Lamkin:

We desire to acknowledge your request for an opinion relating to the Jones-Munger law, on October 27, 1939, which is as follows:

> "'A' purchased land as the highest bidder at a tax sale November, 1938. The said land was being offered for the third time.
>
> QUESTION: Does Section 9953a, Page 851, Session Acts of the Legislature for 1939, apply so as to enable 'A' to secure title and possession now, or when would 'A' be entitled to possession and title?
>
> "I would appreciate very much an opinion from your office in the above matter."

Section 9953a, Laws of Missouri 1933, page 432, is as follows:

> "Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal

> to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9956a thereof, is, in part, as follows:

> "The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, * * * " (Underscoring ours)

Section 9957c thereof, is, in part, as follows:

> "Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale

> under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, * * * ." (Underscoring ours)

The rights of certificate holders, obtained by sales consummated under the provisions of Sections 9952c and 9953, supra, are construed by the court in the case of Hilton vs. Smith, 33 S. W. 464, 465, 466 as follows:

> "* * * In the absence of provisions of law defining the rights of the holder of a certificate of purchase, the generally accepted rule is that until the delivery of a deed he takes no title to the land, either legal or equitable. * * * After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector."

A third sale to the highest bidder, under the provisions of Section 9953a, supra, entitled the purchaser to a certificate with the legal rights construed in the above decision, however subject to the redemption statute 9956a, supra. If such purchaser continued to pay the subsequent taxes accruing against said lands, after the issuance of his certificate, there could never be a third sale under the provisions of Section 9953a, Laws of Missouri 1939, at page 851.

In event such certificate-holder failed to pay the taxes accruing after the issuance of such certificate he "forfeited his rights of priority thereunder to the subsequent purchaser", as provided in Section 9957c, supra. And, if the land were

offered at a third final sale, under the provisions of said Section 9953a, Laws of Missouri 1939, by failure of the certificate-holder, at a third sale under the 1933 law, to keep such subsequent taxes paid, such certificate-holder under the third sale executed under and by virtue of the 1933 law, would lose his rights obtained under the certificate.

A certificate-holder, under a third sale under the 1933 Jones-Munger law, in event he keeps up the payment of subsequent taxes, would, after the redemption period, be entitled to obtain his deed and possession immediately.

CONCLUSION

It is, therefore, the conclusion of this department that, a certificate-holder at a third sale under the provisions of Senate Bill No. 94, Laws of Missouri 1933, is entitled to a deed and possession after the redemption period unless he fails to pay subsequent taxes and permits the property to be sold under the provisions of Section 9953a, Senate Bill No. 311, Laws of Missouri 1939, at page 851, and in such event he loses all rights obtained under the certificate of purchase.

Very truly yours,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

TAXATION: County collector is not compelled to notify a tax payer as to his personal taxes until after they become delinquent.

December 21, 1939

12-29 FILED 51

Hon. Henry C. M. Lamkin
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 13, 1939, which reads as follows:

> "I would like to have an opinion from your office in regard to the following matter:
>
> "FACTS: 1934 personal property taxes will become outlawed on January 1, 1941. There are a number of these tax assessments unpaid in Callaway County. This situation is also true for 1935, 1936 and 1937. In a great many of these cases the tax-payer against whom the personal taxes have been assessed was unaware of the tax, and paid his real estate tax assuming that he was paying the total amount of tax due. He received no notice of any sort on these taxes being assessed and unpaid until the county collector who went into office the first of January of this year sent notices that unless the taxes were paid by the latter part of this month suit would be filed to collect the same.
>
> "QUESTION: Is the former collector guilty of any dereliction of duty? Can these taxes be recovered by suit, and, if so, is the penalty against a

> taxpayer who paid his real property taxes in good faith and in the belief that he was paying his whole tax bill provided for delinquent taxes?"

Section 9782 R. S. Missouri, 1929, partially reads as follows:

> "In all counties, except the city of St. Louis, the assessor shall be provided with two books, one to be called the 'real estate book,' and the other to be called the 'personal assessment book.' * * * ."

Section 9800 R. S. Missouri, 1929, partially reads as follows:

> "The assessor, except in St. Louis city, shall make out and return to the county court, on or before the twentieth day of January in every year, a fair copy to the assessor's book, verified by his affidavit annexed thereto, in the following words, to-wit: * * * *."

It will be noticed that under the two above sections the assessor must make out two books; one to be called "personal assessment book", the other to be called the "real estate book". These books under Section 9800 must be turned in to the county court on or before the 20th day of January in every year.

Section 9880 reads as follows:

> "As soon as may be after the tax book of each year has been corrected and adjusted, and the amount of county tax stated therein according to law, the county courts shall cause the same to be delivered to the proper collector, who shall give receipts therefor to the clerks of the

> county courts respectively; and each collector shall be charged by such clerk with the whole amount of the tax books so delivered to him."

Under the above section each collector is charged by the clerk of the county court with the amount of the tax books so delivered to him. When the taxes are not paid to the collector, in accordance with the amounts set out in both the personal and real estate books, then under section 9938 R. S. Missouri, 1929, he shall make lists thereof, one to be called the "personal delinquent list" and the other the "land delinquent list."

Section 9940, R. S. Missouri, 1929, partially reads as follows:

> " * * * For the purpose of this chapter, personal tax bills shall become delinquent on the first day of January following the day when said bills are placed in the hands of the collector, and suits thereon may be instituted after the expiration of said first day of January, and within five years from said day. * * * * "

Under section 9782, supra, the assessor having made his levy it becomes the duty of the taxpayer to pay the tax without notice. We only find one section which provides for the notice of the payment of all taxes. This section is 9908 R. S. Missouri, 1929, and reads as follows:

> "It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four

written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days (not less than three) that he will remain at each of such places for the purposes aforesaid; and it shall be his duty to attend at the time and place thus appointed, either in person or by deputy, to receive and collect such taxes: Provided, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given."

Section 9912 R. S. Missouri, 1929, makes it the duty of the collector to furnish to all non-resident taxpayers a statement of the amount of taxes assessed against real estate; but these sections have been declared to be directory and not mandatory.

In the case of St. Francis Levee Dist. v. Dorroh, 289 S. W. 925, l. c. 928, the court said:

"* * In passing, it might be noted that the date of delinquency of such levee taxes, or annual installments thereof, is precisely and definitely fixed by the statute, and is not dependent whatsoever upon the giving of any notice to the taxpayer or the making of a demand upon him for payment of such taxes. It might also be stated that appellant does not challenge herein the validity of the assessment of special benefits made against his respective lands, nor does he challenge the validity of the levee taxes (based upon such special benefit assessment) or the levy of the annual installments thereof; in

fact, he has apparently recognized their validity by making payment of the principal of said annual installments. * * "

The court further said: (par. 2 same l.c.)

"* * In State ex rel v. Wilson, 216 Mo. 215, 287, 115 S. W. 549, 571, we said:

'This court has many times held that, when an assessor makes out his assessor's books, jurisdiction attaches and the rest of the proceedings are only directory (citing authorities). The broad principle announced and underlying all of these cases is, that when a valid assessment is shown, its entry upon the tax book and the failure of the property owner to pay it when due, a good cause of action is made out, and that all other requirements and proceedings are mere formalities and intended to assist and facilitate the collection of the taxes, and are not intended to be stumbling blocks and hindrances thrown in the way of a speedy collection of them.'

"To like effect is State ex rel v. Dungan, 265 Mo. 353, 177 S. W. 604.

"In Noland v. Busby, 28 Ind. 154, a somewhat similar statute was held to be merely directory. Said that court:

"'The statute makes it the duty of the treasurer on receipt of the duplicate, forthwith, to "cause notice to be posted up at the courthouse door, and in three other public places in the county, and to cause the same to be published in some newspaper having general circulation in his county, if any there be, for three weeks successively, stating in such notice the amount of tax charged for state, county, school, road or other purposes, on each

> one hundred dollars valuation of the taxable property; and also the tax on each poll for state, county and other purposes." * * * If a valid assessment and levy had been made of the taxes and a proper duplicate thereof made out and placed in the hands of the treasurer for collection, his failure to give the notice would not invalidate the tax, or prevent its subsequent collection. That, like various other duties enjoined by the statute, can only be regarded as directory to the officer; the neglect to give the notice would not discharge the tax, or present a valid obstacle to the collection thereof.'"

CONCLUSION

In view of the above authorities, it is the opinion of this department that the former collector is not guilty of any dereliction of duty. It is the further opinion of this department that personal taxes can be recovered by suit when properly instituted and a taxpayer who has paid his real property taxes in good faith and in the belief that he was paying his whole tax bill, including his personal taxes, is subject to the penalties accrued on the personal taxes.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

SCHOOLS: Consolidated Districts may furnish transportation to non-resident pupils.

February 16th, 1939.

2-18

FILED
52

Hon. Willard B. Leavitt,
Prosecuting Attorney,
Polk County,
Bolivar, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of February 9th, 1939, asking our opinion on the following questions

> "Has a consolidated High School the right to furnish transportation, outside its district, to transport non-resident pupils to said school?"

Section 16, Laws of 1935, p. 351, makes provisions for one district to send its resident pupils to school in another district, under certain conditions. This section then provides:

> "Subject to the limitations in this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil; nor shall any school be denied the right to collect tuition from a pupil, parent or guardian, if the same is not paid in full as herein provided."

While we find no express authority for a district to admit a non-resident pupil, it is clear that this section impliedly confers that power upon the district, and leaves it solely to their discretion.

Section 16-a, Laws of 1935, p. 352, pertains to transportation of student, and contains this provision:

> "When the board of directors of a district that admits non-resident pupils to its high school makes provision for transporting such pupils to such high school....."

This statute then provides that the state will pay a portion of the transportation cost on the non-resident pupils, under certain conditions.

Again we find no express provision in the statutes concerning a district's authority to transport to its school non-resident pupils, yet it is equally clear that under this statute by implication, they have such right if they so desire.

Tracing both the above statutes back to their origin it will be found that they are applicable to town, city and consolidated schools. See: Laws of 1935, page 351; Laws of 1933, page 393; Laws of 1931, page 334, Section 16.

CONCLUSION

It is, therefore, our opinion that consolidated school districts have the authority to furnish transportation to bring to said school non-resident pupils if it so desires.

Respectfully submitted,

APPROVED:

LAWRENCE L. BRADLEY,
Assistant Attorney General.

(Acting) Attorney General.

LLB:RV

BURIAL SOCIETIES: May admit members up to sixty-six (66) years of age.

March 29, 1939

4-5

FILED
52

Mr. Willard B. Leavitt
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Mr. Leavitt:

We wish to acknowledge your letter of March 14th, as follows:

> "I would like your opinion or ruling on Section 5014 R. S. 1929 where it says; Provided that no member shall be admitted into such association who AT HIS OR HER LAST BIRTHDAY WAS OVER THE AGE OF 65 YEARS.
>
> Does this mean that a person is eligible for the insurance up to the age of 66. Or does it mean that insurance can't be written after a person has his 65th birthday."

Section 5014 R. S. Mo. 1929, states that associations may be incorporated under the provisions of Article X, Chapter 32 R. S. 1929, for the purpose of furnishing funeral or burial benefits for their members:

> "Provided, that no member shall be admitted into any such association who, at his or her last birthday was over the age of 65 years * * * "

A man or woman, as we view the above quoted portion,

could be sixty-five (65) years and 364 days, and at their last birthday be only sixty-five (65) years and thus eligible to become a member within the meaning of the above section.

We have been unable to find any age limitation, which is actually like the one before us for consideration. However, in the case of Watson vs. Loyal Union Life Association of Muskogee, 286 Pac (Sup. Ct. of Okla) 888, the certificate was issued by the company under a statute which provided that the articles of association of mutual benefit societies have incorporated therein the following:

> "' Article III shall state the objects of the association and the plans by which these objects are to be carried out, including the extreme limit of age of persons to whom benefit certificates may be issued, which limit of age shall not exceed fifty-five (55) years.'"

The defendant contended that the certificate was void for the reason that the insured was over fifty-five (55) years of age at the time it was issued and that for this reason no recovery could be had. The court in holding that under the above article a person was not over fifty-five (55) years of age until he arrived at the age of fifty-six (56) said:

> "As before stated, the certificate was issued May 31, 1927. Insured was born December 24, 1871, and was therefore, at the time of the issuance thereof, 55 years, 4 months, and 4 days old. She arrived at the age of 56 December 24, 1927. Was she then at the time the certificate was issued over 55 years of age within the meaning of the act in question?" We arrive at the conclusion that she was not. A person is ordinarily not considered over 55 years of age until he arrives

> at the age of 56. It may safely be said that it is universally so understood, and it occurs to us that this must have been the sense in which the language was used by the Legislature.
>
> Defendant contends that the very moment one passes his or her fifty-fifth birthday, he or she is then over 55 years of age. If this contention be correct, the question naturally arises: At what period in a man's life would he be said to be only 55 years of age? He certainly would not be of that age until he reaches his fifty-fifth birthday. If the contention of defendant be correct, no one could legally give his age as 55 years one hour or one moment after he passes his fifty-fifth birthday. We cannot believe that the Legislature intended that the act should be so construed, but, on the contrary, are of the opinion that the language used should be construed in its ordinary sense and be given its ordinary meaning. We prefer to so construe it, and in so doing arrive at the conclusion that insured was not over 55 years of age at the time she took out the certificate in question."

The above case is cited and quoted with approval in the case of James vs. Colonial Mutual Life Association 47 Pac. 2nd (Cal) 362, l.c. 363.

And in the case of Wilson vs. Mid-Continental Life Insurance Company of Oklahoma City 14 Pac 2nd (Okla) 945, the court in holding that the phrase "under the age of sixty-five (65) years," within a clause in an automobile accident policy excluding coverage of persons over sixty-five (65) years was inapplicable to persons who had not reached their sixty-sixth birthday, said:

"The only provision or reference as to age limit provided in the policy is: 'Sec. 17. The insurance under this Policy shall not cover any person under the age of eighteen nor over the age of sixty-five years.'

In construing section 2, chap. 32, Sess. Laws 1925, with reference to age limit which reads as follows: 'Article III. Shall state the objects of the association and the plans by which these objects are to be carried out, including the extreme limit of age of persons to whom benefit certificates may be issued, which limit of age shall not exceed fifty-five (55) years,' in the case of Watson v. Loyal Union Life Ass'n, 143 Okl. 4, 286 P. 888, this court said in the syllabus: 'A person is not over 55 years of age, within the meaning of section 2, chapter 32, S. L. 1925, until he arrives at the age of 56.' And in the body of the opinion this court said: 'A person is ordinarily not considered over 55 years of age until he arrives at the age of 56. It may safely be said that it is universally so understood. * * * * *'

We are of the opinion that in construing the ordinary and generally accepted meaning of the language used in the policy, fractions of a year should not be considered, and that the insured having not reached his sixty-sixth birthday at the time of the accident and death, that he was therefore not 'over the age of 65 years,' and that the policy was in force at the time of his death, and that the demurrer should have been overruled."

In view of the foregoing reasoning, we are of the

opinion that a person is eligible for membership in associations governed by Section 5014 R. S. Mo. 1929, until he or she arrives at the age of sixty-six.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

CONSTITUTIONAL LAW:
APPROPRIATIONS TO INDIVIDUALS OR PRIVATE AGENCIES PROHIBITED:

State funds may not be paid to private institutions or agencies for the care of indigent sick and/or the care of dependent and/or neglected and dependent children.

May 5, 1939

5-11

FILED
52

Mr. Joseph A. Lennon
Assistant Attorney General
905 Central National Bank Bldg.
St. Louis, Missouri

Dear Sir:

This is in reply to yours of recent date in which you enclosed a letter from the Honorable John J. Butler of St. Louis who is in charge of the Catholic charities in that area. The question which is submitted in this letter is as follows: "Does your State Constitutions prohibit the payment of State funds to private institutions and agencies on a per capita basis:

a. For the care of the indigent sick?
b. For the care of dependent, neglected, and delinquent children?"

The sections of the Missouri Constitution which apply to the appropriation of public moneys to private individuals or associations are as follows: Section 46 of Article IV:

> "The General Assembly shall have no power to make any grant, or to authorize the making of any grant of public money or thing of value to any individual, association of individuals, municipal or other corporation whatsoever: Provided, That this shall not be so construed as to prevent the grant of aid in a case of public calamity."

Section 47 of Article IV provides in part as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * * * * * * * * * * * * "

Section 7 of Article II of the Constitution provides as follows:

> "That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In our research of the cases reported for Missouri we fail to find where the Missouri courts have passed directly upon such a question as you have submitted, however, in the case of State ex rel. City of St. Louis v. Seibert, 123 Mo. 424, the court indirectly touches upon such a question. In that case when an appropriation to the insane asylum of the City of St. Louis was under consideration it seems that this asylum was a private institution and the question of the constitutionality of the appropriation was raised because it was in violation of the provision of the Constitution which appropriates public moneys to private institutions. In that case it

was held that the appropriation complied with the requirements of the Constitution because the asylum was only the agency through which the benefits passed to the individuals. In our research of later cases on this question, we find that the weight of authority is to the effect that public funds may not be paid to private individuals or corporations for the purpose of paying for the care of indigent sick, for the care of dependent, neglected and delinquent children.

In Volume 55 A. L. R. at page 311, the case of Willis Collins v. Martin, Auditor General, et al., was passed on by the Supreme Court in Pennsylvania in 1927 and found in 290 Pa. 388, 139 Atl. 122, and the question similar to the one which you have presented was under consideration. The Constitution of the State of Pennsylvania had a provision similar to the Missouri Constitution as to the appropriation of public funds for charitable and educational purposes. That Constitution provided that:

> "'No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes, to any person or community, nor to any denominational or sectarian institution, corporation or association.'"

In the Martin case, supra, it was held that acts of aiding indigent sick are charitable acts and not governmental acts. At 55 A. L. R., l.c. 316 in the Martin case it is said:

> "Whether the charitable work is compulsory or discretionary, the performance is controlled by the Constitution. No function of government can be discharged in disregard of, or in opposition to, the fundamental law. If the performance of the proposed function can be done only in one way and that way is prohibited by the Constitution, then there can be no function or duty of government relating to the thing to be done. * * * * * * * * * * * * * * * * * *

> Overshadowing any proposed exertion of power, there is always the limitation of the Constitution. In this case no money shall be given 'to denominational or sectarian institutions, corporations, or associations.' It stands as a sentinel in its limited sphere to warn and prevent those in control who may attempt to invade the forbidden ground, and, when attention is directed to their conduct, the Constitution articulates through the courts. The state cannot secure performance of a governmental duty through a medium that has been prohibited from acting. * * * * * * "

Again at l.c. 318 of the Martin case the court said:

> "* * * * The Constitution prohibits contracts with sectarian or denominational institutions, associations, and corporations, where the basic subject-matter is founded on an appropriation for charity and benevolence. * * * * * * * * "

And at l.c. 319 it is said:

> "In conclusion we may say that it is immaterial whether the institution receiving the money is to be benefited or profited, or whether in fact such money merely replaces what is actually used in caring for this class of citizens."

In Volume 22 A. L. R., at page 1312 in the case of Bennett v. City of La Grange et al., the Supreme Court of the State of Georgia, 153 Ga. 428, in passing upon a provision of the Constitution of that state similar to Section 7, Article II of the Missouri Constitution, and in speaking of the services of the Salvation Army, said at l.c. 1317:

> " * * * * * The fact that it undertakes to disseminate Christian truth, which many people believe to be the highest and holiest form of religion, does not render it unsectarian. The fact that the Salvation Army undertakes to reform the working classes, to reclaim the vicious, criminal, dissolute, and degraded, to visit the poor, lowly, and sick, which is 'pure religion and undefiled before God,' and the highest form of benevolence, does not free it from being a sectarian institution. Being such, no money can be taken, directly or indirectly, from the public treasury, to aid it in these benevolent objects and purposes. * * * * * "

From the weight of authority it seems that the provision of the Missouri Constitution would prohibit the state from enacting any legislation or appropriating any funds to private institutions and agencies on a per capita basis for the purposes which you have set out in your request.

CONCLUSION

From the foregoing it is the opinion of this department that the provisions of the Missouri Constitution would not authorize the payment of state funds to private institutions and agencies on a per capita basis for the care of indigent sick or for the care of dependent, neglected and delinquent children.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

UNEMPLOYMENT INSURANCE: In absence of fraud four separate corporations having a majority of the same stockholders, and not individually having eight employees, do not come under the Unemployment Compensation Act.

October 19, 1939

10-24

FILED 52

Hon. Joseph A. Lennon
Assistant Attorney-General
905 Central National Bank Bldg.
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of October 4, 1939, which reads as follows:

"Ernest E. Winkelmann called at my office concerning the interpretation of Section 3 (H)-(4) of the Missouri Unemployment Compensation Law.

"There are involved four separate corporations which operate separate drug stores in the City of St. Louis. One corporation was formed October 13, 1913; another corporation was formed July 1, 1915, and the third corporation was formed July 1, 1915; the fourth corporation was formed and organized February 8, 1935. All of these corporations operate separate and distinct stores at different addresses in the City of St. Louis. These corporations were formed primarily by Ernest A. Winkelmann and Henry F. Winkelmann for the purpose of furnishing employment for their children.

"The stock in these four corporations is divided up among nine people, the majority, however, being held by Ernest A. Winkelmann and Henry F. Winkelmann. The amounts in the various corporations can be ascertained by writing Ernest E. Winkelmann at 7631 So. Broadway.

"The Unemployment Compensation Commission of Mo. is contending that all of these corporations should be considered as a single unit under Section 3 (H) -(4) of the Missouri Unemployment Compensation Law.

"I understand there are a number of similar situations in the City of St. Louis which is causing great confusion to the owners of these corporations. I believe an opinion from the Attorney-General's Office would be in order covering this subject; there is no question in my mind that this thing is going to come up frequently.

"I gather from the correspondence of the Unemployment Compensation Commission that they have definitely concluded in their opinion, regardless of the fact these are separate corporations, that they are one employing unit under the sections aforementioned. Of course, the stockholders in these corporations contend otherwise. There is a very substantial sum of money involved at this writing and, of course, will be larger in the future. These taxpayers are not satisfied with the interpretation placed on these sections by the Unemployment Compensation Commission and are extremely anxious that the Attorney-General's Office render an opinion thereon."

Section 3, par. (g), of the Unemployment Compensation Act, Laws of Missouri, 1939, page 888, reads as follows:

"'"Employing unit" means any individual or type of organization, including any partnership, association, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representative of a deceased person, which has or subsequent to January 1, 1936, had in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit

> which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this Act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this Act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the work."

It will be noticed under the above paragraph (g) that an individual performing services within this state for any employing unit which maintains two or more separate establishments within this state, shall be deemed to be employed by a single employing unit. That phrase applies only where the same employing unit has two or three other places of business in this state, and does not apply to the statement of facts set out in your request.

Section 3, par. (h), sub-section (1), of the same act, reads as follows:

> "Any employing unit which for some portion of a day but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, within either the current or the preceding calendar year, has or had in employment, eight or more individuals irrespective of whether the same individuals are or were employed in each such day; * * "

Under this section in order that an employing unit come within the terms of the Unemployment Act there must be eight or more individuals employed in the concern. In answering your request we are presuming that each and every separate corporation set out in your statement did not have eight or more employees, but the aggregate number of employees of all of the separate corporations consisted of more than eight individuals. The section which is mainly under construction is Section 3, par. (h), subdivision(4), of the Unemployment Act, Laws of Missouri, 1939, which appears on page 889. This section reads as

follows:

> "Any employing unit which, together with one or more other employing units, is owned or controlled by legally enforceable means or otherwise, directly or indirectly, by the same interests, or which owns or controls one or more other employing units by legally enforceable means or otherwise, and which, if treated as a single unit with such other employing units or interests, or both, would be an employer under paragraph (1) of this subsection; * * * "

It will be noticed in the above sub-section that the word "same" appears. Under the statement of facts set out in your request, although the majority of the stock is held by the same persons in each corporation, it does not necessarily mean that they are owned or controlled directly or indirectly, by the same interest, for the reason that being corporations each store is a separate and distinct entity from the other store. You also state in your request that the purpose of the forming of the separate and distinct corporations was so that the children of each of the two main principal stockholders could have employment and a business of their own. It will also be noticed in the above section that the words "directly or indirectly", are used, which, in other words is a prevention of the use of fraud or a sham to evade the terms of the Unemployment Act.

It has been repeatedly held that a corporation is distinct and separate from its members or stockholders. 14 C. J. page 58, section 19, states the rule as follows:

> "Since a corporation is a person distinct from its members or stockholders, it follows that, even though the same individuals may be the incorporators of, or own stock in, two separate corporations, and even though such corporations may have the same individuals as officers, there is no identity between the two corporations, and neither is liable for

the acts or faults of the other merely because of the identity of the members or stockholders and officers. A holding corporation has a separate corporate existence, and is to be treated as a separate entity, unless the facts show that such separate corporate existence is a mere sham, or has been used as an instrument for concealing the truth."

Also, in the case of Knott v. Fisher Vehicle Woodstock & Lumber Co., of Erin, Ark., 190 S. W. 378, the court said:

"This is an interplea ingrafted on an attachment suit. The defendant in the attachment is the Fisher Vehicle Woodstock & Lumber Company, a Missouri corporation, and the interpleader is a corporation of Arkansas with practically the same name. For convenience we will designate the defendant as the Missouri corporation and the interpleader as the Arkansas corporation. The Missouri corporation became indebted to plaintiff, and he brought suit and attached the property of interpleader, some woodworking machinery, as defendant's property, and the Arkansas corporation has interpleaded claiming ownership. A. B. Fisher purchased this attached machinery from an Indiana manufacturing company and mortgaged it back to secure $2,500 of the purchase price. Fisher then helped organize the Missouri corporation, which took over the property subject to the mortgage which had been duly recorded. The Missouri corporation became involved in debt and made default in the payment of this mortgage debt. The mortgage was foreclosed by the holder of the note, an Indiana bank, and that bank became the purchaser and owner of the machinery. Fisher then helped organize the Arkansas corporation, and the Indiana bank sold this machinery to it. Plaintiff, a creditor of the Missouri corporation, attached this property of the Arkansas corporation as belonging to the former. "

The court further said, at l. c. 379:

> "There was no fraudulent conveyance by the Missouri corporation, plaintiff's debtor, and, unless the property on its transfer to the Arkansas corporation became the property of the Missouri corporation, plaintiff had no right to attach it. This, however, was not the theory upon which plaintiff recovered, as his instruction predicated his right to recover on the transfer being fraudulent. This particular property was no more subject to attachment as the property of the Missouri corporation than was any other property owned by the Arkansas corporation. Similarity or even identity of names does not make the identity of corporations formed under different sovereignties. Even if there was identity of stockholders, the corporations would be distinct (10 Cyc. 287; 5 Thompson on Corporations, sections 5985, 6094; Richmond & I. Const. Co. v. Richmond, etc., R. Co., 68 Fed. 105, 15 C. C. A. 289, 34 L. R. A. 625; * * * "

In the above case the stockholders of the Missouri Corporation were the same stockholders of the Arkansas Corporation. The court in that case, under the facts as set out in the case, held that the two separate corporations were not formed for any fraudulent purpose. The rule is greatly discussed in the case of Majestic Company v. Orpheum Circuit, 21 Fed. 2d 720, l.c. 724, where the court said:

> "In legal conception a corporation has an entity separate and distinct from its stockholders; and the act of the corporation is not that of the stockholders. Nor is its obligation that of its stockholder. Hall's Safe Co. et al. v. Herring-Hall-Marvin Safe Co. (C. C. A.) 146 F. 37, 14 L. R. A. (N.S.) 1182, modified 208 U. S. 554, 28 S. Ct. 350, 52 L. Ed. 616; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A.) 68 F. 105, 34 L. R. A. 625. (3) A corporation is not liable for the acts or the obligations of another corporation, merely

because it controls such other by reason of ownership of its stock. New York Trust Co. v. Carpenter (C. C. A.) 250 F. 668; Minifie v. Rowley, 187 Cal. 481, 202 P. 673; City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; Watson v. Bonfils (C. C. A.) 116 F. 157; Syndicate Co. v. Bohn (C. C. A.) 65 F. 165, 169, 27 L. R. A. 614; 12 Columbia Law Review, 496, 517; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A.) 68 F. 105, 34 L. R. A. 625.

"The corporate entity will not be ignored at law nor in equity, whether the control is in the hands of one or many stockholders. City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; 12 Columbia Law Review, 496, 517; Richmond, etc., Co. v. Richmond,etc., R. R., supra; Watson v. Bonfils, supra; Aiello v. Crampton (C. C. A.) 201 F. 891; East St. Louis, etc., Ry. Co. v. Jarvis (C. C. A.) 92 F. 735.

"(4) The corporation will be regarded as a legal entity as a general rule, and the courts acting cautiously and only when the circumstances justify it, will ignore the fiction of corporate entity, where it is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and will regard the corporation as an association of persons. Peckett v. Wood (1916 C. C. A. 3d Cir.) 234 F. 833; New York Trust Co. v. Carpenter (1918 C. C. A. 6th Cir.) 250 F. 668; The Gloucester (D. C. Mass. 1923) 285 F. 579; Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 28 S. Ct. 288, 52 L. Ed. 481, 487; City of Winfield v. Wichita Natural Gas Co. (C. C. A.) 267 F. 47; Richmond, etc., Co. v. Richmond, etc., R. R. (C. C. A. 6) 68 F. 105, 34 L. R. A. 625; Watson v. Bonfils (C. C. A. 8) 116 F. 157; East St. Louis, etc., Ry. v. Jarvis (C. C. A. 7) 92 F. 735; Aiello v. Crampton (C. C. A. 8) 201 F. 891; Hall's Safe Co. et al. v. Herring-

Hall-Marvin Safe Co. (C. C. A. 6, 1906) 146 F. 37, 14 L. R. A. (N.S.) 1182, modified 208 U. S. 554, 28 S. Ct. 350, 52 L. Ed. 616; Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641; Peterson v. Chicago, R. I. & P. R. Co. (1907) 205 U. S. 364, 27 S. Ct. 513, 51 L. Ed. 841; Pullman's Palace Car Co. v. Mo. P. R. Co., 115 U. S. 587, 6 S. Ct. 194, 29 L. Ed. 499; Peckett v. Wood (1916 C. C. A. 3) 234 F. 833; In re Watertown Paper Co. (1909 C. C. A. 2) 169 F. 252; Smyth v. Asphalt Belt R. Co. (1923 D. C. Tex.) 292 F. 876; Georgia S. & F. Ry. Co. v. Georgia Public Ser. Comm. (1923 D. C. Ga.) 289 F. 878; City of Holland v. Holland City Gas Co. (1919 C. C. A. 6) 257 F. 679; Haskell v. McClintic-Marshall Co. (1923 C. C. A. 9) 289 F. 405; Stone v. Cleveland, C., C. St. L. Ry. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770; Ulmer v. Lime Rock R. Co. (1904) 98 Me. 579, 57 A. 1001, 66 L. R. A. 387; Bergenthal v. State Garage & Trucking Co., 179 Wis. 42 (1922) 190 N. W. 901; Pittsburgh & Buffalo Co. v. Duncan (C. C. A.)232 F. 584; Martin v. Development Co. of America (1917) (C. C. A. 9) 240 F. 42; United States v. Milwaukee Ref. Transit Co. (C. C.) 142 F. 247; Edward Finch Co. v. Robie, 12 F. (2d) 360 (C. C. A. 8 Cir.); 31 Harvard Law Review, 894; 27 Harvard Law Review, 386; 17 Columbia Law Review, 128, 132 to 133; 2 Mass. Law Quarterly, 308, 309 to 310; 28 Harvard Law Review, 811; 32 Harvard Law Review, 424, 428; 20 Harvard Law Review, 223 to 224; 96 Central Law Journal, 201; 12 Columbia Law Review, 496, at 517."

In all of the cases cited and set out in the above partial opinion in that case it appears that the rule is not settled conclusively, but is a mixed question of fact and law; that in each case a separate rule or opinion could be formed, all depending upon the facts in the case. It is all based upon the general rule that the legal entity of a corporation is recognized and the courts uphold the separate and distinct entity in all cases, except in very few exceptions where it is used as a blind, or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and in that case the courts have interpreted the corporation as an association of persons.

CONCLUSION.

WHEREFORE, in view of the above authorities, it is the opinion of this department that corporations separately formed and operating, although consisting of the same stockholders, or same officers, who have received their certificate of incorporation as separate corporations from the Secretary of State do not come within sub-division 4, paragraph (h), of Section 3, of the Unemployment Compensation Act, 1939, page 889, unless, under the facts of the incorporation and their operation they are used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud.

It is further the opinion of this department that although we do not pass upon the facts in the case, it appears from the statements in your request that it was not the intention of Ernest A. Winkelmann and Henry F. Winkelmann to evade the Unemployment Act, but was for the purpose of furnishing employment for their children. Further facts may be used to show that their intentions were fair in the matter and not for the purpose of defeating public convenience, justifying a wrong, or perpetrating a fraud. That the certificate of incorporation may have been obtained for each of the separate corporations some time before the enactment of the Unemployment Act, which was in 1937.

This office cannot render an opinion to cover all facts that resemble the facts stated in your request, for the reason that it is a mixed question of fact and law, whether or not the separate corporations are operating, owned and controlled by legal enforceable means, directly or indirectly, by the same interest, so as to not come within the terms of the Act by reason of a sham or fraud.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

PROBATE COURT : Court cannot oust the administrator who has taken charge of an estate under Sec. 299 (5) by appointment under the terms of proviso in Sec. 7.
PUBLIC ADMINISTRATOR:

March 5, 1939

3-6

FILED
53

Hon. Paul S. Limerick
Public Administrator
St. Louis County
Clayton, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 27, 1939 in which you present this question. Does the probate court have authority under Section 7, R. S. Mo. 1929 to appoint an administrator (not a person entitled to the priority) when the estate is one falling within the subdivision five of Section 299 R. S. Mo. 1929?

Section 7 R. S. Mo. 1929 provides:

> "Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate (Sec. 306 R. S. 1929), or one or more of them, as the court * * * * * shall believe will best manage and preserve the estate: Provided, however, if the court * * * should believe no one of such persons entitled to administer is a competent and suitable person, some other person than those above mentioned may be appointed."

The pertinent part of Section 299 R. S. Mo. 1929 is as follows:

> "It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons * * * * * * in his county * * fifth, when any estate of any person who dies intestate therein, or elsewhere, is left in the county liable to be injured, wasted or lost, when said intestate does not leave a known husband, widow or heirs in this state; * * *."

Literally this section authorizes the public administrator to administer estates of persons who die intestate in the county, or elsewhere, (leaving no known husband, widow or heirs in this state) when the estate is left in his county and is liable to be injured, wasted or lost. In other words before the public administrator is to act (1) the person must die intestate, (2) leave no known husband, widow or heirs in this state, (3) the estate must be left in his county and, (4) liable to be injured, wasted or lost.

In Leeper v Taylor 111 Mo. l.c. 322 it is stated:

> "Section 299, Revised Statutes 1889 (now 299 R. S. 1929), makes it the duty of the public administrator to take charge of the estates of deceased persons in the cases specified in the first seven subdivisions thereof. In those cases the public administrator, in taking charge of estates, acts independent of any order of the probate court."

He, of course, must give the notice required by Section 302 R. S. Mo. 1929.

In re Estate of Hill 102 Mo. App. l.c. 621, it is said of the public administrator under Section 299, supra:

> "No appointment by the probate court was required, * * where the public administrator, of his own motion, has taken charge of the estate of a deceased under any of the specifications now contained in the above section, and has given notice under section 295 (now 302)."

In re Estate of Brinckwirth 266 Mo. l.c. 477 the court announced this rule, as stated by counsel:

> "'The Public Administrator has authority to take charge of an estate under the Missouri Statutes, and he continues in charge until

superseded by one having a superior right to administer.'"

With the law, as above set out in mind, it is clear that if the public administrator does that which the statute makes it his duty to do, there can be no dispute with the probate court about who is to administer estates which fall under part five of section 299, because said administrator can enter upon the administration without any order from the probate court. Once he takes charge of an estate he continues in charge until superseded by one having a superior right to administer as set out in section 7, supra, or removed "for good cause shown" under Section 305 R. S. Mo. 1929.

The effect of the proviso in Section 7 is to give the probate court authority to refuse letters to those persons named in said section having prior rights to administer, when he deems them unsuitable or incompetent. This right of the court is dependent upon there being such a person in the state who is unfit. When there is such a person in the state, even though unfit, the public administrator has no statutory right to administer under section 299 part 5. By the same line of reason when there is not a person having superior right to letters of administration under section 7, in the state, then there is no one for the court to find unsuitable so that the proviso can operate to give the court authority to appoint another person. In such cases the public administrator should on his own motion take charge.

CONCLUSION

Therefore it is our opinion that the probate court cannot divest the public administrator of his right to administer an estate which falls under section 299 (5) R. S. 1929, after he takes charge of said estate, except when a person with superior right to administer appears or by removal for good cause under Section 305 R. S. Mo. 1929.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

LLB:WW

SCHOOLS: School board in common school district may assess a levy up to forty cents per hundred dollars valuation without an election by the taxpayers.

May 24, 1939

5-31

FILED
53

Mr. Delmas E. Liggett
County Superintendent of Schools
Gentry County
Albany, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of April 22, 1939, which reads as follows:

"Will you please advise me on the following situation? District number eight (8) of Gentry County, for years has left the matter of setting the amount of the tax levy in the hands of the local board. So far as I am able to find they have never determined the tax levy by a majority vote at their annual school meeting.

"Two members were elected to the three member board on the platform that they would pay tuition and transportation expenses of students attending high schools in this county and adjoining counties.

"Their present levy is thirty (30) cents, however, they will need a levy of fourty (40¢) cents (and the equalization quota, $1,075) to pay for high school tuition and transportation. A levy of 40¢ on the basis of the teacher and attendance quotas will not yield a sufficient sum (746.00) to allow the board to carry out the program for which two members were elected (by a majority vote).

"A group in the district, with no children, some of which are small landowners (all larger landowners favor 40¢ levy) are objecting to any levy over twenty (20¢) cents.

"(So far as I am able to find the real cause of the objection is a personal matter which should not have been connected with the school election whatsoever, however, they are determined that the newly elected board shall not have funds to carry out the school program which they had planned and for which they were elected to provide).

"Questions:

"Inasmuch as it has been the custom for a number of years of standing to leave the matter of setting the tax levy in the hands of the board, and the school meeting was held with this in mind, then the majority of votes were cast for directors who plainly stated that they favored paying the high school tuition and transportation, and who knew and stated that the program which they proposed would require a 40¢ levy and qualify for the equalization quota of state funds. Would this board have authority to assess a 40¢ levy and qualify for the equalization quota of state funds?

"Would this board have authority to continue the present levy (30¢) in order that they can pay the tuition required by law?

"Is the 20¢ levy the maximum levy for this district this year, not withstanding the fact that high school tuition must be paid?

"Can a special election for voting a special levy be held after giving posted notice of fifteen days?"

Article 10, section 11, Constitution of Missouri, partially reads as follows:

> "* * * * * * * * * * * * * * * * *For school purposes in districts composed of cities which have one hundred thousand inhabitants or more, the annual rate on property shall not exceed sixty cents on the hundred dollars valuation, and in other districts forty cents on the hundred dollars valuation: Provided, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers, voting at an election held to decide the question, vote for said increase."

Under the above constitutional provision ordinary common school district boards may assess or levy, for school purposes, forty cents on the hundred dollars valuation, and when the rate of levy exceeds forty cents on the hundred dollars valuation a majority of the voters who are tax-payers voting at an election may vote for an increase to an amount not exceeding sixty-five cents on the hundred dollars valuation.

Section 9204, R. S. Mo., 1929, which is a section applicable to all classes of schools, reads as follows:

> "Boards of directors are hereby authorized to make an estimate for the levy of a tax upon all the taxable property of the school district at its assessed valuation, said tax to be levied and collected as other taxes for school purposes -- said taxto be sufficient in amount to pay the annual interest on all bonds of their respective districts,

and to pay for the printing or engraving of any bonds that may be issued by virtue of this chapter."

This section of course is limited to that part of article 10, section 11 of the Constitution of Missouri, as above set out.

Section 9225, R. S. Mo., 1929, reads as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation for school purposes, or when any five resident taxpayers of such district shall petition such board, in writing, that they desire an increase on the rate of taxation, such board shall determine the rate of taxation necessary to be levied in such district within the maximum rates prescribed by the Constitution for such purposes, and shall submit to the voters of said school district who are taxpayers of such school district, at an election to be by such board called and held for that purpose, at the usual place of holding elections for members of such board, whether the rate of taxation be increased as proposed by said board, due notice having been given as required by section 9283; and if a majority of the voters who are taxpayers voting at such election on the proposition to increase levy shall vote in favor of such increase, the result of such vote, and the rate of taxation so voted in such district, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on the receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all the taxable property,

> real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

This section specifically sets out the method and limits of the voting for an increase of levy by the taxpayers of any school district.

The St. Louis Court of Appeals defines a taxpayer as a person owning property in the state subject to taxation on which he regularly pays taxes. (This definition is adopted in Pope's Legal Definitions) Sutton v. Fassie, 71 S. W. (Mo.) 745. In the following case the party seems to have owned an automobile and was considered a taxpayer. Castilo v. State Highway Department, 312 Mo. 244, l.c. 262. The laws effecting the organization, functions and powers of the school district are not to be strictly construed. State ex rel School District, 238 S. W. l.c. 820, State ex rel Cornahan v. Jones, 266 Mo. 191, l.c. 201.

Section 9227 R. S. Mo. 1929, reads as follows:

> "The propositions authorized in sections 9225 and 9226 may be submitted at an annual meeting, or at a special meeting called and held for that purpose. Said board of directors or board of education submitting such proposition shall cause notice thereof to be given as provided by section 9283."

Section 9283, R. S. Mo., 1929, mentioned in section 9225, supra, reads as follows:

> "The annual meeting of each school district shall be held on the first Tuesday in April of each year, at the district schoolhouse, commencing at 2 o'clock p. m. If no school-

> house is located within the district, the place of meeting shall be designated by notices, posted in five public places within the district fifteen days previous to such annual meeting, or by notice for same length of time in all the newspapers published in the district, giving the time, place and purposes of such meeting."

I am presuming that School District No. 8, in Gentry County is a common school district, and under section 9284 R. S. Mo. 1929, the following powers are set out:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast: Fourth: To determine by ballot, the length of school term in excess of eight months that the public schools of this district shall be maintained for the next scholastic year; also, to determine the rate, if any, in excess of forty cents on the hundred dollars assessed valuation to be levied for school purposes as provided for in section 9225."

Under section 9225, supra, if the election is held on the annual meeting of the school board it is not necessary for the board to first fix the rate as the matter is settled by the vote of the taxpayers, but if it is a special election, then the minutes of the board at a meeting previous to the special election should show the rate agreed when set by the board. It was so held in the case of Betton v. Scott, 168 Mo. 378, l.c . 389, in which the court said:

> "First, that in order to increase the rate of taxation for school purposes above forty cents on the $100 valuation, the board must first determine the rate necessary, and submit the proposition to the voters of the district,

and said proposed rate must be adopted by a majority of the voters voting upon said proposition, and that in this case both the board and the voters have failed to comply with these requirements, and, hence, the increase is void.

"Second, that since the adoption of the Constitution of 1875, the interest and sinking-fund tax must be voted by the taxpayers of the school district at the same time when the indebtedness on which it is to be applied originated.

"1. Proceeding to a consideration of these in the order mentioned, it will be observed that the contention that the qualified voters can not determine the rate for school purposes, but can only reject or adopt the rate first determined by the board, is predicated upon section 9777, Revised Statutes 1899. We can not give our assent to this view.

"Counsel evidently do not discriminate between those things which the qualified voters of a school district may do at an annual meeting and those which may be done at a special or called meeting. The time and place of the annual meeting is fixed by law. (Sec. 9749, R. S. 1899). At such annual meeting the qualified voters have the power by a majority of the votes cast, among other things: 'Fourth. To determine, by ballot, the length of school term in excess of six months that the public schools of the district shall be maintained for the next scholastic year; also to determine the rate, if any, in excess of forty cents on the one hundred dollars valuation to be levied for school purposes as provided for in section 9777.' (Sec. 9750, R. S. 1899).

"There is nothing in section 9750 which requires the board of directors to first determine the rate and submit it to the annual meeting, be-

cause at that meeting the qualified voters determine the length of the term and the law requires that they shall be furnished with a statement of the finances of the district as was done in this case.

"With this information before them the voters can intelligently fix the length of the term and the rate of taxation necessary to support the school without any estimate of the board. Moreover, as the board can not know in advance what length of term the voters will fix upon, any estimate it would make would be pure conjecture. It can not be that the increase is void unless the board first determines the rate, as the whole power of fixing the length of term and determining the rate is vested in the qualified voters. If the board suggests a rate it is clear the voters could reject it.

"We are of opinion that it was amply sufficient to submit the question of an increase of rate and leave it to the voters to determine what it should be. The purpose of the law was that the voters should authorize the increase over forty cents, and this they did and specified sixty cents as the rate.

"Section 9777, Revised Statutes 1899 on its face discloses that it is a provision for a special, not an annual meeting. That section looks to a condition when the board in its judgment deems it necessary to increase the rate, and the meeting is only authorized to pass upon those things for which it is called. Such a meeting is not to determine the rate but to increase that already determined at the annual meeting."

CONCLUSION

In view of the above authorities in answer to your first query, will say that it is the opinion of this depart-

ment that the school board at their annual meeting may set the rate of levy for school purposes in the district at any amount, providing the same is not in excess of forty cents on the hundred dollars valuation of the property in the district, but if at the annual election the board desires to raise the rate of levy in excess of forty cents, it would be necessary for the majority of the taxpayers at the annual meeting by an election to authorize a levy in excess of forty cents on the hundred dollars valuation.

In answer to your third query, will say that if the board has ordered a levy of thirty cents on the hundred dollars valuation, at the regular annual meeting, it is not necessary for the taxpayers to vote upon that order, or even by way of a special election.

In answer to your third query, will say that it is the opinion of this department that if the school board at the annual election had set the levy at twenty cents on the hundred dollars valuation, and that the same has been certified and accepted by the county clerk it would be necessary that a special election be held in accordance with section 9225, supra.

In answer to your fourth query will say that it is the opinion of this department that under section 9225, supra, which holds that the election should be properly advertised as set out in section 9283, supra. Under section 9283 it describes the method, time and place of holding the annual meeting of the school board in each school district. It sets out that the meeting should be held in a school house and if no school house is located within the district the meeting shall be designated by notices posted in five public places within the district fifteen days previous to such annual meeting or by publication in a newspaper.

Section 9225, supra, states that the election on a proposal to raise the levy beyond the forty cents per hundred dollars valuation, to be published as set out in section 9283, R. S. Mo. 1929, and according to this section, it is the opinion of this department that a

special election for voting a special levy may be held after giving posted notice of fifteen days.

As indicated by your request, it is your desire to obtain state aid under the provisions as set out under the Laws of Missouri, 1931. It is further the opinion of this department that where the school district desires state aid it is necessary as set out under section 17, of the Laws of Missouri, 1931, page 344, that where the school board makes a levy in excess of twenty cents on the hundred dollar assessed valuation for school purposes, it must be authorized by a majority of the voters who are taxpayers of the district voting upon said levy; but where the school district does not desire state aid the board may make a levy of forty cents upon a one hundred dollar valuation without an election. It is also the conclusion of this department, that where the levy is not in excess of twenty cents the school district would be entitled to state aid without an election upon the levy.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

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TYRE W. BURTON
(Acting) Attorney General

WJB:RW

OFFICERS:
AUDITING ACCOUNTS OF PUBLIC ADMINISTRATOR OF COUNTY OF ST. LOUIS:

Comptroller of the County of St. Louis may audit the accounts of the public administrator of that county.

June 13, 1939

6-14

FILED
53

Mr. Paul S. Limerick
Public Administrator
St. Louis County
Clayton, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the question of whether or not the County Auditor or Comptroller of the County of St. Louis is authorized by law to audit the books, records and accounts of your office.

The Missouri statute which provides for the election of a public administrator for counties provides in part as follows (Section 296, R. S. Missouri 1929):

> "Every county in this state, and the city of St. Louis, shall elect a public administrator at the general election in the year 1880, and every four years thereafter, who shall be ex officio public guardian and curator in and for his county.
> * * * * * * * * * * * * * * * * * * *"

This section was amended in 1933, Laws of Missouri, 1933 at page 165 by adding Section 296-A, which provides as follows:

> "Each Public Administrator elected, as now or as hereafter provided for in this Article, is hereby declared to be an officer for the County in which he is elected and for the City of St. Louis, if elected therein. The County courts of each County in this

> state now or hereafter having a population of 100,000 inhabitants or more according to the last federal census shall make suitable provision for an office for the Public Administrator in the Courthouse of the County if suitable space may be had for same, and shall be provided as soon as the County Court shall be of the opinion that the business in charge of the Public Administrator is such as to reasonably require a separate office for the convenience of the public: The Public Administrator of the City of St. Louis shall have suitable and convenient offices provided for him in the Civil Courts Building by said City."

It will be noted by this amendment that the public administrator is treated as a public officer of the county. In counties with one hundred thousand population or more the public administrator is authorized to have an office in the courthouse as soon as the business will justify. According to the opinion of the county court, St. Louis County, having a population of over two hundred thousand, would be within that classification.

From the fact that the public administrator is elected, and from the fact that he is designated as a public officer, and from the fact that he is provided with an office by the county, there is no question but that such officer is a public official within the meaning of that term and within the meaning of the provisions of the Constitution of this state.

When our Constitution was adopted, the makers of that document had in mind a limitation to be placed upon the amount of salary that the public officials might retain. With that idea in mind, we think that Section 13 of Article IX of the Constitution was included. This section is as follows:

> "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury."

It will be noted that there is a ten thousand dollar limitation on the amount of salary that a county or municipal officer may retain in any one year. Such officers are also required to make a quarterly return of the fees which he collects as such officer during that period.

In State ex rel. v. Pohlman, 60 Mo. App. 444, 450, the court, in discussing this section of the Constitution, said:

> "* * * * The evident meaning of both the constitutional provision and the statute is that the compensation of the officer shall not exceed $10,000 per annum from all sources of revenue incident to his office."

The compensation of the public administrator is fixed by Section 298, R. S. Missouri, 1929, which is as follows:

> "He shall receive the same compensation for his services as may be allowed by law to executors and administrators, unless the court,

> for special reasons, allow a higher compensation. Such public administrator may be removed from office in the same manner and for the same causes as judges of the county court."

For the purpose of removing such officer the lawmakers have set up the same causes as those in which judges of the county court may be removed. Whatever fee the public administrator receives as such officer it is by virtue of his office and comes within the class of fees which the foregoing provisions of the Constitution requires to be reported quarterly.

From the foregoing we do not think that there is any question but that the public administrator is one of the officials which the Constitution contemplates that shall make a report of his fees and who shall be limited in the amount of fees which he earns and collects in any one year. That being the case, the question is then who would be authorized to audit your accounts.

St. Louis County, having a population of two hundred eleven thousand, comes within the classification of counties mentioned in Sections 9a and 9b, Laws of Missouri, 1937, page 428. These sections relate to the office of the county comptroller in counties of that size. Section 9a provides in part as follows:

> "In all counties of this state having or which may hereafter have a population of more than two hundred thousand inhabitants and less than four hundred thousand inhabitants according to the last federal decennial census, the people of such county shall elect a county comptroller who shall be the budget officer and accounting officer of such counties and all of the duties and powers conferred by this Act upon the budget officer and accounting officer shall be vested in the said county comptroller. The county comptroller shall be elected for a term of four years

> at the general election held in the year 1938 and every four years thereafter. The salary of the said county comptroller shall be five thousand dollars per annum, payable monthly. * * * * * * * * * * * * * * * * * * "

Section 9b also applies to the county comptroller, and referring to this section as it applies to the duties of the comptroller to audit accounts of officers of the county, we find that this section provides in part as follows:

> "* * * * He shall audit the accounts of all officers and employees of the county annually and upon their retirement from office and shall keep a correct account between the county and all county and township officers, and it shall be his duty to examine all records and settlements made by them for and with the county court or with each other, and said county comptroller shall, whenever he desires, have access to all books, county records, or papers kept by any county or township officer, employee, or road overseer. * * * * * "

In 1933 the lawmakers enacted an auditing bill which provided for the State Auditor to audit the accounts of all the county officers of the state except those counties in which a county auditor is elected. Among the officers listed as those who would be audited from the State Auditor's office, we note that the public administrator is listed, so if your office was not in a county in which the auditor is elected, there is no question but that you would be subject to the audit.

By referring to Article IX, chapter 85, R. S. Missouri, 1929, which pertains to county auditors in counties which contain cities from fifty thousand to one hundred fifty thousand, and especially Section 12217 of said article, it will be seen that all of the officers of

such counties are subject to audit by the county auditor. By Section 12239, R. S. Missouri, 1929, which applies to counties from eighty thousand to one hundred fifty thousand it will be seen that all of the county officers are subject to examination by the county auditor.

Reading all of these sections together, which we think are intended to cover every county in the state, there is no doubt in our mind but that it was intended by the lawmakers that the officers of the county be subject to audit and in the case of the County of St. Louis the provision has been made for the comptroller to perform that duty. As stated above, the public administrator, being a county officer, comes within the same class as other county officers do with reference to an audit.

CONCLUSION

From the foregoing it is the opinion of this department that the Comptroller of the County of St. Louis is authorized by law to audit the records, books and accounts of the public administrator of that county.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

DOG LICENSE LAW: Any constable in the county may enforce the dog license law.

January 6, 1939

1-17

FILED
54

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We have your letter of January 3, 1939, requesting an opinion from this department, which reads as follows:

> "In several townships in this County there are no Constables and there is no one who will serve if appointed. In view of that situation what arrangement can be made for the enforcement of the dog license law which was recently approved in this County."

Section 11516, R. S. Mo. 1929, reads as follows:

> "Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

It will be noticed by this section that the sheriff of any county is the conservator of the peace and has the same jurisdiction as a constable.

Section 11756, R. S. Mo. 1929, reads as follows:

> "Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

It will be noticed by this section that constables may serve either civil or criminal process throughout their respective counties.

You mentioned in your request that no constables have been appointed in several of the townships and for that reason the dog license law can not be enforced.

CONCLUSION

In view of the above authorities set out, it is the opinion of this department that the sheriff may enforce the dog license law or any constable in the whole county can enforce the dog license law in any township located in the whole county.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:HR

TAXATION: County clerk is entitled to retain ten cents for each county dog license, in addition to his regular salary.

February 10, 1939

2-21

FILED
54

Hon. Edward V. Long
Prosecuting Attorney
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated February 7th, 1939, which reads as follows:

> "At page 224 paragraph one, Laws of 1937, it is provided that the County Clerk shall receive ten cents (10¢) for each County Dog License issued which shall cover all of his services in the matter. Please advise me that since the County Clerk is on a salary basis is he entitled to retain this ten cents (10¢) fee for each license issued in addition to his regular salary."

Section 11811, Session Laws of 1937, page 442, reads partially as follows:

> "* * * * * * * * * * * * * * * * *
> It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said re-

> port to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

This section 11811, is the general law providing for the salary of county clerks, deputies and assistants.

Section 12874 Session Laws of 1937, page 225, reads partially as follows:

> "* * * * * * * * * * * * * * * * * *
> Such clerk shall retain out of the money received for each license issued the sum of ten cents, which shall cover all his services under this article, and he shall pay the balance and all other sums received by him under the provisions of this article, less the cost of license tags, record books, blank applications and affidavits and the cost of transmitting the balance to the treasurer of the county."

It will be noticed that section 12874, supra, is a special enactment allowing a special fee for added duties of the county clerk.

It will also be noticed that the section specifically says:

> "Such clerk shall retain * * *
> the sum of ten cents * * *"

and the balance should be paid into the treasury of the county. This section is not ambiguous and specifically states that the county clerk should retain the ten cents and pay the balance into the treasury of the county and need not comply with

section 11811, supra, which provided that in view of the county clerk receiving a stated salary, all fees accruing to their offices should be turned into the county treasury.

It will be also noticed under section 12874, supra, that such clerk shall retain the ten cents as set out therein.

The courts have construed that where a general law is enacted on a certain matter, and a special law is enacted upon a certain matter, which matters are somewhat in common, the special enactment governs for such exceptions made by the special enactment. It was so held in 67 S. W. (2d) 50, l. c. 57, paragraphs 10-12, 334 Missouri 653.

> " 'It is the established rule of construction that the law does not favor repeal by implication but that where there are two or more provisions relating to the same subject matter they must, if possible, be construed so as to maintain the integrity of both. It is also a rule that where two statutes treat of the same subject matter, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although later in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.' Lewis-Sutherland, Stat. Const. vol. 1 (2d Ed.) Sec. 274, pp. 537-539. See, also, State ex rel Rutledge v. School Board, 131 Mo. 505, 516, 33 S. W. 3; Manker v. Faulhaber, 94 Mo. 430, 440, 6 S. W. 372.
>
> " 'In many of the cases just cited (under the passage quoted supra) there was a general repeal of all inconsist-

> ent acts and parts of acts. As a general rule the insertion of this general repealing clause does not add anything to the effect of the general act to repeal local or special laws.' Lewis-Sutherland, supra, p. 529."

Section 12874, supra, is not a violation of the State Constitution which forbids the increasing of the salary of an incumbent while in office, for the reason that new and additional duties have been imposed on the clerk which are not imposed upon county clerks of other counties, in which counties the dog tax law has not been adopted. It was so held in the case of State ex rel vs. Sheehan, 269 Mo. 421, l. c. 429, where the court said:

> "Another contention made is that since the appellant was an officer at the time of the passage of the act, it is inapplicable to him because the Constitution prohibits any increase in the pay of an officer during his term of office. We think this contention unsound because the act in question enjoins upon such officers as appellant new and additional duties and provides merely a compensation therefor. While in some jurisdictions a constitutional provision such as ours has been held to inhibit even this, in this and many other states the contrary doctrine has been accepted and acted upon. (Cunningham v. Current River Railroad Co., 165 Mo. 270; State ex rel v. Walker, 97 Mo. 162; State ex rel v. Ranson, 73 Mo. 89; State ex rel. v. McGovney, 92 Mo. 428; * *"

CONCLUSION.

In view of the above authorities it is

the opinion of this department that the county clerk, in counties which have adopted the dog tax law, is entitled to retain for himself ten cents for each county dog license issued which shall cover all of the services in the matter, notwithstanding the fact that the county clerk is on a salary basis. The ten cent fee should be retained in addition to his regular salary.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RW

COUNTY COURTS:
DOGS:
COLLECTION OF TAXES:

The county court is not authorized to appoint and pay a person to enforce the collection of dog taxes but may pay a person a reasonable sum to enforce its quarantine order on dogs for rabies.

February 24, 1939

3-1

FILED
54

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you requested an official opinion from this department on the following question:

> "Please give me an official ruling on the following situation.
>
> "In Section 12877 Revised Statutes of Missouri, 1929, it requires the Marshals and Constables of the various cities and townships in this County to enforce the dog law. In this particular County the Constable's have resigned and refused to serve. Would this not be an emergency whereby a special Deputy Sheriff could be appointed under provisions of Section 11516, Revised Statutes of Missouri, and the County Court pay him a per diem for his services."

You supplemented the above request by the following letter dated February 22, 1939:

> "This letter is written you in confirmation of our telephone conversation this morning and to supplement the information given in my letter under date of February 21st wherein I ask for an opinion as to whether or not the County Court could

pay a Special Deputy Sheriff $2.00 per diem under Section 11516, Revised Statutes of Missouri, 1929, when such Deputy Sheriff is to impound certain dogs here in this County.

"As you know this County passed the County Dog Law at the last election and since this law is being enforced there have been numerous dogs abandoned in the County. We are informed that there are at least two or three hundred stray dogs in Louisiana and I know that there is a large number in this City. The Veterinarians in the County advise me that rabies is very prevalent and we have had considerable stock to be bitten by mad dogs. These dogs are not fed and are dangerous. The Constables in the various townships have resigned and refuse to act. Under such conditions it seems to me that an emergency would exist were the lives and property of citizens of this County would be endangered and that the County Court could pay such Deputy.

"This condition has been such that a Deputy Sheriff has already been appointed by the County Court and they have agreed to pay him $2.00 per diem."

"P.S. Since dictating the above letter there has been a stray dog which went mad on the street here adjoining the Courthouse and had to be killed by the Deputy Sheriff."

In answer to the first question, from an examination of the statutes which apply to taxation of dogs, we find that the lawmakers made it the duty of the constables and town marshals to enforce the provisions of the law by Section 12877, R. S. Mo. 1929, which is as follows:

"Every city or town marshal of every incorporated city or town in the state,

> constables of every township in every county of the state containing incorporated towns or cities which do not maintain the office of town or city marshal shall, within their jurisdiction, take up and impound in a suitable place (the location of which place shall be given by a notice posted in some conspicuous place in his office) all dogs found running at large in their respective cities, towns or townships without collars around their necks, marked as herein provided, and they shall keep such dogs for a period of one week, and at the expiration of said period shall put such dogs to death by humane methods: Provided, however, that the owner of any such impounded dog may upon the payment of the tax herein provided, and a redemption fee of five dollars ($5.00) redeem such impounded dog and the city or town marshal or constable heretofore mentioned shall be permitted to retain the sum of two dollars ($2.00) out of each redemption fee so paid, and shall pay over the balance of said fee on the first day of each month to the treasurer of the county in which said city or town marshal or constable, as the case may be, has jurisdiction, to be accounted for by said treasurers in the same manner as they are required by this article to account for licenses taxes; and any marshal or constable who shall fail or refuse to take up and impound any such dog shall be guilty of a misdemeanor and on conviction thereof fined not less than five dollars nor more than twenty-five dollars."

It will be noted that this section makes it the duty of such officials to take up and impound all dogs in their jurisdiction which are running at large without a collar

on them showing that the tax has been paid. This section provides for a fee of two dollars ($2.00) for the officer performing this service which is to be paid by the owner of the dog if and when he redeems it. If the dog is not redeemed at the end of one week from the date of taking up, then the officer is to put it to death in some humane manner.

This section does not specifically provide pay for the officer for keeping the dog, but by the amount allowed such officer for his fee evidently the lawmakers have intended that the two dollar fee shall include the pay to him for impounding and keeping the dog until it is redeemed or put to death. We note that this section does not provide pay for the taking up and impounding of the dog which is not claimed or where the dog is unknown, but if the officers have any complaint about that omission in the law they would have to take that up with the lawmakers and have the act amended to cover pay for that service.

The rule for authority of county courts to pay out public funds to officers for salaries and fees is stated in State ex rel. v. Brown, 146 Mo. 401, 406, as follows:

> "It is well settled that no officer is entitled to fees of any kind unless provided for by statute, and being solely of statutory right, statutes allowing the same must be strictly construed. State ex rel. v. Wofford, 116 Mo. 220; Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675. In the case last cited it is said: 'The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for services he is required to perform as a public officer, he has no claim upon the state for compensation for such services.'

Williams v. Chariton Co., 85 Mo. 645.

"The question then is by what statute is plaintiff entitled to the fees claimed?

"It is true that by section 3267, and section 4, article 20, page 2158, Revised Statutes 1889, the sheriff of the city of St. Louis is required to attend the criminal courts and court of criminal correction of said city, but no fee is allowed him by these statutes for such service, in the absence of which the presumption must be indulged that the service was gratuitous. * * * * * "

And in King v. Riverland Levee District, 218 Mo. App. 490, 493, the rule is further stated:

"It is no longer open to question but that compensation to a public officer is a matter of statute and not of contract, and that compensation exists, if it exists at all, solely as the creation of the law and then is incidental to the office. (State ex rel. Evans v. Gordon, 245 Mo. 12, l.c. 27, 149 S. W. 468; Sanderson v. Pike County, 195 Mo. 598, 93 S. W. 942; State ex rel. Troll v. Brown, 146 Mo. 401, 47 S. W. 504.) Furthermore our Supreme Court has cited with approval the statement of the general rule to be found in State ex rel. Wedeking v. McCracken, 60 Mo. App. l.c. 565, to the effect that the rendition of services by a public officer is to be deemed gratuitous, unless a compensation therefor is provided by statute and that if by statute compensation is provided for in a particular mode or manner, then the officer is confined to that manner

> and is entitled to no other or further compensation, or to any different mode of securing the same."

From the foregoing it will be seen that the constables or marshals are only entitled to two dollars ($2.00) for impounding a dog the pay of which depending upon the owner redeeming the dog.

You state in your letter that the constables have resigned and refuse to enforce this law. As a result thereof the county court has appointed a deputy sheriff to perform these duties, and you ask whether or not the court is authorized to do this by virtue of the provisions of Section 11516, R. S. Mo. 1929, which is as follows:

> "Every sheriff shall be a conservator of the peace within his county, and shall cause all offenders against law, in his view, to enter into recognizance, with security, to keep the peace and to appear at the next term of the circuit court of the county, and to commit to jail in case of failure to give such recognizance. In any emergency the sheriff shall appoint sworn deputies, who shall be residents of the county, possessing all the qualifications of sheriff. Such deputies shall serve not exceeding thirty days, and shall possess all the powers and perform all the duties of deputy sheriffs, with like responsibilities, and for their services shall receive two dollars per day, to be paid out of the county treasury."

We construe this section to be applicable only when there is a general disturbance of the peace in the county and the sheriff being unable to quell it may appoint deputy sheriffs for a period of not exceeding thirty days who shall receive two dollars ($2.00) per day for their services. We do not think that the failure to enforce the dog tax law is such an emergency as is contemplated by the lawmakers by said Section 11516, and, therefore, the county court would be unauthor-

ized to pay a deputy sheriff two dollars ($2.00) per day for thirty days to perform the duties of enforcing the dog tax law.

Your letter of February 22nd puts another issue into the request, that is, would the county court be authorized to employ and pay a person to enforce its orders made for the purpose of checking rabies, which you state is prevalent in that county. The sections of the statutes which apply to the duties of the county court in such cases are as follows: 12867, 12868, 12869 and 12870.

Section 12867 R. S. Missouri, 1929, is as follows:

> "Whenever rabies becomes prevalent in any city, town or village in this state, the mayor of such city, town or village shall, according to the necessity of the case, issue a quarantine order, requiring every owner or person in charge of any dog or dogs within the limits of such city, town or village, to either kill or impound his dog or dogs, or to have such dog or dogs immunized. Said order shall be published once in the paper officially publishing the business of such city or town; and in the absence of such paper, shall be posted as in case of sales of personal property. The mayor of such city, town or village is authorized by proclamation, to terminate any such quarantine whenever, in his judgment, the necessity for it no longer exists."

Section 12868, R. S. Missouri, 1929, is as follows:

> "Whenever rabies become prevalent in any county, township, or school district in this state, outside of any city, town or village in such county, it shall be the duty of the county court or, when court is not in session, the presiding judge of the court, to take cognizance

thereof. The county court, or when court is not in session, the presiding judge thereof, is empowered and ordered to issue a quarantine order on any county, township, or school district, according to the necessity of the case, that each and every owner or person in charge of any dog or dogs, in the territory affected, shall either kill or impound every dog owned, or for the time possessed by him, or have such dog or dogs immunized. Said order shall be published as provided in section 12867 of this article. Such county court or presiding judge thereof is authorized by order to terminate any such quarantine whenever, in the judgment of the court or presiding judge, the necessity for it no longer exists."

Section 12869, R. S. Missouri, 1929, is as follows:

"Whenever any quarantine order is issued as provided in section 12867 or section 12868 of this article, it shall be the duty of all police officers, and town marshals and constables, in their respective jurisdictions, and within the jurisdiction of such quarantine, to kill all dogs found running at large, except those which have been immunized."

Section 12870, R. S. Missouri, 1929, is as follows:

"All expenses of such quarantine shall be paid out of the treasury of such city, town or village, or of the county, township or school district, as the case may be, and for the performance of their respective duties, the police officers, town marshals and constables, respectively, shall receive such fees and mileage as is provided by law for the performance of their other like duties."

From said Section 12867 it will be seen that the county court, when it deems it necessary, may make the quarantine order. After such order has been made, it is the duty of the police officers, town marshals and constables to enforce it. They are to be paid out of the treasury of the county, city, township, school district or village in which such quarantine order is made.

Section 12870, supra, provides that the officers enforcing the quarantine orders "shall receive such fees and mileage as is provided by law for the performance of their other like duties."

While this statutes does not specifically state what the amount of the fee shall be, yet it clearly shows that the lawmakers intended that the officers shall be paid for that service. It is definite as to the pay for mileage, and since it provides that they shall receive pay for this service as they receive pay for other like duties, then it will be necessary to refer to the general statutes to find where such officers perform other duties like the ones imposed upon them by Section 12869, supra, and by the fee allowed for such service, fix the fee for the officer for performing the duties imposed upon him by said Section 12869.

Section 11777, R. S. Missouri, 1929, which refers to constables, provides that a constable shall receive ten cents per mile for serving process. If it is necessary for the constable to travel in executing the quarantine order of the county court, then this service would be like the service of the officer in serving a process, and we think he would be entitled to mileage at ten cents per mile. This section also provides that the constable shall receive such compensation as the justice of the peace may award for receiving and keeping property on execution or attachment.

The constable, in enforcing the quarantine order of the county court by taking up and keeping or impounding the dogs, would be performing a service like that of receiving and keeping property under execution or attachment, and we think that the lawmakers had this section in mind when they provided that the officer should receive pay the same as for other like service and that they intended that for

the services of the constable in performing his duties under the quarantine order of the court he should be paid such amount as the county court which issued the quarantine order may deem proper.

CONCLUSION.

From the foregoing we are of the opinion that the county court is not authorized to employ and pay out of the county funds a person to enforce the provisions of the law relating to taxation of dogs. However, we are of the opinion that if there is an epidemic of rabies in the county, city, township or school district that the county court may make a quarantine order and pay the officers who enforce such order a reasonable amount of compensation for their services and for the mileage which such officer travelled in executing the order they shall be paid at the rate of ten cents per mile.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

_____

(Acting) Attorney General

TWB:DA

ANIMALS:
DOG TAX:
DOGS:

Person having more than ten dogs liable only for ten dollars tax.

March 16, 1939

3-22

FILED
54

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "Please give me a ruling on that part of Section 12873, Laws 1937, page 224, paragraph 1, which reads as follows:
>
> "Provided: That any person or persons operating a licensed kennel of more than ten dogs in which all dogs kept by him or them are confined and not allowed to roam, shall pay a tax of $10.00, which amount shall be the full amount of tax on all dogs kept by said person or persons as described above."
>
> "Does the man who owns ten dogs or more and keeps them confined with the exception of the time he is hunting them considered to be operating a kennel?
>
> "Does a man who trades in dogs and has ten or more dogs confined and does not breed or raise dogs considered to be operating a kennel?"

Section 12873, Laws of Missouri, 1937, page 225, provides in full as follows:

> "The tax on each male dog and each spayed female dog, of which the certificate of a veterinarian or the affidavit of the owner is produced, in this state shall be one dollar ($1.00) per year, and the tax on all other dogs in this state shall be three dollars ($3.00) per year, payable to the county clerk of the county in which the owner resides. Provided: That any person or persons operating a licensed kennel of more than ten dogs in which all dogs kept by him or them are confined and not allowed to roam, shall pay a tax of $10.00, which amount shall be the full amount of tax on all dogs kept by said person or persons as described above."

The obvious intent of the legislature in enacting the proviso to the above statute was to excuse the person or persons who had quite a number of dogs from paying an exorbitant amount of tax on such dogs which would render the possession of them a luxury. The legislature, fully aware of Missouri's heritage as a "hound dog" state, did not wish to impose such a tax upon the owner of a pack so as to make the possession of them beyond the means of the ordinary person of Missouri.

In interpreting the section quoted in your request it must first be pointed out that the word "licensed" when used in reference to kennels, must be omitted from the statutes and treated as mere surplusage. A close search of the statutes of Missouri discloses no reference or statute dealing with the licensing of kennels. It is a rule of statutory construction that:

> "* * * words to which no meaning at all can be attached, or words having no meaning in harmony with the legislative intent as collected from the entire act, will be treated as surplusage, and will be wholly disregarded

> in the construction of the act in order to effectuate the legislative intent; * * * * *" 59 C. J. 992

In State ex rel. Tadlock v. Mooneyham, 253 S. W. 1098, 212 Mo. App. 573, the court said:

> "A word, phrase, or sentence may be read out of the statute, * * * * *"

"Kennel" is defined in 35 Corpus Juris, 900, as:

> "A house for a dog or for dogs, or for a pack of hounds; but the term is sometimes used in the sense of pack or collection of dogs usually kept or bred for hunting, or for sale."

Applying the above definitions to the questions asked in your request, it will be seen that a person who owns ten or more dogs and keeps them confined with the exception of the time that he is hunting with them is operating a kennel within the provisions of Section 12873, supra.

Further, a person who trades in dogs and has ten or more dogs confined also comes within the purview of Section 12873, supra.

CONCLUSION.

It is, therefore, the opinion of this department that a person who has more then ten dogs which are confined and not allowed to roam and which are kept or bred for hunting or for sale is operating a kennel within the meaning of Section 12873, Laws of Missouri, 1937, page 225, and is liable for a county dog tax of ten dollars ($10.00).

Respectfully submitted

APPROVED:

ARTHUR O'KEEFE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

ROAD DISTRICT: A voter on the submission of the adoption of a special road district need not be a taxpayer, but should be qualified under the general election laws.

March 27, 1939

3-28

FILED
54

Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 15th, 1939, which reads as follows:

> "Please give me a ruling as to what constitutes a qualified voter who would be entitled to vote in the election set forth in Chapter 42, Article 9, Section 8055, Revised Statutes of Missouri, 1929."

Section 8055, R. S. Missouri, 1929, in reference to the qualification of the voters in adopting a special road district, has not been passed on by the Supreme Court of this state. Part of Section 8055, R. S. Missouri, 1929, reads as follows:

> "Whenever fifty qualified voters, who are resident taxpayers of any such proposed special road district, shall file a petition with the county court of any county, asking the court to submit this article to a vote of the people of such proposed road district for their adoption, the county court of such county shall make an order of record that this article,

> describing the same by its title and the date of its approval, be submitted to the voters of such proposed road district at the next general election, or at a special election to be held for that purpose at such time as the court may order."

It will be noticed by the above partial section that the intention of the Legislature was that in order to submit to a special election on the adoption of a special road district, it would be necessary that fifty resident taxpayers shall file a petition. The purpose of mentioning resident taxpayers was to prohibit fifty persons who were not taxpayers of the special road district to file a petition for the submission of the proposal, which would be no extra costs to such persons. But, under the partial section it will be noticed that the Legislature used the phrase, "vote of the people of such proposed district for their adoption." Under this phrase it did not specifically state a vote by the taxpayers of such special proposed road district. It is also noticed that the Legislature in enacting the section as above partially set out stated, " be submitted to the voters of such proposed road district at the next general election, or at a special election." This part of the section did not specifically say that the proposal should be submitted to the taxpaying voters of such proposed road district. This partial section does not seem to be ambiguous in any respect unless one can say that in view of the fact that the Legislature required fifty taxpayers to file a petition, then only taxpayers could vote on the proposal after the filing of the petition. The wording does not seem to be ambiguous and should be construed according to the common and known meaning of the words "voters" and "vote of the people".

In 59 C. J., page 952, it is said:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning," citing Cendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523."

In Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224, the Court said:

> "To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

In the case of State ex rel Little Prairie Special Road District, v. Thompson, State Auditor, 285 S. W. 57, the court, in a mandamus proceeding in which it ordered the registration of bonds voted by a special road district, by the State Auditor,

said:

> "Said article was adopted by the people of said district at an election duly called for that purpose by the county court, ***"

It will be noticed by the above decision that the court said: "said article was adopted by the people of said district, * * * ". It did not say that the article was adopted by the taxpayers of said district.

CONCLUSION.

In view of the above authorities it is the opinion of this department that a voter, in order to be qualified to vote in an election as set forth in Chapter 42, Article 9, Section 8055, R. S. Missouri, 1929, need not be a taxpayer, but his qualifications should ohly comply with the voter of a general or special election.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General.

TAXATION AND REVENUE: Owner purchasing at third sale acquires interest free from tax liens for which sale was had.

April 29, 1939

5-7

FILED 54

Honorable Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Mo.

Dear Mr. Long:

We desire to acknowledge your request for an opinion of April 26th, which is as follows:

"The Collector of this County has asked that I secure an official opinion from you relative to the following situations:

"First, A owns a piece of property which has been offered for sale twice for delinquent taxes under the Jones-Munger Law and no bid received and on the third sale it was sold to B for an amount less than the taxes due. A redeems the property. Must A pay the balance due for delinquent taxes or is the property redeemed clear of all taxes?

"Second, If a owner of a piece of property buys the same at the third and final tax sales at an amount less than the total amount of taxes due must he pay the full amount of taxes due or is the land relieved of that lien?"

Your first request is answered by an opinion to Mr. John G. Burkhardt, Associate City Counselor of St. Louis on March 7, 1938.

SECOND, IF A OWNER OF A PIECE OF PROPERTY BUYS THE SAME AT THE THIRD AND FINAL TAX SALES AT AN AMOUNT LESS THAN THE TOTAL AMOUNT OF TAXES DUE MUST HE PAY THE FULL AMOUNT OF TAXES DUE OR IS THE LAND RELIEVED OF THAT LIEN?

Section 9953a, Senate Bill No. 94, Laws of 1933, at page 432, is as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9953b, is as follows:

"Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Whenever land is sold under Section 9953a, supra, it is made to the highest bidder and "the purchaser thereof shall acquire thereby the same interest therein as is

acquired by purchasers of other lands at such delinquent sales".

There is no statutory provision for another sale of such lands for the taxes for which such sale was had except in case of redemption under Section 9953b, supra. Therefore except in case of redemption this is a final sale and it extinguishes, as to the highest bidder, the tax liens for which the sale was had. There is no provision in said Section 9953a, supra, nor any other Section of Senate Bill No. 94 which could be construed as prohibiting the owner or any party in interest from becoming the highest bidder.

CONCLUSION

Therefore, it is the conclusion of this department that an owner of land, bidding it in for taxes under Section 9953a, supra, acquires his interest as such purchaser free from all tax liens for which the sale was had.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

SVM:LB

SHERIFF'S FEES: Entitled only to mileage actually traveled.
HIGHWAY PATROL: Warrant to be executed by them, should be Addressed to them.

June 5th, 1939.

6-10

FILED
54

Hon. Edward V. Long,
Prosecuting Attorney,
Pike County,
Bowling Green, Missouri.

Dear Sir:

We are in receipt of your letter of June 1st, requesting three rulings, and will take them up in the order given by you.

Your first question:

"A member of the State Highway Patrol executes a State Warrant and delivers the prisoner to the Sheriff. The Sheriff has no active part in making the arrest or transferring the prisoner to jail. However, the Sheriff makes a return on the warrant showing that he travelled a certain number of miles in executing the warrant and in bringing the prisoner to jail. Is the Sheriff entitled to receive this mileage?"

Section 11789, R. S. Mo. 1929, provides:

"No mileage fees for serving any writ, summons or other legal process shall be collected unless the sheriff shall actually travel the distance for which he makes such charge: * * * * * *"

Section 11792, R. S. Mo., 1929, further provides that:

> "* * * * *. Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court * * * *."

In connection with these statutes, we wish to call your attention to the fact that only the officer to whom the writ or warrant is directed shall execute same.

CONCLUSION

The Sheriff is entitled to fees for only the mileage actually traveled by him in executing any warrant. Under the circumstances referred to by you, he would probably be entitled to fees of one dollar ($1.00) for executing the warrant by bringing the prisoner before the magistrate.

Your second question is as follows:

> "A warrant is issued by a Justice of the Peace in the county and the same is executed by a member of the State Highway Patrol. The Trooper delivers the prisoner to the Sheriff at the jail but the Sheriff refuses to take charge of the prisoner or lock him in the jail but releases the prisoner. What would be the proper procedure against the Sheriff in such case?"

Section 8527, R. S. Mo., 1929, reads as follows:

> "It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

Section 8526, R. S. Mo., 1929, makes the Sheriff of each county in the state the jailer, and provides that he may appoint a jailer under him who should bear in mind that a warrant provides for bringing of a prisoner apprehended before the magistrate. Upon his apprehension, he may give bail, or in the case of failure to give bail, he shall be committed to jail.

CONCLUSION

Any sheriff who refuses to accept a prisoner upon the proper commitment is guilty of a misdemeanor, and may be convicted of such.

Your third question:

> "A State Warrant is executed by a member of the State Highway Patrol and the Sheriff refuses to make a return on said warrant. Is the Trooper authorized to sign such warrant as having been executed?"

Section 3418, R. S. Mo., 1929, provides:

"* * * * * * it shall be the duty of the justice to forthwith issue a warrant for the arrest of the defendant, directed to the sheriff of the county or constable of the township, or, if no such officer is at hand, then to some competent person who shall be specially deputed by the justice to execute the same, by written indorsement to that effect on such warrant."

CONCLUSION

A state warrant is ordinarily directed to the Sheriff or any constable of the county and should be given to either of them which may be present. If neither of them is present the warrant may be directed by the Justice or officer issuing same to a member of the state highway patrol who may return same.

Respectfully submitted,

ROBERT L. HYDER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

RLH/RV

COUNTY COURTS:

COUNTY HIGHWAY ENGINEER: County Court must determine whether applicant for position as county highway engineer meets statutory requirements as to qualifications.

July 27, 1939

FILED
54

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We have received your letter of July 15th, which reads as follows:

> "Please inform me whether or not the County Court can under Sections 8806, 8809, 8819, Revised Statutes of Missouri, 1929, appoint anyone as Highway Engineer who is not a civil engineer and who can not qualify as a practical civil engineer.
>
> To qualify as a practical civil engineer what would be required to be the extent of his training.
>
> This opinion is requested of me by the County Surveyor."

You have referred us to Sections 8806, 8809 and 8819 of the Revised Statutes of Missouri, 1929. These statutes all refer to juries. No doubt you refer to Sections 8006, 8009 and other sections contained in Article VIII, Chapter 42, R. S. Mo. 1929.

Section 8006 provides as follows:

> "There is hereby created in the several counties of the state of Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway

> engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

As to the qualifications of such county highway engineers, Section 8009 reads in part as follows:

> "The county highway engineer shall be a resident of the state of Missouri, and shall be skilled in the laying of drains, in bridge, culvert and road building and general road work, and he shall have a practical knowledge of civil engineering, and shall be active and diligent in the discharge of his duties. * * * * "

It will be observed that the above statutes do not require the county highway engineer to be a civil engineer but require only that he "shall have a practical knowledge of civil engineering". Of course if a candidate for such office is not a civil engineer, or if he cannot qualify as a practical civil engineer, as you suggest in your letter, it is clear that such person would not have a "practical knowledge of civil engineering".

We can see no distinction between the term "qualifying as a practical civil engineer" and the statutory term "practical knowledge of civil engineering". Certainly if a person could not qualify as a "practical civil engineer" he would not be possessed of "practical knowledge of civil engineering". Consequently, if a candidate cannot qualify as a practical civil engineer we are of the opinion that the county court, if it so finds, is without authority to appoint such candidate as county highway engineer.

The statutes do not state the extent or amount of training a person must have in order to qualify as a practical civil engineer. This is a matter which appears to have been left to the judgment and discretion of the county court. The county court is given the exclusive right to appoint such officer.

In the case of Langston v. Howell County, 79 S. W. (2d) 99, the Supreme Court of Missouri, in commenting on a particular declaration of law given by the lower court, said:

> "If the declaration of law means that the discretion and power to select a county highway engineer and fix the length of term for which he is appointed is vested in the county court, we also concur therein."

Therefore, since the "power to select a county engineer" is in the county court, the power also to determine whether such person is possessed of the necessary statutory qualifications must, of necessity, also be lodged in said court. Since the county court only can appoint, and since the right to determine the qualifications is not given to any other person or body, it would follow that the county court must apply the statutory qualifications and determine whether the applicant has sufficient knowledge and experience to qualify.

Section 8011, R. S. Mo. 1929, provides that the county court may, if it so desires, appoint the county surveyor to the office of county highway engineer. As to this appointment and the qualifications for the office which the surveyor must possess, Section 8011 reads as follows:

> "The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; * * * *".

Here again it appears that the duty is placed upon the county court to determine whether or not the county surveyor is "thoroughly qualified and competent, as required by this article".

The case of State v. Starkey, 49 Minn. 503, 52 N. W. 24, throws some light on the proper construction which should be placed on Section 8009 as to the qualifications a county highway engineer should possess. In that case an ordinance of the

City of St. Paul, Minnesota, authorizing the appointment of a building inspector, provided that he should be a "practical architect and sanitary engineer". The court held that this expression meant a person having a professional knowledge of architecture and a practical experience in superintending the construction of various kinds of buildings, including plumbing and drainage. More particularly, the court said:

> "The term 'practical architect and sanitary engineer' should not be given too narrow or technical a construction, but should be considered in connection with the nature of the business and duties required of the officer, which relate, not so much to the styles of the architecture, external finish, or matters of ornamentation, as a knowledge of the principles of architecture as practically applied in determining the strength, quality and adaptation of materials and the proper foundation for structures, and also in estimating and calculating the proportionate strength of walls, timbers, columns, and supports, and the strain or pressure to which they may be subjected, in conformity with the rules of the department."

CONCLUSION

We conclude, therefore, that since the county court has the exclusive right to appoint the county highway engineer, such court must determine whether or not an applicant for such position has a "practical knowledge of civil engineering". If the county court finds that the applicant cannot qualify as a practical civil engineer, or that he does not have a practical knowledge of civil engineering, then such court is without authority to appoint such person. Further, that the statutes do not specify the amount or extent of training or experience that an applicant must have in order

to possess "practical knowledge of civil engineering", and this is a matter which, by necessity, must be left to the judgment of the county court.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:VC

RECORDER OF DEEDS: Has no authority to keep out of office justice of peace soliciting performance of marriage ceremony, whose conduct annoys applicants for marriage license and is detrimental to efficient operation of said office, but county court has right to eject intruders from said office.

October 19, 1939

10-20

FILED
54

Mr. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We received your request for our opinion dated September 7, 1939, in the following terms:

> "Please give me a ruling on the following situation:
>
> We have a justice of the peace in this county who persists in loafing in the Recorder of Deed's office and when couples come to this office to secure their marriage licenses he will either follow them in this office and insist on marrying them. This conduct is annoying to the applicants for the license and to the Recorder of Deeds. Does the Recorder of Deeds have the authority to forbid and keep this justice of the peace from coming into his office?"

In your letter dated October 16, 1939, you referred to the conduct of the justice of the peace as "detrimental to the efficient operation of his office".

The framers of the Constitution and the legislature, having given to the county court the right to expel or eject intruders or trespassers from the county courthouse or offices therein (as will be seen below), it is to be presumed it was not intended to be exercised by the Recorder of Deeds.

Article VI, Section 36, Constitution of Missouri, provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 2078, R. S. Mo. 1929, Mo. St. Ann., page 2658 provides, in part:

> "The county court shall have control and management of the property, real and personal, belonging to the county * * * ."

The control and management of county property was held in Sparks vs. Purdy, 11 Mo. 219, necessarily to include the right summarily to expel or eject intruders or trespassers from the county courthouse and offices therein and the court, in part, said, at side pages 224 and 225:

> "The law intrusts the County Court with the control and management of the property, real and personal of the county; and under this power the court superintends the public buildings. Public convenience requires that a summary power to prevent the illegal occupation of, and to eject trespassers from the places designed for the transaction of the business of the county should exist in some body." (Underscoring ours)
>
> *
>
> "That a County Court may expel an intruder from the court-house in a summary way, we have no doubt, but under the circumstances of this case, their conduct toward

Sparks was harsh and illegal."

Where the sheriff, by authority of the county court, forcibly ejected from a county office a former county officer, it was held that neither the judges of the county court, nor the sheriff were liable in damages and the court, in part, said:

> "The county court was entitled to the free and unconditional access to and use of its records and it was entitled to treat any one as a trespasser who, without official authority, obstructed its access to or use of the same. (Sparks v. Purdy, 11 Mo. 219.)"

Morgan vs. Owen, et al 193 Mo. 587, l.c. 596, 91 S. W. 1055.

The question what conduct makes one an intruder or trespasser in a county office seems to have arisen most frequently in connection with the conduct of persons coming into and using the office of the Recorder of Deeds for the purpose of copying records for abstracters. In stating the rule that abstracters, as a part of the general public, have a right to come into and use the office of the recorder, it is said that right is subject to the following conditions, in 1 R.C.L. 98 (and cases cited):

> "Even when the statutes confer this extensive right on abstracters, they must exercise it reasonably, with due regard to the rights and duties of the custodian of the records and to the right of others having similar privileges of access; and the right may be exercised only on compliance with such reasonable regulations as the law and the custodian of the records may prescribe, such as a limitation on the number of employees that an abstracter may put at work on

> the records at one time, decent and orderly behavior of such employees, etc."

Regarding a similar situation, the Supreme Court of Tennessee, in Shelby County vs. Memphis Abstract Company 203 S. W. 339, L.R.A. 1918 E, 939, l.c. 941, 942, said:

> "By Sec. 505 of Thompson's Shannan's Code the sheriff of the county is given charge of the courthouse, unless some other person is specially appointed by the court for the purpose, and he is given power to prevent trespassing and to exclude intruders. The county register is custodian of the records in his office, and in event the employees of defendant company should prove to be intruders by refusing to obey reasonable rules or demands of the register, or should unduly interfere with other members of the public in their use of the registry, the sheriff would have authority to exclude them."

The right which the sheriff was there said to have was based on his having charge of the courthouse. That right is possessed in Missouri by the county court, because it has charge (control and management) of the courthouse.

The limitation upon the right of an abstracter, as a part of the public, to use the office of the recorder of deeds, was announced in the following terms in Day vs. Button 96 Mich. 600, 56 N. W. 3:

> "'This right does not permit the register to be unduly annoyed by a large force, or by work at unseasonable hours, or by the monopoly of furniture, office room, or records to the exclusion of other persons, or interfere with his right to prescribe

a reasonable use of the same."

Upon all the above authority, if the conduct of the justice of the peace is such as to impair the efficiency of the office of the recorder of deeds (as you indicate it is in your letter dated October 16, 1939), or such as to interfere unduly with the use of said office by the public, the county court has the right, by its order through the sheriff, to expel or eject said justice of the peace as an intruder or trespasser. The framers of the Constitution and the legislature, having given that right to the county court, it is to be presumed it was not intended to be exercised by the recorder of deeds. Where the statute directs the performance of certain things by a particular person or body, it implies that it shall not be done by a different person. 59 C. J. page 984 and cases cited.

The reference in some of the cases cited to the prescribing of rules and regulations by the recorder is applicable only to the records themselves.

CONCLUSION

The recorder of deeds has no authority to keep out of his office a justice of the peace soliciting performance of a marriage ceremony, whose conduct annoys applicants for a marriage license, and is detrimental to the efficient operation of said office, but the county court has the right to eject intruders from said office.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

EH:RT

STATUTORY CONSTRUCTION: Words "shall be lawful" in Section 9953b., Laws of Missouri, 1939, construed to be directory.

November 30, 1939

12-1

FILED
54

Hon. Edward V. Long
Prosecuting Attorney
Pike County
Bowling Green, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 27, 1939, which reads as follows:

"Our County Court failed to appoint a Trustee to purchase real estate sold for taxes as provided under Section 9953b at page 851, Laws of Missouri, 1939. The Collector desires me to inquire of you whether or not the failure of the County Court to appoint such Trustee in any way affects the sale or the title to property which he has conveyed to the purchasers at this sale."

Section 9953b page 851, Laws of Missouri, 1939, reads as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to

such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees. Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest

and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

The problem presented is one of statutory construction. It is, namely, whether, under the foregoing act, it is mandatory on the County Court to appoint the trustee, or whether such action is merely discretionary with them. Note the use of the words "shall be lawful" in Section 9953b, Laws of Missouri, 1939, supra.

In 59 C. J. page 1086, it is said:

"* * * It is also a general rule that the word 'shall,' when used by the legislature in a grant of authority to a court, means 'may,' * * * "

Again in 59 C. J. at page 1087, it is said:

"The words 'it shall be lawful' are, according to their ordinary and natural meaning, permissive and enabling words only, * * * "

The court in State v. City of Maplewood, 99 S. W. (2d) 138, l. c. 142, paragraph 5, has said:

"The general rule with respect to the use of permissive words in a statute is stated in 59 C. J. section 633, pp. 1077 and 1078, as follows:

'On the other hand, where statutes are purely enabling in character, simply making that legal and possible which otherwise there would be no authority to do, and no public interests in private rights are involved, they will be construed as permissive. Generally, statutes, directing the mode of proceeding by public officers, designed to promote method, system, uniformity, and dispatch in such proceeding, will be regarded as directory if a disregard thereof will not injure the rights of parties, and the statute does not

declare what result shall follow noncompliance therewith. * * * '"

More particularly, there is the decision in People ex rel Comstock v. City of Syracuse, 12 N. Y. Supp. 890, 894 in which the court holds:

"The words 'it shall be lawful' impart a discretion. It is only where the subject matter imperatively requires it that they can receive a different construction."

CONCLUSION

In view of the above authorities, it is the opinion of this Department that there is no absolute duty on the County Court, under Section 9953b, Laws of Missouri, 1939, to appoint a trustee, and such action on their part is simply discretionary. It follows that the validity of the sale by the County Collector, and the transfer of title to the purchaser, is not affected by failure of the County Court to appoint a trustee.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

RPCW:RW

COUNTY COURTS: Have authority to institute suits to prevent trespasses upon county property.

December 5, 1939

12-7

FILED
54

Mr. Edward V. Long
Prosecuting Attorney
Bowling Green
Missouri

Dear Sir:

This will acknowledge receipt of your letter of November 9, 1939, requesting an opinion as follows:

> "Kindly advise me whether or not a County Court acting under authority of Section 2078, Revised Statutes of Missouri, 1929, has the authority to institute an injunction suit against certain trespassers on County lands. Of course, this assumes that there would be sufficient grounds for an injunction providing the County Court had the authority to institute and prosecute said suit."

In Carpenter vs. St. Joseph 263 Mo. 705, it is held an injunction is the proper remedy to prevent trespasses upon property.

Section 698, R. S. Mo. 1929, provides that, "Every action shall be prosecuted in the name of the real party in interest * * * ." In Swift & Co. v. Wabash Railroad Co. 149 Mo. Appeal, l.c. 531, it is stated, "Plaintiff is the real party in interest if he has and shows the complete legal title to the cause of action asserted."

Section 2078, R. S. Mo. 1929, provides:

> "The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 12071, R. S. Mo. 1929, provides:

> "The county court of each county shall have power, from time to time, to alter, repair or build any county buildings, which have been or may hereafter be erected, as circumstances may require, and the funds of the county may admit; and they shall, moreover, take such measures as shall be necessary to preserve all buildings and property of their county from waste or damage."

It seems that under the last mentioned statutes the power to institute an injunction suit to prevent trespasses upon county land would be vested in the county court because that body is vested with the control and management of property belonging to the county and is directed to take what action may be necessary to prevent waste or damage to said property. Under the rule as above stated, the county is the real party in interest because it owns all county lands - the county court being merely the agent of the county with respect to the control and management of county lands.

In Stoddard County v. Malone 115 Mo. 508, the County of Stoddard instituted an action to recover damages for trespass upon certain lands belonging to the county. At l.c. 512, the court commented on the right of the county to bring said action and said:

> "The plaintiff being the owner of the land and no other person being in the actual occupancy thereof, can maintain its action for the injury complained of. Brown v. Hartzell, 87 Mo. 564 and cases cited."

While the Malone case is not directly in point in that it is a trespass action, we think it applies by analogy and that if the county is authorized to bring a suit to recover damages resulting from a trespass, it also is authorized to maintain a suit to prevent a trespass upon county property.

CONCLUSION

Therefore, it is our opinion that the county court is authorized to institute and maintain a suit for injunction in the name of the county against persons who are trespassing upon county property.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

LLB:RT

INSURANCE: Reasons for disproving articles of incorporation for Missouri Valley Mutual Casualty Company.

February 10, 1939

2-10 FILED 55

Hon. Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri

Dear Sir: Att: Charles L. Henson, Chief Counsel

We received your letter of February 7 in which you enclosed the proposed articles of incorporation of the Missouri Valley Mutual Casualty Company for our examination and approval as is required by law. The incorporators are attempting to form a company under the above name under the terms of Article 7, Chapter 37, R.S. Missouri, 1929.

We are unable to approve the articles of incorporation for the following reasons:

(1) Article III of said articles reads in part as follows:

> "The specific kind of business which this corporation proposes to transact, is to write, grant and issue policies of insurance on automobiles, both passenger cars, commercial, and other vehicles including their contents, in all of its phases, covering against the hazards of fire, lightning and transportation; tornado; cyclone, windstorm, hail, earthquake, explosion, flood and water damage; glass breakage; theft, robbery, and pilferage; collision and upset, and all kindred and associated coverages, including comprehensive coverage; * * *." (Underlining ours).

The meaning of the above language is that the company would be authorized to write a fire policy only or any other coverage mentioned therein on motor vehicles.

This is in violation of the terms of Section 5844, which section is contained in Article 7, Chapter 37, R.S. Missouri, 1929. The pertinent part of this section reads as follows:

> "Automobile insurance. Against any or all loss, expense and liability resulting from the ownership, maintenance or use of any automobile or other vehicle; Provided, no policies shall be issued under this subsection against the hazard of fire alone."

The use of the term "comprehensive coverage" in connection with automobile insurance, as we understand the term, means the authority to write a full coverage policy including fire liability and property damage insurance. We are informed that the term is so used and considered in insurance circles. That being true, the incorporators have apparently attempted to form a corporation authorized by its charter to write fire insurance alone on automobiles, and also the right to issue policies including full coverage. Since such provision is in violation of said Section 5844, supra, it is not in proper form and cannot be permitted in the articles of incorporation.

(2) Another part of Article III is in the following language:

> "This corporation shall also have authority to buy, lease, rent, sell, exchange, let, mortgage, and otherwise acquire and dispose of real estate and buildings necessary for its use, or for the benefit of its policyholders, and to exercise any and all other powers and rights not prohibited by law."

Unquestionably, the corporation, as such, has the power and authority to buy, lease, rent, sell, exchange, let, mortgage and otherwise acquire and dispose of real estate necessary for its corporate use in carrying on the business of the company when duly formed. However, when the corporation is formed, it will become an entity, distinct and apart from its incorporators or members or policy holders, and it will have no right to acquire and hold real

estate "for the benefit of its policy holders", or one or more of them. Nowhere does the insurance law provide that property can be purchased for other than strictly corporate uses.

(3) Article IV reads as follows:

> "The annual meeting of the memberships of this corporation shall be held at its home office on the third Tuesday of January of each year at ten o'clock A.M., unless otherwise changed by the Board of Directors as provided for in the by-laws of this corporation. A majority of all members or incorporators present, in person or by proxy, at any of the meetings of the membership or incorporators, shall constitute a quorum for the transaction of its business, and every decision of a majority of these persons duly assembled shall be valid as a corporate act."

Apparently, the incorporators are attempting here to provide that if a majority of the incorporators are present at any annual meeting, that a meeting of such incorporators can take the place of and act in lieu of a meeting of the members. The language is in the alternative. It states that "a majority of all the members or incorporators present" shall constitute a quorum for the transaction of its business at the annual meeting. This section is in conflict with Section 5847, also contained in said Article 7, Chapter 37, R.S. Missouri, 1929, which reads as follows:

> "Every member of the company shall be entitled to one vote, or to a number of votes based upon the insurance in force, the number of policies held, or the amount of premiums paid, as may be provided in the by-laws."

Consequently, the attempt to place the management of the company in the hands of the incorporators or a majority of them is contrary to law and cannot be approved and permitted in the articles of incorporation.

For the above reasons, we are unable to approve and certify the articles of incorporation of the Missouri Valley Mutual Casualty Company, and we are returning the articles, together with the affidavit of publication, to you herein.

Yours very truly,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

JFA:VAC
Enc.

INSURANCE DEPARTMENT: Approval of affidavit of change in number of Directors of Pyramid Life Insurance Company.

February 25, 1939

FILED
55

Honorable Ray B. Lucas
Superintendent
Department of Insurance
Jefferson City, Missouri

Dear Mr. Lucas:

This is to acknowledge the letter of Mr. Charles L. Henson, Chief Counsel, under date of February 24, 1939, enclosing an affidavit of change in number of Directors of the Pyramid Life Insurance Company of Kansas City, Missouri.

We have examined the affidavit and find same is in due form, and has the approval of this department.

Very truly yours,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
MW:RT

INSURANCE: Approval of Amended Articles of Incorporation of Central Mutual Casualty Company of Kansas City.

May 16, 1939

5-17

FILED
55

Hon. Ray B. Lucas, Superintendent
Department of Insurance
Jefferson City, Missouri

Attention: Charles L. Henson, Chief Counsel.

Dear Sir:

We have received from you the proposed Amendment of Articles of Incorporation of the Central Mutual Casualty Company of Kansas City, a corporation organized and existing under the provisions of Article 7, Chapter 37, R. S. Mo., 1929.

We have examined the said Amended Articles of Incorporation and find the same to be in accordance with the provisions of Article 7, Chapter 37, R. S. Mo., 1929, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

We are enclosing the original amendment of said articles and also document furnished by the company showing the original and amended articles in parallel columns.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

JFA:RW

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

HABITUAL DRUNKARDS; Not confinable in state institutions under order of probate court.

June 1st, 1939.

6-1

FILED
55

Hon. A. L. Luther,
Prosecuting Attorney,
Scotland County,
Memphis, Missouri.

Dear Sir:

This department is in receipt of your letter of May 29th, as follows:

> "I would like to have an opinion in regard to whether or not under Section 509, Article 19, Chapter I, R.S. Missouri, 1929 if it is possible that this Section can be so construed that the Probate Court would have power to confine a habitual drunkard in the State Hospital at the expense of the County where the patient has no funds."

Section 509, R. S. Mo. 1929, reads as follows:

> "All residents of this state, except those in the condition of senility, or suffering pain from incurable disease, who are or shall become habitual users of opium, cocaine, or of some salt or derivative of these drugs, to such an extent as to become what is commonly called or known as "dope fiends" or "addicts," shall be subject to involuntary confinement in the state hospitals for insane persons, under treatment by the medical

> staffs of such hospitals, for the cure of such habit, and for such period of time as shall be necessary to accomplish such cure. Persons so confined shall be entitled to be released when, and not before their appetite for such drug, or drugs, has been thoroughly eradicated, which cure shall, prima facie, depend upon the opinion of the hospital superintendent where the confinement occurs."

It is the opinion of this department that the probate court does not have the power under this section to confine habitual drunkards in any of the state institutions under any circumstances.

Section 508, R. S. Mo., 1929, provides that habitual drunkards may have guardians appointed, but distinguishes them from drug addicts.

It is our opinion, therefore, that habitual drunkards cannot be confined in state institutions under this, or any other, section of out laws, either at the cost of the county or with the costs to be paid from their estates.

Very truly yours,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General.

RLH/rv

July 18, 1939 7/15

FILED
55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. Charles Harvey
Assistant Counsel

Dear Sir:

We have received your letter of July 15th, in which you enclosed the original and one copy of the proposed Articles of Association of the Public Mutual Casualty Company. We have examined the said Articles and we find the same to be in accordance with the provisions of Article 7, of Chapter 37, R. S. Missouri, 1929, and not inconsistent with the Constitution and Laws of the State and of the United States.

We observe, however, that there is no declaration of intention to form the company attached to the said Articles. Probably the same is on file in the Insurance Department, as is required by Section 5797, R. S. Missouri, 1929. We note also that the proof of publication shows that the declaration of notice of intention to form a company was published, and consequently the said declaration of notice must have been on file as is required. If so, then the incorporators would have likewise complied with the laws in this particular, although we have no knowledge as to whether or not this was done.

We are returning herein the original Articles of Association.

APPROVED:

Yours very truly,

COVELL R. HEWITT
(Acting) Attorney General.

J. F. ALLEBACH
Assistant Attorney General.

JFA:RW

INSURANCE: Approval of reduction and increase of capital stock of St. Louis Fire and Marine Insurance Company.

August 1, 1939

8-7

FILED
55

Honorable Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Attention: Mr. William G. Chorn

Dear Sir:

We have received your letter of July 31st in which you enclosed certified copies of the meetings of the stockholders and directors of the St. Louis Fire and Marine Insurance Company whereby the amount of the capital stock of said company was reduced to $175,500.00 by reducing the par value of each share of common stock from $10.00 per share to $6.50 per share, together with the simultaneous increase of the capital stock of said company from $175,500.00 to $212,500.00, such increase consisting of a new issue of 37,000 shares of preferred stock of the par value of $1.00 per share. Further, that the total reduction in the par value of the common stock amounted to $94,500.00, which amount was transferred to the surplus account of the company. Further, that the new issue of preferred stock of the par value of $1.00 per share was to be sold at $4.00 per share, and $3.00 of each share, or a total of $111,000.00 was to be credited to the surplus account of said company.

You have also sent us a report of an examiner of the Insurance Department showing that said entire new issue of preferred stock has all been subscribed and paid for in full. Also attached to said report is the affidavit of the president and secretary of the St. Louis Fire and Marine Insurance Company, stating that the entire authorized issue of 37,000 shares of the preferred stock has been fully subscribed and paid for.

It also appears from the certified copy of the meeting of the stockholders authorizing such reduction and increase in the amount of capital stock, that all the stockholders of the company were represented either in person or by proxy at said meeting.

We are of the opinion that the certified copies of the proceedings, both of the stockholders' and directors' meetings of the St. Louis Fire and Marine Insurance Company, are in

accordance with the provisions of Articles VI and X of Chapter 37, R. S. Mo. 1929, and are not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JFA:VC

INSURANCE: Approval of amendment to Articles of Incorporation of Kansas City Life Insurance Company changing date for annual meeting of stockholders.

September 12, 1939

9-1

FILED
55

Hon. Ray B. Lucas
Superintendent
Insurance Department
Jefferson City, Missouri

Att: William G. Chorn

Dear Sir:

We have received your letter of September 2 in which you enclosed a certified copy of the corporate records of the Kansas City Life Insurance Company, showing an amendment to Article 8 of the Articles of Incorporation changing the date of the regular annual meeting of the stockholders from the second Monday in January of each year to the third Monday in January of each year. The enclosures you sent include the minutes of meetings of the Board of Directors and also the minutes of a special meeting of the stockholders of the company.

We have examined the certified copy of these records and we are of the opinion that the proceedings were regular and that the amendment was properly adopted. We find that the same is in accordance with the provisions of Article 2, Chapter 37, R.S. Missouri, 1929, and not inconsistent with the Constitution and laws of the State of Missouri and the United States.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

JFA:VAC

INSURANCE: Disapproval of proposed Articles of Incorporation of Industrial Benefit Insurance Company.

September 27, 1939

9-27

FILED
55

Hon. Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri

Att: Charles Harvey

Dear Sir:

We have received your letter of September 22 in which you enclosed the proposed Articles of Incorporation of the Industrial Benefit Insurance Company.

We are unable to approve the proposed Articles of Incorporation. It is apparent that the incorporators are attempting to form a new corporation under the terms of Article 4, Chapter 37, R.S. Missouri, 1929, and in such attempt, they have not complied with the provisions of that article as to form or requirements. While the title or heading to the said articles indicates the same as amended Articles of Incorporation, yet the articles themselves do not provide that any existing charter is to be thereby amended. The first paragraph of the articles reads as follows:

> "BE IT KNOWN, that we, the undersigned, E.G. Rankin, L.D. Holder, S.W. Wells, B. Hollander, R.L. Holder and J.E. Bantle, being all the members of the present Board of Directors of INDUSTRIAL BENEFIT ASSOCIATION, together with J.B. Rule, M.D., all citizens and residents of the State of Missouri, do hereby associate ourselves together as a body politic under the name and style of INDUSTRIAL BENEFIT INSURANCE COMPANY, for the purpose of doing a life, accident and Health insurance business on the

> stipulated premium plan as a mutual company, as defined and regulated by the provisions of Article 4, Chapter 37 of the Revised Statutes of Missouri, 1929, and for that purpose do hereby enter into the following agreement:"

The above paragraph states that the undersigned, being all the members of the present Board of Directors of the Industrial Benefit Association "associate themselves together as a body politic" for the purpose of doing a life, accident and health insurance business on the stipulated premium plan. Since there is no indication whatsoever in the wording of the articles to the effect that an existing charter is being amended, and since the wording indicates that a new corporation is being formed, the same can only be viewed as an attempt to form a new corporation.

This being the case, the incorporators have not complied with the terms of Section 5760, R.S. Missouri, 1929, and contained in Article 4, Chapter 37, dealing with incorporation of stipulated premium companies.

Section 5760, supra, provides that the incorporators shall associate themselves by articles of agreement, in writing, duly signed and acknowledged, setting forth, among other things, the following:

> " * * third, the amount of the capital stock of the corporation, provided the same be a stock company, which shall not be less than $25,000, the number of shares into which it is divided, and the par value thereof, that the same has been bona fide subscribed, and actually paid up in lawful money of the United States, and is in the custody of the persons named as the first board of directors; the name and place of the several shareholders and the number of shares subscribed by each; *"

It will be observed that nowhere in the proposed Articles of Incorporation is there any mention of the amount of capital stock of the company or that capital stock in the amount of not less than $25,000.00 has been fully subscribed and paid up in cash, together with the number of shares into which the same is divided, and the par value thereof. The Articles of Incorporation do not indicate what sort of a financial structure it proposes to have in order to comply with the insurance laws of this state or any information to indicate that the financial requirements and capital setup, as provided for in Article 4, has been or will be complied with.

Attached to the Articles of Incorporation is a copy of a resolution of the Directors of the Industrial Benefit Association wherein it is resolved that the said Industrial Benefit Association accepts and adopts the provisions of Article 4, Chapter 37, R.S. Missouri, 1929, for the purpose of conducting the business of the company on the stipulated premium plan. The resolution further provides that the name of the company be changed to that of the Industrial Benefit Insurance Company and further that the officers "are hereby directed to cause the Articles of Association to be amended to conform to and comply with said Article 4, Chapter 37, Revised Statutes of Missouri, 1929, and amendments thereto, and that they be authorized and directed to obtain a Charter or Certificate of Incorporation under said Article and Chapter". It appears, also, that the incorporators of the Industrial Benefit Insurance Company are composed of the Directors of the Industrial Benefit Association only. This resolution, of course, either authorizes the incorporators to amend the Articles of Association of the Industrial Benefit Association or to form a new company. As we said above, there is nothing in the articles themselves to indicate that any existing charter is being amended. Further, if a new company is being formed, and that appears to be the effect of the articles, then the statutory requirements have not been fully complied with.

CONCLUSION.

Therefore, since the proposed Articles of Association of the Industrial Benefit Insurance Company, as submitted, provide for the formation of a new company, and since the direct statutory requirements as to the form of said articles has not been complied with, this department cannot approve the same.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

JFA:VAC

INSURANCE: Approval of articles of incorporation of Mutual Commerce Casualty Company.

September 27, 1939

9-27

FILED
55

Hon. Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri

Att: Mr. Charles Harvey

Dear Sir:

We have received your letter of September 21 to which you attached the proposed articles of incorporation for the Mutual Commerce Casualty Company, together with the declaration of the incorporators setting forth their intention to form a corporation for the purpose of transacting a mutual casualty business under the terms and provisions of Article 7, Chapter 37, R.S. Missouri, 1929.

We have examined said articles of incorporation and it is our opinion that the same are in accordance with the provisions of Article 7, Chapter 37, R.S. Missouri, 1929, and are not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

Yours very truly,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

JFA:VAC

INSURANCE: The "Safe Driver's Reward" which involves a return of 15% of premium by casualty companies to policy holders in the event no claims are reported is a rate making device only and, therefore, proper.

November 4, 1939

11-9 FILED 55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

We have received your letter of October 17, 1939, which reads as follows:

> "Certain stock companies are writing insurance policies to automobile owners providing for a return of about fifteen per cent of the premium at the end of the year in the event the policy-owner does not have a claim under his policy. This is known as a Safe Driver's Reward, and the question has been raised with us that probably a stock company cannot write a policy which provides for a return of a portion of the premium at the end of the year. This question has been raised in view of the opinion furnished to us by Assistant Attorney General Hoffman, dated August 14, 1936, and the further opinion by Assistant Attorney General Wasserman, dated January 5, 1938.
>
> "We would like for your office to advise us whether or not, in your opinion, these stock companies can legally write such a policy in Missouri."

As we understand the situation, the stock insurance companies you have in mind are incorporated and are engaged in the writing of casualty insurance under

the terms of Article 6, Chapter 37, R.S. Missouri, 1929; that such companies have put in force a plan whereby 15% of the total premium paid for automobile casualty insurance is returned to the policy holder at the end of the policy year in the event the insured does not have a claim under the policy within that period; that this plan is known as the "Safe Driver's Reward".

We have been unable to find any statute which appears to deal, either directly or indirectly, with automobile casualty rates. The Legislature has never said that automobile casualty insurance rates are to be regulated in any way. Full competition, therefore, appears to be sanctioned in this particular field of insurance rates and the companies engaged in such business apparently are permitted to establish their own rates.

In the case of Aetna Casualty and Surety Company v. Lawson, 166 S.E. 811 (S. Ct. of App. of W. Va.), the contention was made that since indemnity insurance companies were subject to the same "examination and supervision" by the Insurance Commissioner as were fire insurers that the Insurance Commissioner, therefore, had the authority to regulate rates of indemnity companies. The court, in holding that the Commissioner's duties with respect to rates went no further than fire insurance rates and did not include the supervision of rates on indemnity insurance because the Legislature had not so provided, said at l.c. 812:

> "As long as competition is sanctioned in any business, those engaging therein are permitted to establish their own rates. And when, in the opinion of the Legislature, regulation thereof becomes necessary, such businesses are by legislative enactment placed under designated regulatory bodies. The fact that fire insurance has been subjected to such regulation does not show legislative intent to regulate indemnity companies."

If and when the Legislature determines that regulation of automobile casualty rates are necessary, then, by statute, the matter of rates will be placed under the supervision and direction of a designated regulatory body as has been done in this state in connection with fire insurance rates. However, until that is done, neither the Superintendent of Insurance nor any other person or department has any regulatory powers over automobile casualty rates. Therefore, if the return of 15% of the premium at the end of the year to the policy holder as a reward for not having a claim under the policy involves only a question of rates, and we believe that it does involve only a rating question, then the plan would appear to be permissible.

If the plan you have outlined is something other than a rating plan only, it would be necessary to say that the policy holders were being permitted to participate in the surplus earnings of the company. In other words, stock casualty companies would, in that event, be issuing participating contracts of insurance to those who might emerge at the end of a year with no losses. However, we do not believe such a plan can be called a participating contract.

A participating policy is thus described in Cooley's Briefs on Insurance, Vol. 1, 2nd Ed., page 164:

> "A common form of life policy is that known as a 'participating policy', by virtue of the provisions of which the insured is entitled to share in the surplus earnings of the company in proportion to the premiums paid on the amount of his policy. This share in the surplus may be payable to him, at the option of the company, at a certain fixed period or as dividends. In the absence of a statutory provision, the time of distribution of a surplus to policy holders depends on the discretion of the directors of the company, except so far as it may be determined by the charter of the company or valid by-laws."

Again, on page 783, Cooley says:

> "A participating policy is one in which the insured shares in the profits arising from the premiums paid by himself and all others belonging to his class."

In other words, a participating policy is one where the policy holders share in the "profits" or "surplus earnings" of the company. If there should be no profits or surplus earnings, then there could be no dividends paid. Obviously, it would be impossible to ascertain at the beginning of a period the exact amount of profits or surplus earnings the company might realize at the end of such period. The surplus earnings might be large - in which event the participation could be correspondingly large. Again, such earnings might be very small or the business of the period might have sustained a loss. In any event, such dividends are ordinarily paid at the option of the company and at such times and in such amounts as the company might determine.

In the plan you outline, 15% of the premium is returned under certain conditions whether the company has realized a profit or not. The company has agreed to do this by contract. The policy holder is entitled to receive the 15% whether the company or its board of directors has declared a dividend out of surplus earnings or not. We think it is clear that the contracts containing the plan you have outlined are not participating contracts of insurance, but merely constitute a method of ascertaining the rate on a certain class of risks. Since it cannot be called a participation or a dividend plan whereby the policy holder shares in the "profits" or "surplus earnings" of the company, it must be only a rate system and, therefore, proper under existing laws.

CONCLUSION.

It is our conclusion that the "Safe Driver's Reward" plan, whereby 15% of the premium is returned to the policy holder at the end of the policy period by certain stock casualty companies in the event no claims are submitted under the policy contract, is a rate making device only, and since there is no control over automobile casualty rates in this state, there can be no objection to the plan you have outlined.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

INSURANCE: Contract whereby Royal Provident Corporation of America agrees to replace lenses in glasses and give free adjustment on frames is insurance contract.

November 14, 1939

11-20

FILED
55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads as follows:

> "The Royal Provident Corporation of America, Title Guaranty Building, St. Louis, Missouri, has recently been incorporated and granted a charter under Article VII of Chapter 32, Revised Statutes of Missouri, 1929, which article pertains to manufacturing and business companies. The purposes for which the corporation was formed are set out in Section 7 of its articles of incorporation, which reads as follows:
>
> "'That the corporation is formed for the following purposes:
>
> "To solicit members in the association for the purpose of securing service on eyeglasses, eyelenses, and appurtenances, of said members; To offer adjustment service to all members on all types of eyeglass frames without any additional charge; To offer service on all types of eyeglass lenses; To buy, sell, manufacture, or otherwise deal in all types of frames, lenses, or other appurtenances pertaining to the sale,

purchase, and use of all types of eyeglasses; To own real and/or personal property and to buy and sell real and/or personal property; And to do any and all acts necessary and proper in connection therewith.'

"The Corporation solicits members and charges a membership fee of $1.00 per year. A copy of the application for membership and a membership card issued by the Corporation are enclosed herein. In return for the $1.00 membership fee, no interest in this stock company is given to the subscriber. But the Corporation offers free adjustments and minor repairs to eyeglasses and discounts for appurtenances to eyeglasses equal to at least 33-1/3% to these 'members'.

"The Corporation agrees that upon the breaking of a lens of a member's eyeglasses, it will replace such lens for 75¢ for each single vision lens and $1.25 for each bifocal lens. The member may avail himself of this service as often as necessary during the life of the contract. The Officers of the Corporation inform us that they purchase the lenses for replacement from the Bachman Optical Company, of St. Louis, Missouri, and that by purchasing said lenses in large quantities they are able to obtain them for less than 75¢ for single vision lenses and $1.25 for bifocal lenses in almost every instance. They say that there may be a very few occasions when the lenses will be more than that price. Investigation may be necessary to determine whether or not this company carries lenses in stock. They may only refer the member to the Optical Company for the service, the cost being reimbursed by the company to the Optical Company.

* * * * * * * * * * * * *

"This Department respectfully requests your opinion, * * as to whether the plan of operation, as above outlined, constitutes the doing of an unauthorized insurance business * * * * ."

The application for membership blank used by the corporation, after providing blanks for the name and address of the applicant, together with a detailed description of the "present usable eyeglasses" of the applicant, then recites:

"Applicant agrees to pay to the Royal Provident Corporation of America the sum of One Dollar (-1.00) as annual membership fee, payable in advance for one year from above date, at the time of signing this application."

On the back of this membership blank, we note the following:

"The fee as stated herein entitles the member to the following benefits:

"1.-Replacement of lense or lenses at any time during the membership period, upon payment to the Association of a service charge of 75¢ for each single vision lense replaced, or $1.25 service charge for each double vision (bifocal), lense replaced.

"2.-A discount of not less than 33-1/3% in the event the member desires to purchase new lenses or frames, if the same are purchased through the Association.

"3.-Free adjustments on frames at any time during the membership period.

"It is agreed with the member -

"1.-That all replacements, adjustments, or new lenses or frames purchased through the Association will be made by the Bachman Optical Company.

"2.-That the Association may, at its option, cancel the membership herein contracted, upon giving to the member ten (10) days notice of its intention to do so, and refund to said member the membership fees paid.

"3.-That the member agrees to furnish to the Association all pieces and parts of the broken lense or lenses, regardless of condition, together with all frames or mountings formerly attached thereto, such broken pieces to remain the property of the Association. If it is impossible to replace the lense or lenses from the broken pieces furnished by the member, then the member agrees that he will furnish the Association with a copy of the prescription for such lenses, any cost of securing such prescription shall be borne by the member.

"4.-All discounts will be based upon the retail prices of the Bachman Optical Company."

It will be noted first that the Royal Provident Corporation of America is a stock company incorporated as a manufacturing or business company; that this stock business corporation issues certificates or contracts to anyone who wears eyeglasses and who desires the benefits made available by such a contract; that the annual membership fee is $1.00, payable in advance, and in return, the applicant is entitled to receive as benefits the replacement of single vision lenses (if the same are

broken or destroyed in any manner whatsoever) for the sum of 75¢ each, and in a like manner, bifocal lenses for $1.25 each. The cost of 75¢ or $1.25, as the case might be, is designated in the application as a "service charge". The applicant is entitled to a "discount of not less than 33-1/3% in the event the member desires to purchase new lenses or frames, if the same are purchased through the Association". Free adjustment on frames is also given at all times. The question is, then, whether such contracts are in fact contracts of insurance.

Section 5892, R.S. Missouri, 1929, provides in part as follows:

> "No company shall transact in this state any insurance business unless it shall first procure from the superintendent of the insurance department of this state a certificate stating that the requirements of the insurance laws of this state have been complied with authorizing it to do business; * * * * * * * * *."

Section 5893, R.S. Missouri, 1929, provides in part as follows:

> "No individual or association of individuals, under any style or name, shall be permitted to do the business mentioned in this chapter within the state of Missouri unless he or they shall first fully comply with all the provisions of the laws of this state governing the business of insurance."

Section 5909, R.S. Missouri, 1929, states in part as follows:

> "Any association of individuals, and any corporation transacting in this state any insurance business, without being authorized by the superintendent of the insurance department of this state so to do, or after the authority so to do has been suspended, revoked, or has expired, shall be liable to a penalty of two hundred and fifty dollars for each offense * * ."

In the case of State ex rel. Duffy v. Western Auto Supply Company, 134 Ohio St. 163, 16 N.E. (2nd) 256, decided in the year 1938, the respondent, Western Auto Supply Company, a Missouri company and a business corporation, was engaged in the sale of automobile parts, accessories and equipment and pneumatic rubber tires in various locations of the State of Ohio. The respondent, upon a sale of a tire, would issue one of two types of contracts, each of which were called a "guarantee" to each buyer. One form was a specific guarantee for the period stated therein "against blow-outs, cuts, bruises, rim-cuts, under-inflation, wheels out of alignment, faulty brakes or other road hazards that may render the tire unfit for further service (except fire and theft)". It then provided that:

> "In the event that the tire becomes unserviceable from the above conditions, we will (at our option) repair it free of charge, or replace it with a new tire of the same make at any of our stores, charging . . . th of our current price for each month which has elapsed since the date of purchase. The new tire will be fully covered by our regular guarantee in effect at time of adjustment. Furthermore: every tire is guaranteed against defects in material or workmanship without limit as to time, mileage or service."

In the blank spaces were inserted the trade name of the tire, the period covered by the guarantee and the fractional part thereof represented by a single months' wear. The other form constituted a guarantee "to wear" for not less than the period therein specified and then provides as follows:

> "Should the tire fail within the replacement period, return it to the nearest Western Auto Store and we will either repair it free or replace it with a new tire, charging you a proportionate part of the current price for each month you have had the tire."

In holding that the agreements were really contracts of insurance and not merely guarantees of material and workmanship, the court said:

> "Are such agreements of guarantee permissible as incidental to the sale of automobile tires; or do they constitute 'the business of insurance' or 'the business of guaranteeing against liability, loss or damage' or are these agreements of guarantee 'contracts substantially amounting to insurance' within the purview of Section 665, General Code, and therefore inhibited?
>
> "What is insurance? 'Broadly defined, insurance is a contract by which one party, for a compensation called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party

promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause.' 32 Corpus Juris, 975. It is a contract 'to indemnify the insured against loss or damage to a certain property named in the policy, by reason of certain perils to which it may be exposed.' State ex rel. Sheets, Atty. Gen., v. Pittsburgh, C., C. & St. L. Ry. Co., 68 Ohio St. 9, 30, 67 N.E. 93, 96, 64 L.R.A. 405, 96 Am. St. Rep. 635; State ex rel. Physicians' Defense Co. v. Laylin, Secy. of State, 73 Ohio St. 90, 97, 76 N.E. 567.

"It seems well settled that to constitute insurance the promise need not be one for the payment of money, but may be its equivalent or some act of value to the insured upon the injury or destruction of the specified property. It is well settled, also that the business of insurance is impressed with a public use and consequently its regulation, supervision and control are authorized and required to protect the general public and safeguard the interests of all concerned. * * * * * * * * * *

"The respondent, in one of its forms of contract, specifically guarantees 'against defects in material and workmanship without limit as to time, mileage or service;' but it goes further and undertakes to indemnify the owner of such tires against all road hazards (except fire and theft) which may render his tire unfit for service. The terms employed in the guarantee

are sufficiently broad to include not only damage from blow-outs, cuts and bruises, whether resulting from under-inflation, faulty brakes or misalignment, but any and every hazard, including collisions, whether resulting from negligence of the owner or another. It clearly embraces insurance upon the property of the owner, such as is authorized by the provisions of Section 9556, General Code, to be written by companies required to comply with the insurance laws of the state.

"The ultimate force and effect of the contract of indemnity embraced in this guarantee may be appreciated if extended to cover not only the automobile tire but the automobile itself. Surely no one would contend that an undertaking by an automobile manufacturer to replace an automobile damaged or destroyed (excepting only by fire and theft) within a specified period after its purchase is not a contract to reimburse one if he suffers loss from a specified cause or to indemnify him against such loss.

"The fact that such contract of indemnity is made only with the purchaser of the indemnitor's product does not relieve the transaction of its insurance character. When the sale is complete, title passes and the property which is the subject of insurance or indemnity belongs to the purchaser. If the contracts of indemnity involved here are not violative of the insurance laws, then every company may, in consideration of the purchase price paid therefor, furnish its product and also undertake to insure it against all hazards for a specified period. Even if such contract is an incident in

> the sale of merchandise and its use therein does not constitute the business of insurance, it in effect is a contract 'substantially amounting to insurance' within the restrictive provisions of Section 665, General Code.
>
> "We are unable to discern any essential difference in the character or effect of the various forms of agreement of indemnity made by the respondent and advertised in its catalogue. Each constitutes an undertaking to indemnify against failure from any cause except fire or theft and therefore covers loss or damage resulting from any and every hazard of travel, not excepting negligence of the automobile driver or another. It is substantially an unconditional promise of indemnity, and that is insurance."

In the contract involved in the above Western Auto Supply case, the company agreed to replace a tire damaged as a result, for instance, of the owner's carelessness in not keeping the same properly inflated, provided the owner paid a certain monthly depreciation charge. In other words, the owner was to pay for the service he had received from the tire and the company furnished him with new equipment.

In the instant matter, the applicant pays $1.00 as an annual membership fee and then pays 75¢ or $1.25 for each replacement of a lens, regardless of how much the lens might actually cost the company. If the applicant carelessly or negligently breaks his lenses, he is entitled to this service provided he pays the stipulated amount.

The instant matter appears to be stronger than the Western Auto Supply case because there the seller was issuing the contract ostensibly as a "guarantee". In the instant matter, the Royal Provident Corporation of America

is not the seller, but is entirely a third party issuing the contract of replacement and adjustment after the sale has been completed.

Also, it was held in the Western Auto Supply case that an insurance contract, in order to be classified as such, need not promise the payment of money. The equivalent of money or some act of value to the insured upon the injury or destruction of the specified property was held to be sufficient. In that case the replacement or partial replacement of tires was considered sufficient to designate the same contract as an insurance contract. This is undoubtedly the general rule.

In the case of National Auto Service Corporation v. State (Court of Civil Appeals of Texas), 55 S.W. (2nd) 209, the corporation issued to its members a "membership certificate". This certificate provided, among other things, that for annual dues of $25.00, it would cause to be repaired in its membership garages during that year any damage to the member's automobile caused by accident, not less than $7.50 nor more than $250.00. A certificate for a maximum repair charge not to exceed $500.00 was also issued for an annual charge of $45.00. The certificates also contained the clause that "it must be clearly understood that this is not insurance, as the corporation never pays its members any money, as indemnity, except to repair any damage to members' automobiles at the corporation's authorized repair shop, as herein above provided". The corporation claimed that this method of doing business did not constitute writing insurance, but was merely a service charge to its members. In holding that the company was actually illegally engaged in the insurance business, the court said at l.c. 210:

> "Nor is it essential that loss, damage, or expense indemnified against necessarily be paid to the contractee. It may constitute insurance if it be for his benefit and a contract on which he, in case of a breach thereof, may assert a cause of action. Allin v. Motorist's Alliance, supra; 63 A.L.R. 715. In the

> instant case we think it clearly appears that the purpose of the contract made by appellant was, for a fixed consideration, to indemnify the holder of the certificate against loss resulting from accidental damage to his car within the limits fixed by the certificate, and that it constituted an insurance contract under the rules above announced."

In the case of People v. Roschli (Court of Appeals of New York), 9 N.E. (2nd) 763, it appeared that the Manhattan and Bronx Retail Grocers' Association was a domestic membership corporation in the State of New York. It maintained a so-called "Plate Glass Fund" for members only, which fund was administered by the secretary of the association who served without compensation. Any member who paid a certain sum of money annually into the fund "according to the amount of glass he wishes protected" could obtain the protection thus afforded on plate glass. It appeared that the aggregate of contributions at all times exceeded anticipated payments and at the end of each year a saving of about 50% was paid back to the members. The certificate issued by the association asserted that the "fund is not an insurance or indemnity company, nor does it take insurance risks or issue insurance policies". It appeared that no money was ever paid out of the fund to the members, but each broken or destroyed plate glass was replaced. In holding that this arrangement constituted a Reciprocal or Inter-Insurance arrangement, the court said at l.c. 764:

> "This fund was a device whereby the contributors, through a chain of reciprocal agreements, undertook to insure each other at cost."

There are several cases which hold that a contract, in order to be termed an insurance contract, must provide for the payment of money and nothing else.

Commonwealth v. Provident Bicycle Association, 178 Pa. 636; Moresh v. O'Regan, 120 N.J. Eq. 534. These cases, however, state the minority rule.

As we understand it, the Royal Provident Corporation of America claims that these contracts cannot be termed insurance contracts because single vision lenses usually cost them less than 75¢ and double vision lenses less than $1.25 because of its wholesale buying facilities in large quantities. That the company, therefore, usually makes a profit upon each replacement and this profit takes the contract out of the realm of insurance. We do not believe that this matter of profit to the company has any such effect. The above cases show that the contract to repair and adjust at all times, constitutes an insurance benefit. In this connection, we call attention again to the fact that the 75¢ or $1.25 charge is designated in the application blank or contract form as a "service charge". The company, therefore, by the language which it has used, considers the additional costs as compensation for services performed and not to cover the costs of the lenses which might be replaced. Further, the costs of such lenses when purchased by private persons must be considerably more than 75¢ or $1.25, or otherwise there would be no incentive or reason to buy such a contract. Therefore, the benefit must be that replacements of lenses to contract holders cost much less than the same replacements would cost one who had no such contract. This must constitute a benefit or no one would care to purchase the agreement. Since such benefits accrue to the contract holder if the lenses in his eyeglasses are broken, it must be "a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specific cause, or to guarantee or indemnify or secure him against loss from that cause", as stated in the Western Auto Supply Company case, supra. If the certificate holder is thus benefited, it would make no difference whether the "insurer" was also making a profit on the same transaction or not. The real test is the indemnity against loss to the "insured".

CONCLUSION.

It follows, therefore, that the contract issued by the Royal Provident Corporation of America whereby this company agrees to indemnify and save a contract holder free and harmless over and above a certain stipulated amount from loss occasioned by the breakage or destruction of lenses in his eyeglasses, and in which the company also agrees to make free adjustments on frames at any time, said contract being sold at an initial cost of $1.00, is in fact a contract of insurance.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

INSURANCE: Approval of articles of incorporation of Midwestern Fire and Marine Insurance Company.

November 18, 1939

11-20

FILED

55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Att: Charles Harvey, Assistant Counsel

Dear Sir:

We have received your letter of November 16 in which you enclosed the declaration of intention and proposed articles of incorporation of the Midwestern Fire and Marine Insurance Company, together with proof of publication of said declaration.

We are of the opinion that the said declaration and also the proposed articles of incorporation are in accordance with the provisions of Article 6, Chapter 37, R.S. Missouri, 1929, and that the same are not inconsistent with the Constitution and laws of the State of Missouri, or of the United States.

We are enclosing the said declaration, proposed articles of incorporation and proof of publication herein.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

INSURANCE: Approval of proposed articles of incorporation of the American Fidelity Life Insurance Company of Kansas City.

November 22, 1939

11-24
FILED
55

Hon. Ray B. Lucas, Superintendent
Insurance Department
Jefferson City, Missouri

Att: Charles Harvey, Assistant Counsel

Dear Sir:

We have received your letter of November 21 in which you enclosed the declaration of intention to form a life insurance company, under the provisions of Article 2, Chapter 37, R.S. Missouri, 1929, which has been filed in the office of the Superintendent of Insurance by the proposed incorporators of the American Fidelity Life Insurance Company of Kansas City, Missouri. Also enclosed was the proof of publication of said declaration.

We have examined said declaration of intention and proposed articles of incorporation and we find the same to be in accordance with the provisions of Article 2, Chapter 37, R.S. Missouri, 1929, and not inconsistent with the Constitution and laws of the State of Missouri and of the United States.

We are enclosing the proposed articles of incorporation, declaration and proof of publication.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

INSURANCE: Approval of articles of incorporation of the Old American Insurance Company.

December 7, 1939

12-7

FILED

55

Hon. Ray B. Lucas
Superintendent of Insurance
Jefferson City, Missouri

Dear Sir:

We have received your letter of December 7 in which you enclosed the declaration of intention of the incorporators to form the Old American Insurance Company under the terms of Article 6, Chapter 37, R.S. Missouri, 1929. You also enclosed the affidavit of publication of the intention to form said company.

We have examined the said declaration, articles of association and proof of publication and find the same to be in accordance with the provisions of Article 6, Chapter 37, R.S. Missouri, 1929, and not inconsistent with the Constitution and Laws of the State of Missouri and of the United States.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

WJB:VAC

NEWSPAPERS: Newspapers printing notices under section 5599, Laws of Missouri, 1931, page 141, must meet all the requirements of section 13775, Laws of Missouri, 1937, page 432.

March 21, 1939

Mr. T. G. MacLaughlin, President
Santa Fe Savings & Loan Association
916 Baltimore Avenue
Kansas City, Missouri

FILED
56

Dear Sir:

This department acknowledges receipt of your letter of March 7th, wherein you request an opinion relative to the following facts:

"Inasmuch as Building and Loan Associations are under the supervision of the State Bureau of Building and Loan Supervision, we respectfully request your opinion as to the construction of section 5599 R. S. Mo. 1929, as Amended Laws of Missouri, 1931, Page 146 with respect to the provision for foreclosure of mortgages and deeds of trust 'according to law'.

"We assume this expression refers to the general law respecting foreclosure, but our precise question is as to whether or not a notice published in a newspaper, which newspaper may not be able to comply with the provisions of Section 13775, Laws of Mo. -P 431 1937, is valid. For example, if a newspaper did not have a list of bona fide subscribers or was not admitted to the post office as second class matter, would a notice published therein be valid?

"Our reason for requesting this opinion is that recently there have been filed in Independence, Missouri, two cases seeking to set aside foreclosures on the ground that the newspaper in which the notices were published was not qualified under the law.

"We have several mortgages in Independence, and we wish to be sure of our ground in the event of forelosure."

Section 5599 R. S. Missouri, 1929, was repealed along with chapter 35, of article 2, relating to Building and Loan Supervision, and the entire chapter has been re-enacted by the General Assembly, Laws of Missouri, 1931, p. 141, et seq. The pertinent part of said section as re-enacted, page 152 Laws of Missouri, 1931, is as follows:

> "In case any borrowing shareholder shall become delinquent in his obligations to the association as provided by his loan contract, in a sum equal to or exceeding three months dues and interest, the association may proceed, according to law, to foreclose the mortgage or deed of trust given by such borrower as security for the loan. All other mortgages and deeds of trust, including purchase money, mortgages or deeds of trust, given to the association, may be foreclosed according to the general law as to foreclosure of mortgages and deeds of trust. In the event of such foreclosure, the defaulting borrower, in addition to the amount loaned, as shown by the bond and mortgage or deed of trust given by such borrower, shall be charged with all dues, interest, premium and fines, and other sums due and in arrears, and shall have and be given credit for the withdrawal value of the shares pledged and transferred by him as aforesaid, in accordance with the rule hereinafter provided for the withdrawal and cancellation of shares."

This section uses the expression "according to law" in the first sentence, and "according to the general law as to foreclosure of mortgages and deeds of trust." We think both refer to the general law as to foreclosure of mortgages and deeds of trust. In fact, if a deed of trust is given under the Missouri law relating to deeds of trust, of course the foreclosure must be according to the law relative to foreclosure of mortgages under deeds of trust. We therefore come to the conclusion that there is no distinction between "ac-

cording to law" and "according to the general law" relative to deeds of trust, as used in said section 5599.

The clause "according to law" has been defined in the decision of Missouri State Life Insurance Company, 276 S. W. 757, De Rockbraine School District v. Northern Casualty Company, 155 N. W. 10, Hirst v. Xeter Realty, 70 So. 339.

Having brought the terms of the statute within the provisions of section 13775, Laws of Missouri, 1937, page 431, we next determine your question as to whether or not a newspaper must comply strictly with the terms of said section, when a deed of trust as contained in said section 5599 is foreclosed. We are enclosing two copies of opinions relating to the construction of section 13775; one being to Hon. Dwight H. Brown, Secretary of State, Jefferson City, Missouri, dated February 7, 1938, the other to Hon. C. R. Hayes, Prosecuting Attorney, Salem, Missouri, dated February 20th, 1936. These copies are enclosed for the purpose of showing that we have always placed strict construction on the terms of section 13775, as set forth in the copies of the opinions.

CONCLUSION

We are of the opinion that the terms of section 13775, Laws of Missouri, 1937, page 431, are mandatory on the newspaper printing legal notices and must be strictly complied with in every respect. In other words, if a newspaper cannot meet the requirements as contained in said section, then the notices published in said newspaper would be invalid.

Yours very truly,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

OWN:RW

CREDIT UNIONS: Cannot engage in general banking business.

August 1, 1939

8-5

FILED
56

Hon. Russell Maloney
Commissioner of Securities
Secretary of State's Office
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of July 13, 1939, which reads as follows:

> "Several Credit Unions in the State of Missouri which includes the Green City Credit Union have according to reports by our Examiners been pursuing the following practices.
>
> "1. Depositing funds and withdrawing with an order (similar to a check.) These deposits and withdrawals are made in such a manner as to indicate that the intention of the depositer was not to buy shares in the credit union, nor do the withdrawals indicate a withdrawal of the shares or borrowing.
>
> "2. Drafts are issued to persons who have made deposits, as well as persons who have not made deposits.
>
> "3. Fees are charged for the issuance of checks or orders, and drafts.
>
> "4. The method of depositing and withdrawing as well as the issuance of drafts indicate that the intention is to do a banking business.
>
> "This department would appreciate your advice as to the legality of the actions of these credit unions."

We understand from the above letter and also from another communication from you that the Green City Credit Union is engaging in a banking business by keeping money on deposit subject to check, or at least checks or instruments similar to checks, and fulfilling the same purpose, are being written by so-called depositors and are being honored and paid by the credit union upon presentation; that such banking business is carried on in a variety of other ways through the use of drafts issued by persons who have made deposits in such credit union, as well as to persons who have not made deposits; that regular fees are charged for the issuance of checks, orders or drafts and for the cashing of checks issued by the so-called depositors.

The laws governing the formation and operation of credit unions are found in Article 15, Chapter 32, R.S. Missouri, 1929, Sections 5079 to 5099, inclusive.

Section 5079 provides that any seven persons, residents of the State of Missouri, may apply to the Commissioner of Securities in the Office of the Secretary of State for permission to organize a credit union by signing and acknowledging in duplicate a certificate of organization and entering into articles of agreement. Further, that a copy of the by-laws shall be submitted to the Commissioner of Securities at the same time which, among other things, shall contain information as to the following:

> "The conditions under which shares may be issued, transferred and withdrawn, loans made and repaid, and the funds otherwise invested."

Section 5082 gives the powers of credit unions. This section reads as follows:

> "A credit union shall have the following powers:
>
> "(1) It may receive the savings of its members in payment for shares.
>
> "(2) It may make loans to members, through the credit committee and on deposit in the way and manner hereinafter provided.

> "(3) It may invest, through its board of directors, in the bonds of the United States, or of any state thereof or of any municipality, the bonds of which municipality are legal investments for savings banks in the state of Missouri. It may deposit its funds in savings banks, state banks, trust companies and national banks. The funds of the credit unions shall be used first, however, for loans to members in the way and manner hereinafter provided and preference shall be given to the smaller loan in the event the available funds do not permit all loans which have passed the credit committee to be made."

Section 5083 pertaining to the membership, provides as follows:

> "The membership shall consist of the organizers and such persons, societies, associations, copartnerships and corporations as have been duly elected to membership and have subscribed to one or more shares and have paid for the same in the whole or in part, with the entrance fee as required by the by-laws, and have complied with such other requirements as the certificate of organization may contain. Credit union organizations shall be limited to groups (of both large and small membership) having a common bond of occupation or association or to groups residing within a well defined neighborhood, community or rural district."

Section 5087 provides that the Board of Directors shall have the duty, unless the same be specifically reserved to the members, to

> "(1) To act upon all applications for membership and on the exclusion of members.

"(2) To determine, from time to time, rates of interest which shall be charged on loans.

"(4) To fix the maximum number of shares which may be held by the maximum amount which may be loaned to any one member; to declare dividends and recommend amendments to the by-laws."

As to the making of loans, Section 5088 provides:

"The credit committee shall approve every loan or advance made by the credit union to members. Every application for a loan shall be in writing, on a form prepared by the board of directors, and shall state the purpose for which the loan is desired and the security, if any, offered. Security must be taken for any loan in excess of fifty dollars; endorsement of a note or assignment of shares in any credit union shall be deemed security in the meaning of this section. No loan shall be made unless it has received the unanimous approval of the members of the committee present when the loan was considered, which number shall constitute at least a majority of the committee, nor if any member of the committee shall disapprove thereof."

As to what the capital and reserve funds of a credit union shall consist of, Section 5090 provides:

"The capital of a credit union shall consist of the payments that have been made to it by the several members thereof on shares. A credit union shall have a lien on the shares of any member and on the dividends payable thereon for, and to the extent of any loan made to him and of any dues and fines payable by him."

Section 5092 provides as follows:

> "A credit union may lend to its members at reasonable rates of interest, which shall not exceed one per cent a month on unpaid balances or invest the funds accumulated as herein provided."

Section 5093 provides as follows:

> "A credit union shall have the power to borrow from any source, but the total of such borrowing shall at no time exceed twenty-five per cent of the capital, surplus and reserve fund of the borrowing credit union."

As to loans, Section 5094 provides:

> "A credit union may loan to its members, as herein provided, for such purposes and upon such security as the by-laws may provide and the credit committee shall approve except that no unsecured loan shall be made in excess of fifty dollars and no secured loan shall be made in excess of one thousand dollars."

Therefore, it seems clear that a credit union can take into its membership only such persons, societies, associations, co-partnerships and corporations "as have been duly elected to membership and have subscribed to one or more shares and have paid for the same in whole or in part"; that loans can only be made to "members" when approved by the credit committee; that the only method a credit union has of receiving funds is through payments made by members for shares of stock other than such funds that might be borrowed as provided in Section 5093. We find no statute which provides that a credit union might receive money by way of a general or special deposit and pay it out on demand on the check or other similar device of the depositor in such a way as to thereby establish the relation of debtor and creditor between such company and the depositor. Furthermore, it appears to be clear that

no corporation organized under the laws of this state, except the bank, has authority to receive or keep moneys on general or special deposit and pay the same out on checks on the bank.

In the case of State ex inf. Crow, Attorney General, v. Lincoln Trust Company, 144 Mo. 562, the Attorney General proceeded by quo warranto against the defendant trust company because the defendant, a trust company only, was maintaining checking accounts and was doing a banking business, although not chartered to do so. The court said at l.c. 585:

> "But the question here is, are trust companies authorized by statute to receive money on general deposit, and pay it out on check at sight or on demand? If they have any such powers it must be found in the statute, for they possess only such express powers as are conferred upon them thereby, and such as are necessarily implied from the language used. In Matthews v. Skinker, 62 Mo. 329, it was said: 'Corporations have only such powers as are especially given by their charters, or are necessary to carry into effect some specified power. St. Louis v. Russell, 9 Mo. 507; Blair v. Perpetual Ins. Co., 10 Mo. 559; Ruggles v. Collier, 43 Mo. 353. They must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them. Railroad v. Marion Co., 36 Mo. 294. The distinction between natural persons and corporations is, that while the former may make any contract not prohibited by law or not against public policy, the latter can exercise no powers not expressly conferred on them by their charters.' Bank v. Young, 37 Mo. 398.

While the Matthews case was subsequently overruled by the Supreme Court of the United States (98 U.S. 621) in some respects, its soundness as to the powers of corporations under their charters was not doubted nor has it ever been called in question.

"The only words in the statute which have any tendency whatever to sustain respondents' position, are those in the first clause of said section 4 which authorize trust companies to receive moneys and 'to allow such interest thereon as may be agreed, not exceeding the legal rate,' and those in the fifth clause which authorize them 'generally to have and exercise such powers as are usually had and exercised by trust companies.' It is quite clear that no express power is conferred upon trust companies by said section to receive moneys by way of general deposit, nor can any such power be implied from the language quoted from that section. Implied powers must result from the charter by necessary implication, regard being had for the object and purpose of the corporation. And if there be any uncertainty or doubt as to the terms of the charter they must be resolved in favor of the public. In Minturn v. Larue, 23 How. 435, the court said: 'It is a well settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms used by the legislature, must be resolved in favor of the public. This principle has been so often applied in the construction of

corporate powers that we need not stop to refer to authorities.' Carroll v. Campbell, 108 Mo. 559; Charles River Bridge v. Warren Bridge, 11 Pet. 420; Mills v. St. Clair Co., 8 How. 569. There is nothing in the words used that would justify their extension by implication in favor of the respondents beyond the natural and obvious meaning of the words employed, and these do not support the right asserted. The fact that respondents are incorporated as trust companies seems to be inconsistent with the relation of that of debtor and creditor, and in favor of the relation of trustee and cestui que trust.

"Moreover, the powers conferred upon respondents are expressly enumerated, which implies the exclusion of all others not enumerated. In Thomas v. Railroad, 101 U.S. 71, the court observed: 'We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others.'

"It can not be implied from the fact that trust companies have the power to receive moneys and to allow such interest thereon as may be agreed not exceeding the legal rate, that they have the power to receive moneys on general deposit, and pay it out on demand. They can go no further than the statute expressly permits. The clause under consideration grants the right to accept

money and allow interest upon the same. This necessarily authorizes them to create the relation of debtor and creditor as to funds so deposited, but only to that extent. If they can receive money and agree to pay interest thereon, this money may be payable on demand, as well as at such times as may be fixed by agreement, and upon checks or written orders or otherwise as may be most convenient. This is as far as they can go. They have no authority to operate a general deposit account and receive money in any sums whatever upon which no interest is 'allowed' and pay out such funds upon the depositor's checks. It is enough to say that the legislature has not given such power.

* * * * * * * * * *

"In Railroad v. Canal Comm'rs, 21 Pa. St. 9, it was said by Black, C.J.: 'But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the State means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said; and words of equivocal import are so easily inserted by mistake or fraud, that every consideration of justice and policy requires that they should be treated as nugatory, when they do find their way in the enactments of the legislature. In the construction of a charter, to be in doubt is to be resolved; and every resolution which

springs from doubt is against the corporation.'

"Section 7, article XII, of the Constitution of this State, provides that: 'No corporation shall engage in business, other than that expressly authorized in its charter or the law under which it may have been or hereafter may be organized,' etc. See, also, People ex rel. v. Father Matthew Society, 41 Mich. 67. By section 26, article XII, of our Constitution under the title, 'Act creating banks, to be submitted to the people,' it is provided that: 'No act of the General Assembly authorizing or creating corporations or associations with banking powers (except banks of deposit or discount) nor amendments thereto, shall go into effect, or in any manner be enforced, unless the same shall be submitted to a vote of the qualified voters of the State, at the general election next succeeding the passage of the same, and be approved by a majority of the votes cast at such election.' The manifest purpose of this latter constitutional provision was to prevent the incorporation of banks of issue even with the sanction of the legislature, without such an act being first submitted to the people and approved by them.

* * * * * * * * * *

"It thus seems clear that no corporation other than a bank organized according to the laws of this State has the power to receive moneys on general deposit and pay them out on demand, on check or otherwise."

CONCLUSION.

It is, therefore, our conclusion that the Green City Credit Union, in carrying on the banking practices you mention, are exercising powers in excess of those granted, and in violation of the provisions of Article 15, Chapter 32, R.S. Missouri, 1929, governing such associations. This act provides definitely the way, and the only way, in which funds can be given to members, and to members only - that is, through the unanimous approval of the credit committee. From what you say as to the method by which funds are being disbursed, the statutory proceeding is not being followed. In this connection you have also asked what procedure you should follow. We can only suggest that you follow the provisions of Section 5084, which reads in part as follows:

> "Credit unions shall be subject to the exclusive supervision of the commissioner of securities and shall make a report of condition to him at least semi-annually, on blank forms to be supplied by said commissioner in January and July of each year, notice of which reports shall be sent out by said commissioner. * * * * * * * * * * * * * * *
> If it appears to said commissioner of securities that a credit union has violated any of the provisions of this article he may, by an order made over his official seal, after hearing or an opportunity for a hearing has been given said credit union, direct said credit union to discontinue its illegal methods and practices. If a credit union is insolvent or has, within a reasonable time, failed to comply with any order mailed to the last address filed by said credit union with said commissioner of securities he shall immediately, or within a reasonable time thereafter, take possession of the business and property of the credit union and retain possession until such time as he may permit it to resume business or its affairs are finally liquidated."

After you have directed the credit union to discontinue such practices and it fails or refuses to comply therewith your only alternative is to take possession of its business and property and retain such possession until such time as, in your opinion, the matters complained of are fully rectified.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

(Acting) Attorney General

JFA:VAC

INSURANCE:)
BURIAL SOCIETIES:)

United Mutual Life Assurance Society of America, Inc., cannot be licensed as a foreign corporation to do business in Missouri; if it does business without complying with the statutes it is a violation of the penal laws.

August 4, 1939.

8-7

FILED
56

Honorable Russell Maloney
Corporation Commissioner
Secretary of State
Jefferson City, Missouri

Dear Mr. Maloney:

This is to acknowledge your letter, as follows:

"Re: United Mutual Life Assurance Society of America, Inc.

"Find enclosed a copy of the articles of agreement, by-laws and certificate issued as a burial society by the above corporation.

"This department would like to know whether this corporation should be licensed as a foreign corporation to do business in Missouri. Also, whether or not, if it is not necessary for it to be licensed, such corporation would be violating any law in Missouri by doing business and issuing the enclosed certificate in Missouri."

The Articles of Incorporation read in part, as follows:

"The nature of the business and the objects and purposes proposed to be transacted, promoted and carried on, are to do any and all of the things herein set forth as fully and to the same extent as natural persons might or could do, and in any part of the world; viz:

"TO UNITE reputable men, women and children, not for pecuniary profit, but for the purpose of giving aid to widows, widowers, creditors, and those dependent on its deceased members, (nothing in the above shall be construed as to caring for dependent children), all such aid to be by voluntary contributions and not by fixed dues or assessments."

****

"This corporation shall not be for profit, nor shall it have any capital stock. Members shall be admitted on such terms and conditions as are provided in the By-Laws."

The above Articles of Incorporation specifically state that the corporation is one not of profit. Only foreign corporations formed for profit or pecuniary gain need be licensed to do business in this state.

Section 4596, R. S. Mo. 1929, provides in part, as follows:

"Every corporation for pecuniary profit formed in any other state, territory or country before it shall be authorized or permitted to transact business in this state * * * * shall have and maintain a public office or place in this state for the transaction of its business, where legal services may be obtained upon it, * * * * and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. * * *"

Section 4598, Laws of Missouri 1937, Page 205-206, reads in part, as follows:

> "Every company incorporated for the purpose of gain under the laws of any other state * * * * Upon compliance with these provisions by the corporation, the secretary of state shall give a certificate that said corporation has duly complied with the law, and is authorized to engage only in the business set out in the statement filed with its charter. * * * *"

It is noted from the above sections and others forming part of Article 1, Chapter 32, R. S. Mo. 1929, that only corporations organized for pecuniary profit or gain are required to take out a license in order to do business in this state. Mutual Orange Distributors v. Black et al., 287 S. W. 846. While the Secretary of State has only the authority to license foreign corporations organized for gain, yet it does not follow that a non-profit corporation organized in some other state may do business in Missouri without first complying with necessary statutory restrictions governing similar corporations that may be organized in this state.

The United Mutual Life Assurance Society of America, Inc., is a non-profit corporation organized under the laws of the State of Delaware and its business consists of issuing a certificate which is similar to policies issued by insurance companies. The certificate provides that the member must pay a stipulated sum in installments and while the policy is in force death benefits, old age benefits and benefits due to accidental loss to certain parts of the body are paid. If the installments are not paid, the member loses all rights to participate in the benefits. In the event of death of the member, the certificate provides "it is understood and agreed that the Society may make any payment provided for in this certificate to any relative by blood, or connection by marriage, or to any person appearing to the Society to be equitably entitled to the same by reason of having incurred expenses on behalf of the Member for his or her burial."

A reading of the Certificate, together with the Articles of Incorporation, show that said corporation is susceptible of being interpreted to be one which could engage in three business activities which are provided for by the Missouri Statutes, namely: (1) co-operative companies, Article 9, Chapter 32, R. S. Mo. 1929; (2) Insurance Companies, Chapter 37, Article 13; (3) Associations for the purpose of furnishing funeral or burial benefits to their members, Sections 5014 to 5018, inclusive, R. S. Mo. 1929.

No provision is found in our statutes whereby non-profit corporations, whether domestic or foreign, may engage in business as a co-operative company or as an insurance company or as a burial society unless compliance is made with the statutes governing same prior to engaging in business.

Section 5014, R. S. Mo. 1929, exclusively provides the method for incorporating a burial society. Whether said statute is constitutional or not, we do not decide. Rockhill Tennis Club v. Volker, 331 Mo. 947, 56 S. W. (2d) 9. However, the Kansas City Court of Appeals in the case of In re Henry County Mutual Burial Association, 77 S. W. (2d) 124, held that a burial association formed in one county in this state could not remove its location to another county unless it went through the same procedure as an original incorporation. The Court said: "Section 4997 (5014 R. S. Mo. 1929) provides for the original incorporation of such corporations. It will thus be seen that in order to change the location of a corporation of this kind, it is necessary to go through the same process that is required in the original incorporation of the Association."

Section 5018, R. S. Mo. 1929, reads as follows:

> "Any person, who, for himself, or as the agent for any firm, company, corporation, society or association, shall furnish, or attempt to furnish, any burial or funeral benefit without first complying with the provisions of this

> article, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars, or by imprisonment in the county jail for a period of not less than three months nor more than six months, or by both such fine and imprisonment."

From the above, it is our opinion, that a foreign incorporated non-profit association could not engage in business in Missouri as a burial society without first becoming incorporated in Missouri, as provided for in Section 5014, R. S. Mo. 1929. If a foreign non-profit society should engage in business in Missouri as a burial society without first complying with the Missouri laws, then such would be amenable to the penal provisions of Section 5018, R. S. Mo. 1929, in our opinion.

If said non-profit society of Delaware contends that it is not engaged in a burial society business, then it must either be engaged in an insurance business or doing business as a co-operative company. Of course, if it is doing an insurance business, then it has to comply with the provisions of Chapter 37, R. S. Mo. 1929, or be liable to the penal provisions of said chapter. If it contends that its society is neither engaged in selling insurance nor doing business as a burial society, then such would be doing business as a co-operative company and amenable to the provisions of Article 9, Chapter 32.

Section 4986 of Article 9, Chapter 32, reads in part, as follows:

> "Any person, co-partnership, association, organization, or corporation which is now engaged in or shall hereafter engage in issuing contracts or agreements* * * * providing for the maturing or fulfilling of such con-

> tracts or agreements in the order of their issue, or in some other fixed or arbitrarily determined order or manner * * * * shall deposit with the State Treasurer * * * * so that the whole deposit shall be equal in cash value to the sum of $25,000.00 * * * "

Section 4988 of Article 9, Chapter 32, reads as follows:

> "If any person, copartnership, association, organization or corporation, whether they be citizens of this state or of some other state, shall attempt to place or sell any contracts or agreements, or shall attempt to do or transact any business whatsoever in the name or on behalf of any person, copartnership, association, organization or corporation engaged in any business sought to be controlled by this article without first complying with the provisions of this article, said person, officer, agent, corporation or representative shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars or more than one thousand dollars for each offense,"

whether they be citizens of this state or of some other state.

From the above, we are of the opinion that any non-profit corporation incorporated under the laws of another state and which sells certificates providing for the maturing of such certificates in some fixed or arbitrarily determined order or manner (as subject corporation could contend it was doing) would be subject to criminal prosecution if compliance were not first made with Article 9, Chapter 32.

CONCLUSION.

It is our opinion:

1. That the United Mutual Life Assurance Society of America, Inc., cannot be licensed as a foreign corporation to do business in this state.

2. That said non-profit corporation in doing business in Missouri by issuing or selling its certificates would be violating the penal laws of this state unless it complied with Missouri statutes prior thereto and governing the type of business it desires to do.

We are returning the enclosures appended to your letter.

Yours very truly,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JLH:EY
CRH:EG

SCHOOLS:
SUPERINTENDENT:
QUALIFICATIONS:

County superintendent of schools is required to possess only one of the alternative qualifications set out in Section 9454, R. S. Mo. 1929.

January 4, 1939

15 FILED 57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this department which request is as follows:

> "Section 9454 of the 1929 statutes of Missouri setting up the qualifications of the county superintendent of schools. The question has been raised as to whether certain of the qualifications are mandatory and the other four qualifications are directory or optional. It seems from my reading of the section that the first of the two qualifications are mandatory, and the last four optional. The requirements being that the applicant for the office should have the first two qualifications and any one of the other of the four qualifications listed in the section in order.
>
> "Is this last clause the correct conclusion to be reached of the requirements that are necessary?"

The portion of Section 9454, R. S. Missouri, 1929, which applies to the question which you have submitted is as follows:

> "* * * * said county school superintendent shall be at least twenty-four years old, a citizen of the county, shall have taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or shall have spent the two years next preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of Missouri, or shall hold a first grade county certificate authorizing him to teach in the county of which he is superintendent; * * * * * * * * * * * * * "

The first part of this requirement is mandatory, that is, the superintendent must be twenty-four years of age and a citizen of the county. The remainder of this portion of the statute dealing with the superintendent's qualifications contains four different requirements, and your question goes to whether or not the superintendent should possess one or all of such requirements. These different requirements are separated by the word "or".

In Words and Phrases, Third Series, Volume V, page 653, concerning the word "or", it is said:

> "In its elementary sense, the word 'or' is a disjunctive particle indicating an alternative. It often connects a series of words or propositions, presenting a choice of either. Pompano Horse Club v. State (Fla.) 111 So. 801, 805, 52 A. L. R. 51."

We find where this section of the statute has been before our appellate courts on two different occasions. In one case, State v. Hodge, 8 S. W. (2d) 881, the court held that where the superintendent possessed one of these qualifications, that is, where he held a first-grade certificate, that he was qualified to hold the office. In the case of State ex inf. Chinn v. Hollowell, 288 Mo. 674, the

court held that if the person elected held a certificate of the board of regents of a state normal, that he was qualified to hold the office. From these two cases it is conclusive that if the candidate possesses anyone of the alternatives set out in said Section 9454, supra, that he is qualified to hold the office of county superintendent of schools.

CONCLUSION.

It is, therefore, the opinion of this department that if a candidate for the office of superintendent of schools has either taught or supervised schools as his chief work during at least two years of the eight years next preceding his election or appointment; or if he shall have spent the next two years preceding his election or appointment as a regular student in a state teachers' college or university, and shall at the time of his election hold a diploma from one of the state teachers colleges or state university, or shall hold a state certificate, authorizing him to teach in the public schools of the state, or if he holds a first grade county certificate authorizing him to teach in the county of which he is superintendent, that he is qualified to become superintendent of schools provided he is twenty-four years of age and is a citizen of his county.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

SHERIFF: A sheriff may serve warrant issued on a misdemeanor out of the Circuit Court in any other county in the State.

January 12, 1939

1-16 FILED 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have your letter requesting an opinion from this Department, which reads as follows:

"Suppose that I file direct in the circuit court of my county, an information on a misdemeanor. I would do this by virtue of the authority vested in me by sections 3501 and 3502 of the 1929 statutes. Suppose the defendant resides in some other county, other than this county of Morgan. Could the circuit clerk, as clerk of the criminal court issue a warrant for the apprehension of the defendant that could be served by the sheriff of Morgan County, Mo, said warrant being issued to the sheriff of Morgan County Mo.?

"It is my contention that the clerk of the circuit court of Morgan County, Mo, by virtue of the law that the circuit court has concurrent jurisdiction of any misdemeanor case, a criminal case in which I as prosecuting attorney would file direct in the circuit court, and the circuit clerk would have jurisdiction to issue a warrant to apprehend the defendant, said warrant issued to the sheriff of Morgan County, Mo, and without any further certification, and could be served

by the Morgan County sheriff on the defendant in any county in the state of Missouri.

"The clerk of the circuit court has in his office three blanks, copies of which I have included, which apply to the apprehending of defendants in criminal cases, on information filed in the circuit court. You will see where I have underlined in pencil the clause, "......be found in your county ....." The circuit clerk contends that this clause keeps him from issuing a warrant to the sheriff of Morgan County, Mo, where the defendant to be arrested lives outside of Morgan County.

"My further contention is that these forms are irregular and the clause is mere surplusage, and the said form was probably compiled by some printing house, and the sheriff of this county should be able to apprehend and arrest the defendant on such a warrant, any where in the state of Missouri.

"Why should not this clause read, 'wherever he be found.' In fact I am including with this request for an opinion the warrant used by the justices of the peaces in this county in criminal cases, which has just this clause.

"I advised the circuit clerk that he was further guided by sections 3511, and 3568. By sec.3568, it seems to me to give explicit authority that the warrant be issued to our local sheriff to be served by him on the defendant in any county in the state. The circuit clerk contends that sec 3568 applies only to the

law applicable to indictments because art 8 is headed and does deal with indictment in criminal cases by a grand jury.

"If you will strike out the parts of any of these forms and add to if necessary any form for a general capias warrant, I will have some printed for the circuit clerk to use, and keep down this confusion in having warrants issued where the defendant does not happen to love in Morgan County, Mo.

respectfully submitted,

G. Logan Marr"

Section 3501 R. S. Mo., 1929, reads as follows:

"Except as otherwise provided by law, the circuit courts shall have exclusive original jurisdiction in all cases of felony, and concurrent original jurisdiction with and appellate jurisdiction from justices of the peace and police courts of towns and cities in all cases of misdemeanor."

Section 3502 R. S. Mo., 1929, partly reads as follows:

"All felonies shall be prosecuted by indictments or information, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; and all misdemeanors shall be

> prosecuted by indictment or by information in the courts having jurisdiction thereof. * * *"

It will be noticed by Sec. 3501 that circuit courts have original jurisdiction with the justice courts in regard to the trial of misdemeanors.

Section 3504 R. S. Mo., 1929 reads as follows:

> "Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information; the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Under this section the prosecuting attorney may file direct in the circuit court an information charging a misdemeanor.

Section 3509 R. S. Mo., 1929 reads as follows:

> "The trial and all proceedings upon any information filed in a court

> of record shall be governed by the law and practice applicable to trials upon indictments in said court."

It will be noticed by section 3509 that the procedure in the trial of informations is the same as procedure in the trial of indictments.

Section 3568 R. S. Mo., 1929 reads as follows:

> "The warrant shall issue to the sheriff of the county where the indictment or information is filed, unless the prosecuting attorney directs it to be issued to some other county; warrants may be issued to different counties at the same time. The sheriff must execute the warrant and subpoenas immediately after receiving them."

By virtue of section 3509, supra, the law as set out in section 3568, supra, which is under article 8, chapter 29, and refers to procedure under indictments, the same procedure can be used on the trial of a case under an information.

Section 3469 R. S. Mo., 1929 reads as follows:

> "Warrants issued by any judge of the supreme or circuit or criminal court of any county may be executed in any part of this state; and warrants issued by any other magistrate may be executed in any part of the county within which he is such officer, and not elsewhere, unless indorsed in the manner directed in the next section."

Under this section warrants issued by a court of record may be executed in any part of the state, providing the procedure, as set out in Section 3470 R. S. Mo., 1929 is followed.

Under section 3470 R. S. Mo., 1929 the main procedure is to have the warrant properly endorsed and a certificate attached by the seal of the court showing that the officer issuing the warrant was fully authorized to do the same.

That a sheriff may serve a warrant in any county of the state as set out in section 3568, supra, was fully upheld in the case of State ex rel Billings, Prosecuting Attorney v. Rudolph, Warden of State Penitentiary, 17 SW (2d) 932, par. 7, where the court said:

> "While not ruling the question, some observations on the authority of circuit courts to issue writs of habeas corpus ad prosequendum will not be amiss. If a circuit court issued such a writ, no question of conflicting or territorial jurisdiction would be involved. The writ is equivalent to a warrant for an arrest. It should be executed as warrants are executed. Sections 3909, 3911, and 3814, R. S. 1919. Our courts have power to issue all warrants which may be necessary in the exercise of their respective jurisdictions. Section 2341, R.S. 1919.
>
> "In Ex parte Marmaduke, 91 Mo. 228, loc. cit. 251, 4 S. W. 91, 99 (60 Am. Rep. 250), it is said:
>
> 'Independent of any such

statute (Rev. St. 1919, sec. 2341), courts, having been created for the purpose of administering public justice, have, in consequence of their being courts, the inherent right to effectuate their jurisdiction by all process necessary for that purpose. * * * The rule being, that, whenever power of jurisdiction is conferred, everything necessary to make either effectual is implied. 1 Kent. Com. 463, and cas. cit.'

"In re Edward Talbot, 8 Ohio Dec. 744, loc. cit. 747, it is said:

'A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court are to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court, once having by its process acquired the right to adjudicate upon a person or thing, it has what is called jurisdiction. This power of jurisdiction * * * is the object of process.'

"In Commonwealth v. Ross, 13 Pa. Dist. R. 493, it is held that a district court has authority to issue such a writ to cause a defendant who is confined in the penitentiary outside of the territorial jurisdiction of the court to be brought before it for trial on an indictment for felony.

"In Ex parte Marmaduke, supra, the

St. Louis criminal court issued a writ of habeas corpus ad testificadum, which was served in Cole county on the warden of the penitentiary. The authority of that court to issue the writ was not questioned.

"It follows the warden of the penitentiary is ordered to deliver Henry Stocks to the sheriff of Dunklin county, to be taken there for trial on said indictments. It is further ordered that said sheriff return Henry Stocks to the penitentiary on the termination of said trials."

CONCLUSION.

In view of the above authorities it is the opinion of this Department that the clerk of the circuit court of Morgan County, Missouri, may issue a warrant in a misdemeanor case out of the circuit court and directed to the sheriff of Morgan County, who may serve the warrant in any county in the state.

It is also further the opinion of this Department that the three blanks enclosed, which are warrants on informations filed in the circuit court, may be issued by striking out the clause, " be found in your county",

It is further the opinion of this Department that section 3568, supra, applies also to the procedure of trial under an information as well as under indictments, notwithstanding the fact that article 8 is headed and deals

with indictments in criminal cases by a grand jury.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

TAXATION: Taxation of Railroads and Utilities for school purposes.

January 23rd, 1939.

FILED 57

Mr. Thomas A. Mathews,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Mr. Mathews:

This will acknowledge receipt of your communication requesting an opinion from this office, which request is as follows:

"Would be pleased to have your legal opinion on the matter of taxation of utilities. The various companies such as railroad, telegraph, electric light, gas and other similar corporations managing utilities in St. Francois County have informed the County Court that they will not pay more than 60% as an average on their properties, for the support of the public schools as this was sufficient for prior years.

"Some of the principals and teachers of the public schools in this county are asking that the percentage on utilities be raised to 71 1/54%, although they have not shown that this increase was necessary.

"I assume that this question has to do with Section 10009, Revised Statutes of 1929.

"Kindly advise whether the position of the various utilities operating here is correct."

In your letter you mentioned two percentage figures, namely 60% and 71 1/54% that the contending parties seek to apply in some manner in reaching the results contended for. It is not clear to us from the context of your letter, whether the parties are applying this percentage factor to the assessment feature of the property involved, or whether to the rate of taxation to be levied. Hence, we will have to deal with your question on a hypothetical basis.

Furthermore, a break-down is necessary, both as to the assessment and rate of levy features, because by court construction, a distinction is made by what is classed as the "distributable" and "local" property of railroads and other utilities.

In this connection we refer you to the case of State ex rel v. Baker, 316 Mo. 853, where a full discussion is shown concerning the distinction in the class of property mentioned.

I.

Assessment of Distributable Property.

The distributable property (including Franchise) of railroads and other utilities owned throughout the state, is required by statute to be assessed by the State Tax Commission, subject to correction by the State Board of Equalization at the true value of the property. The value arrived at by and through said boards is certified to the various County Clerks on an apportionment basis and is final, unless corrected or set aside by proper court action. Hence, if the parties you refer to are attempting by their percentage figures, to fix on their own initiative, some other or different assessed valuation of the property involved for taxation purposes, then such attempt is nugatory and amounts to nothing.

II.

Assessment of Local Property.

The "local" property of a railroad and other utilities, is assessed by the local county assessor in the same manner as all other property located in a county is assessed. Under Section 9799, county property is required to be assessed at its true value, which has

been constructed to be the value placed on property by the assessor subject to correction by the county or state Board of Equalization (see State v. Bethards, 9 S. W. (2d) 603). However, when the assessment is completed the value as determined is a fixed one and is final, unless set aside by court decree, and constitutes the basis upon which the rate of tax is levied.

Consequently, if either of the parties you refer to are attempting to use only a fractional part - whether it be 60% or 71 1/54% - of the assessed value, as finally determined and fixed by the assessing authorities, for the basis upon which the tax should be levied, then such attempt is likewise nugatory and amounts to nothing as in the case of distributable property.

III.

Rate of Taxation on Distributable Property.

The method used to determine the rate of taxation to be applied to the distributable property for school purposes is provided for in Section 10029, the pertinent part of which is as follows:

> " * * *. Such average rate for school purposes shall be ascertained by adding together the local rates of the several school districts in the county, and by dividing the sum thus obtained by the whole number of districts levying a tax for school purposes, and shall cause to be charged to said railroad companies taxes for school purposes at said average rate on the proportionate value of said railroad property so certified to the county court by the state auditor, under the provisions of this article, and the said clerk shall apportion the said taxes for school purposes, so levied and collected, among all the school districts in his county, in proportion to the enumeration returns of said districts. * * *"

See State ex rel. v. Waddill, 330 Mo. l. c. 1125, for an exposition of the aforesaid statutory method.

The average rate provided for is arrived at merely by mathematical computation. However, such average rate is expressed and levied in money denomination, towit: so many dollars or cents on the $100.00 valuation, and is not expressed or levied on any percentage basis. Hence, if the parties referred to in your letter are attempting to arrive at, or apply, an average rate on a percentage basis, such an attempt would be nugatory, notwithstanding the respective reasons given therefor.

IV.

Rate of Taxation on Local Property.

The method used for determining and levying the rate of taxation on the "local" property for school purposes is the same as used in the taxation of the property of private persons, located within the boundaries of a particular school district. The rate is determined and fixed by the school board in accordance with its return to the county clerk. In State ex rel Railroad Company, 110 Mo. l. c. 272, the court said:

> "The court also erred in holding defendant liable for taxes, for school purposes and building purposes on its local buildings, at the average rate throughout the county. The buildings of a railroad company are subject to taxation like other property at the local rates fixed in the districts where they are situated."

The rate is expressed and levied in dollars and cents and not on a percentage basis; and any rate, average or local, levied on the assessed valuation on a percentage basis would be nugatory.

CONCLUSION

In conclusion, it is manifest, in view of the statutes of the state providing a complete scheme for the manner of assessment and rate to be applied, for the taxation of the property of railroads and other utilties for school purposes, that any attempt on the part of either one of the contending factions you mention, to use as a basis the respective contentions made for arriving at the amount of taxation which should be paid by the utilities in question, would be null and void.

APPROVED BY

Respectfully submitted,

J. E. TAYLOR
Acting Attorney General

J. W. BUFFINGTON,
Assistant Attorney General.

JWB:RV

COUNTIES: CONDEMNATION PROCEEDINGS: County may withdraw from condemnation proceedings before owner's right to compensation becomes vested; only liable for court costs and not attorneys fees; when county may appeal from judgment of the circuit court.

February 17, 1939

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

FILED
57

Dear Sir:

We acknowledge your letter of February 9th, wherein you state that the county court of Morgan County concluded that the right of way of an old road should be widened, and that you proceeded under Section 7840 R. S. Mo. 1929 (formerly Section 10636 R. S. Mo. 1919).

That this was the correct section to proceed under, there can be no doubt in view of the court's statement in the case of Tebbs vs. Platte County 28 S. W. (2d) 656, 657:

> "We are not holding, of course, that counties are not vested with the power of eminent domain under which they can condemn private property for public road purposes. They are vested with such power. Section 10636 R. S. 1919; Petet vs. McClanahan, 297 Mo. 677, 688, 249 S. W. 917."

Section 7840 R. S. Mo. 1929 provides as follows:

> "The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads,

or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, descriptions and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sections and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes. If within twenty days after the last day of said publication no claim for damages for the taking of any of such land or property be filed in the county clerk's office by the owner of said property, or by the guardians or curators of insane persons or minors owning said property, then the claim of any such owner shall be forever barred, and the county shall be authorized to enter upon

and appropriate said lands or other property; and the court shall make an order accordingly. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid. If the county court and the land or property owner be unable to agree on the amount of the damages, the county court shall make an order reciting such fact, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation, shall make an order setting the cause for hearing within fifteen days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk. The court, or judge in vacation, shall cause to be empaneled a jury of six freeholders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other property, proposed to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be empaneled. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error. (R. S. 1919, Section 10636)"

The underlined portion of same was held unconstitutional in the case of Barker vs. St. Louis County 104 S. W. 371 for the reason that the statute cast the initiative on the owner, requiring him to prosecute in twenty days for compensation for his property. However, you state that the owner was notified of the action of the court. The owner pursuant to Section 7840, supra, filed his claim for damages in the sum of $500.00, but an agreement was not reached between the owner and the court. The latter then pursuant to the above section "certified the case under Section 7840 to the circuit court."

The circuit court subsequently met, and in accordance with the above section empaneled a jury of six freeholders to view the land and determine the damages. On May 9, 1938, they returned a verdict of $800.00 "as damages for the right of way".

The Morgan County court being in session and hearing of the verdict, was of the opinion that it "should withdraw from the proceedings as soon as possible". On May 12, 1938, the date the award was returned in the circuit court, the county court being in session requested and entered an order that the prosecuting attorney "file a motion to abandon, withdraw, and dismiss any interest that Morgan County had in the right of way".

You further state that the county court is ready to pay the costs of the proceedings, but that the attorney for the landowner contends that there is no right of appeal, or writ of error, or right to withdraw from condemnation proceedings.

It is true that no provision is made in Section 7840 for dismissal, or abandonment of proceedings, as is provided for in Section 1342 R. S. Mo. 1929 for certain corporations, however, we find no statute in this state which would prohibit it.

20 C. J. Section 457, page 1077, states that:

> "In the absence of any statutory provision showing a legislative intent to the contrary, or of a stipulation with the landowner to prosecute the proceedings to a conclusion, the condemning party may discontinue the condemnation proceedings at any time before the right of the property owner to compensation or damages has become complete."

Such rule finds support in the case of Railroad vs. Rail-

road 126 Mo. App. 272, l.c. 278, wherein the court said:

> "The general rule, in the absence of statutory provisions to the contrary, is that the condemning party may discontinue the proceedings at any time before the right of the parties have become vested. There is not even a cavil as to the correctness of this rule, but as to the time when the rights of the parties become vested there is a diversity of opinion. There seems to be no denial of the right of the condemning party to abandon the proceedings where they have not been confirmed or consummated. It may do so at any time prior to the confirmation of the commissioners' report, after the assessment of the damages has been made, and the award has been filed, and either before the submission of the injury to the jury, or after verdict and prior to judgment." (See also Kansas City v. Railroad 189 Mo. 245, l.c. 258, 259.)

And in the case of Simpson v. Kansas City 111 Mo. 237, l.c. 243, 20 S. W. 38, l.c. 40, the court said:

> "The authorities directing such improvements should have, and in the absence of statutory provisions are generally held to have, discretion to accept or reject the property at the price fixed. 'This rule is a necessity in view of the rational conduct of affairs.'"

We assume that the "motion to abandon, withdraw and dismiss any interest that Morgan County had in the right of way" was filed after verdict and prior to judgment so that the owner's right to compensation did not become vested, and if same be the facts we are of the opinion that Morgan County had the right to discontinue the condemnation proceedings.

You state that the county court is ready to pay the costs

of the proceedings.

In the case of Clark vs. Adair County 79 Mo. 546, l.c. 537, the court, in defining the term "counties", said:

> "Counties are territorial subdivisions of the state and are only quasi corporations created by the legislature for certain public purposes."

In the case of Meadow Park Land Company v. School District of Kansas City 250 S. W. 441, l.c. 446, the Supreme Court of Missouri, in defining "school district", said:

> "School districts as quasi corporations are created for specific purpose -- the promotion of education among the children of school age within the district."

14 C. J. Section 43, page 73, states as follows:

> "Giving the term its true meaning, however, it may be said that public corporations are such as are created by the people or the government, state or federal, for political or governmental purposes, such as the United States, states, cities, towns, counties, school districts and other municipal or political corporations * * * * * * *."

It may thus be said that counties and school districts, although referred to as quasi corporations may also be properly termed public corporations.

In the case of Nauman vs. Big Tarkio Drainage District 113 Mo. App. 575, l.c. 581, 87 S. W. 1195, l.c. 1196, the suit was one to recover counsel fees paid out in a condemnation proceeding instituted by the Drainage District but afterwards dismissed. The Kansas City Court of Appeals in holding that

the Drainage District was not liable said:

> "The statute failing to impose any liability in the event of abandonment, beyond the payment of costs, none can be enforced without it appears that the corporation has needlessly, wrongfully, and vexationsly delayed the proceedings, and thereby damaged the landowner."

In the above case, there was a statute providing for the payment of costs upon abandonment of the suit.

And in the case of Meadow Park Land Company vs. School District of Kansas City 301 Mo. 688, 257 S. W. 441, 31 A.L.R. 343, the question was whether the School District of Kansas City, which instituted a proceeding to condemn land of the appellant for school purposes, and after prosecuting that proceeding for several months, dismissed it, was liable for attorneys fees and other attendant expenses. The court in denying such liability but indicating that court costs would have to be paid, said:

> "No statute forbids a school district from dismissing. The question of dismissing the proceeding to condemn a particular parcel of land for a site must be determined by the members of the board of directors, as public officials, and as in the public interest. In the absence of any statute imposing liability upon the school district for their act of discontinuance, it should not readily be held that the school statute (section 11428), which authorizes the district to condemn a site and points out article 2 of chapter 13 as prescribing the manner or mode of procedure to be followed, must be construed as meaning that the school district by discontinuing its proceeding to condemn

> incurs the same liability as it has been held the private corporations, therein designated, incur by a discontinuance. * * * * * * * * * * But the court could not have taxed these expenses, but only costs against the school district in that proceeding, under the decision in St. Louis vs. Meintz 107 Mo. 611, 18 S. W. 30, and Section 1793 R. S. Mo. 1919; * * * * * *."

In the above case, there was also a statute for payment of the costs on the abandonment of the suit.

The case of Manly vs. State Highway Commission 82 S. W. (2d) 619 was an action to cover expenses alleged to have been sustained in defending a condemnation proceeding brought by the State Highway Commission against the plaintiffs in circuit court. The court stated the following rule with reference to the liability of public corporations upon abandonment of a condemnation suit:

> "It is equally well settled that plaintiffs are not entitled to recover if the defendant, as it contends, is a purely public entity or corporation. Meadow Park Land Co. vs. School District of Kansas City 301 Mo. 688, 257 S. W. 441, 31 A.L.R. 343."

In the instant case, there is no statute imposing liability for costs upon abandonment of the suit, however, from the foregoing, we are of the opinion that Morgan County, being a public corporation, would not be liable for attorneys fees and other attendant expenses incurred in condemnation proceedings, and would only be liable for court costs in the discretion of the court.

Section 7840, supra, provides in part as follows:

> "The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

From a casual reading of the above section, it would seem to indicate that Morgan County would have no right to appeal the judgment of the court, inasmuch as appeals are wholly statutory, and there can be no appeal unless the statute authorizes it. Thus, in the case of Bussiere's Administrator vs. Sayman 257 Mo. 303, l.c. 308, the court said:

> "It is a minor premise to the discussion that appeals are wholly creatures of the statute, and that the right of appeal does not exist where expressly given. This is fundamental, or if not fundamental, well settled." (Citing cases)

There is, however, a rule of statutory construction which states that "laws are passed in a spirit of justice and for the public welfare and should so be interpreted if possible or to further these ends and avoid giving them an unwarranted effect." Bowers vs. Missouri Mutual Association 62 S. W. (2d) 1058, l.c. 1063.

And another rule that the purpose of statutory construction is to determine the legislative intent, Gendron v. Dwight Chapin & Co., 37 S. W. (2d) 486, 225 Mo. App. 466.

The legislative intent of Section 7840, supra, prohibiting a review on appeal or writ of error from a judgment of the court was evidently intended to go as to the question of public necessity for taking the property and to the amount awarded as damages.

It should not be interpreted to prohibit a review of the court's action in failing to sustain a motion for dismissal by the county before the rights of the property owner vested. To hold otherwise would be to defeat the ends of justice and public welfare which gives a quasi public corporation the right to determine whether it is wise to expend the taxpayer's money for a right of way.

You state, however, that although the verdict was rendered on May 12th, you did not file your motion for new trial until December 7th, same being overruled when it was argued at a later term, viz., January 9, 1939.

Section 1005 R. S. Mo. 1929 provides when motions for new trial and in arrest of judgment may be filed:

> "All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall so long continue; and if not, then before the end of the term."

It is to be noted that the rule is the same in motions in arrest of judgment as in motions for new trial.

In the case of Schwettman vs. Sander 7 S. W. (2d) 301, a verdict was returned on September 22nd and on October 8th, within term time the court entered its judgment. Thereafter, at the same term, on October 12th, and within four days after rendition of judgment, defendant filed a motion in arrest of judgment which was overruled and the defendant appealed. The court in holding that Section 1456 R. S. Mo. 1919 (now Section 1005 R. S. Mo. 1929) required the motion in arrest of judgment to be filed within four days after trial and not four days after judgment said:

> "Respondent (plaintiff) has filed a motion to dismiss the appeal. The ground relied upon in support of the motion to dismiss this appeal is that, under section 1456, Revised Statutes of Missouri 1919, all motions for new trials and in arrest of judgment shall

> be made within 4 days after the trial, if the term shall so long continue, and if not, then before the end of the term; and that, since the record discloses that the motion in arrest of judgment filed by the defendant was not filed within 4 days after the trial, the trial court properly overruled same.
>
> The point that defendant's motion in arrest was not filed in time is well taken, since it has been held repeatedly that section 1456 of the statute is mandatory, and where a motion for new trial or a motion in arrest of judgment is filed after the time allowed, the same will not be considered by the court. Section 1456, Revised Statutes of Missouri 1919; State ex rel. Waggoner v. Lichtman, 184 Mo. App. 225, 168 S. W. 367; Saxton National Bank v. Bennett, 138 Mo. 494, 40 S. W. 97. Defendant's motion in arrest of judgment, having been filed out of time, amounted to no more than a suggestion to the court that it should set aside the judgment of its own motion during the judgment term. State ex rel. Conant v. Trimble, 311 Mo. 128, loc. cit. 144, 277 S. W. 916, a most comprehensive opinion in which an exhaustive review of the many cases germane to the question is to be found."

In the instant case, your motion for new trial was not filed within four days after trial and hence it was, in our opinion, properly overruled.

You inquire whether you "should attempt to have an order granting the appeal made by the circuit court as an order nun pro tunc from the writing in the record, then appeal to the Supreme Court; or if I fail in that, apply for a writ of error to bring up what I contend to be an invalid judgment against Morgan County for $800.00."

Section 1020 R. S. Mo. 1929 provides on what conditions

appeals may be allowed:

> "No such appeal shall be allowed unless: First, it be made during the term at which the judgment or decision appealed from was rendered; and, second, the appellant or his agent shall, during the same term, file in the court his affidavit, stating that such appeal is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court."

Section 2003, R. S. Mo. 1929 provides the time for holding court in the judicial circuits of the state as follows:

> "In the judicial circuits of this state the courts shall be held at the hereinafter designated places and at the time hereinafter named in each of the several counties respectively in each year."

Section 2017 R. S. Mo. 1929 relates to the fourteenth judicial circuit which includes the county of Morgan:

> " * * * in the county of Morgan, on the second Monday in January, the fourth Monday in April, and the second Monday in September."

Inasmuch as the verdict of the court was rendered in the April term and the affidavit and application of appeal was filed out of term, viz., January term of the court, we are of the opinion that by virtue of Section 1020 R. S. Mo. 1929, Morgan County has lost its right to appeal from the judgment of the circuit court.

As to the question of whether you should get an order nun pro tunc from the writing in the record, we fail to see how same

would be of any aid.

In the case of Neil vs. Tubb, 241 Mo. 666, l. c. 679, the court said:

> "When a court at a former term has made an order or rendered a judgment which should have been then entered on the record but was not, it may be entered at a subsequent term as now for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term; but when entered it is not the order or judgment now made but that which was then made."

The order or judgment of the court would be as of the date made, but inasmuch as the appeal would still have been filed at a subsequent term, we are of the opinion that no appeal is allowable.

CONCLUSION

From the foregoing, we are of the opinion that if the facts disclose that you filed the "motion to abandon, withdraw and dismiss any interest that Morgan County had in the right-of-way," after verdict and prior to judgment so that the owners right to compensation did not become vested, then the judgment rendered would be of no force and effect. However, since you failed to file your motion for new trial within four days after trial and to appeal from the court's action during the term at which the judgment appealed from was rendered, no right to appeal from said judgment would lie and hence, Morgan County has lost its right to appeal from the judgment of the circuit court.

Respectfully submitted,

APPROVED:

MAX WASSERMAN
Assistant Attorney-General

J. E. TAYLOR
(Acting) Attorney-General

MW:RT

OFFICERS: County officers not prohibited from purchasing county warrants at par value.

February 24, 1939

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have received your recent letter, which reads as follows:

> "In this county certain deputy officers have been buying county warrants of others for the purpose of investments. They pay par for these warrants, and keep them for their own investment.
>
> "There has been some complaint that this practice is contary to law. There seems to be no cases cited under section 4094. Just what does the phrases 'shall traffic for or purchase at less than par value or speculate in any county warrant .....'
>
> "What would be your opinion on this matter?"

Section 4094 R. S. Missouri, 1929, which you mentioned in your letter, reads as follows:

> "Every clerk of a court of record, sheriff, marshal, constable, collector of public revenue, or deputy of any such officer, or a judge of a county court, prosecuting attorney or county treasurer, who shall traffic for or purchase at less than the par value or speculate in any county warrant issued by order of the county court of his county, or in any claim or demand held against such county, shall be adjudged

> guilty of a misdemeanor, and shall, upon conviction, be punished by fine not less than twenty nor more than fifty dollars."

In other words, the above statute states that if certain designated officers "shall traffic for or purchase at less than the par value, or speculate in any county warrant" such person shall be adjudged guilty of a misdemeanor.

The word "traffic" was defined in the case of ex parte Moore, 8 Pac. (2d) 818, as follows:

> "According to the Century Dictionary the verb 'traffic' means 'to carry on commerce', 'to have business or dealings', or 'to deal'.

In the case of In re Cameron Town Mutual Fire, Lightning & Windstorm Insurance Company, 96 Fed. 756, the word "traffic" is defined as "the buying of something from another, or the selling of something to another".

The Supreme Court of Wisconsin in the case of Clifford v. State, 29 Wis. 327, states that the words "traffic in" are synonymous with the word "deal".

Consequently, the word "traffic" as used in section 4094, R. S. Missouri, 1929, must mean the buying, selling, and dealing generally in county warrants, and other claims against the county.

Now as to the word "speculate": In the case of Arentsen v. Moreland, 99 N. W. 790, the Supreme Court of Wisconsin stated that to "speculate" is to"take the risk of loss in view of possible gain". Incidentally, this is also the definition given of the word in the Century Dictionary.

Therefore we conclude that the meaning of section 4094, R. S. Missouri, 1929, that none of the officers designated therein shall deal in, buy, sell or purchase any county warrant for less than the par value thereof; that they shall not speculate in the

same, that is to "take the risk of loss in view of possible gain". If they purchased the same at par or face value we cannot see how it can be said that a "possible gain" might accrue. The county will not retire the same at an amount greater than par. There is a risk of loss involved in the event the county could never redeem, but there is no possibility of a gain.

CONCLUSION.

It is our conclusion therefore, that it is not in violation of law for clerks of courts of record, sheriffs, marshals, constables, collectors of public revenue, or deputies of any such officers, or judges of county courts, or prosecuting attorneys, or county treasurers, to purchase county warrants if the same are purchased at par or face value. If any such officer should deal in, purchase, or speculate in county warrants at prices less than par, then any such officer would be adjudged guilty of a misdemeanor as provided for in section 4094, R. S. Missouri, 1929.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General.

APPROPRIATIONS: Where an act creating an office provides for compensation and traveling only within the state, then such officer is not authorized to incur travel expenses outside of the state even though his appropriation provides for such expense.

March 8, 1939

FILED 57

Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date, wherein you ask the following question:

> "Is the Commissioner of Agriculture permitted to travel on official business outside the State, or is the State Auditor warranted in paying such outside State traveling expense, under present laws and the terms of the 1937-38 appropriation?"

The act which created the office of the Commissioner of Agriculture is found in Laws of Missouri 1933, page 167 which provides in part as follows:

> "The Governor, by and with the advise and consent of the Senate, shall appoint a Commissioner of Agriculture, who shall hold his office for a term of four years, and who shall be in charge of the State Department of Agriculture, which is hereby created. Said Commissioner of Agriculture shall be a practical farmer and well versed in agricultural science, and shall be subject to removal from office for cause by the Governor at his pleasure. The compensation of the Commissioner shall be Three thousand dollars ($3,000) per annum, payable monthly. He shall receive traveling and other expenses within the State necessarily incurred in the performance of his duties. * * * * * * "

It will be noted from a reading of this section that the law makers clearly expressed their intent that the Commissioner of Agriculture should receive traveling and other expenses within the state necessarily incurred in the performance of his duties.

Since this act only provides for traveling and other expenses within the state, then by applying the rule "the expression of one thing is the exclusion of all others" it is apparent that the law makers did not intend to pay traveling and other expenses of the Commissioner of Agriculture anywhere except within the state.

By examing the appropriation bills for that department for the years 1933 and 1935, we find that the law makers only provided for "travel" in the appropriation. While in the appropriation for 1937 the law makers provided for "travel within and without the state". By this 1937 appropriation it looks like an attempt was made to legislate, that is, it looks like the law makers by the appropriation act attempted to provide pay for traveling and other expenses within and without the state, which was broader than the terms of the act creating the office of the Commissioner of Agriculture.

It is a well known rule that law makers can not legislate by appropriation bills. This would be in violation of Section 28 of Article 4 of the Constitution because in this particular case the law makers would be attempting to amend the act which created the office of the Commissioner of Agriculture by broadening the provisions of it to include pay for the commissioner and traveling expenses when outside the State of Missouri. By referring to the title of the appropriation act for that department for 1937, it is quite apparent that the law makers only intended to appropriate money for that department and not to legislate.

CONCLUSION

From the foregoing, it is the opinion of this department that by virtue of the terms of the act creating the office of the Commissioner of Agriculture that he is not authorized to incur traveling and other expenses except those which are incurred within the State of Missouri. We are further of the opinion that even though the 1937 appropriation act provides for travel within and without the state, yet the commissioner is not authorized to incur such expense.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

TWB:WW

COUNTY COLLECTORS: What constitutes delinquent personal property tax list and duties of county court in connection with settlement.

May 12, 1939

5-13

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 12, 1939. The question presented is whether or not the enclosed "list" of delinquent personal property taxes returned by the collector (hereafter set out) can be approved by the county court and the court's duty in connection therewith.

We think this necessitates a review of the steps on assessing and collecting taxes and duties of the county collector with respect to returning delinquent tax lists on personal property. In order to preserve continuity, we begin with the initial steps which sets into motion the taxing machinery on personal property. All references to statutes are R.S. Missouri, 1929, unless otherwise indicated.

The assessor first takes a list of all personal property in his county from the owner thereof (Sec. 9756, Laws of 1937, p. 570), or makes such a list on his own view (Sec. 9760). From these lists, the assessor then makes what is called the "assessor's book" (Sec. 9778). This book is divided into two parts. The second is the part designated as "personal property". This part is to contain the names of the owners of personal property, their property and the value thereof, alphabetically arranged according to names (Sec. 9780). This book is then delivered to the county court by the assessor (Sec. 9800). As soon as

the assessor's books are adjusted and corrected, the county clerk makes a copy thereof and extends the taxes on the "tax books" which he makes (Sec. 9876, Laws of 1933, p. 421). Then this book is delivered to the collector (Sec. 9880). The collector then must proceed to collect the taxes extended on the tax book (Sec. 9908). He is authorized to seize and sell goods and chattels to enforce payment of personal taxes (Sec. 9915). Having used all lawful means and diligent efforts to collect said taxes and being unable to do so, the collector, from the tax books, "shall make lists thereof (the unpaid taxes), one to be called the 'personal delinquent list', in which shall be stated the names of all persons owing taxes on personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each". (Sec. 9938). This list is to be returned by the collector, under oath, at the term of county court to be held on the first Monday in March, to be approved or disapproved by the court (Sec. 9918). The county clerk, after approval of this list, makes the same into a "back tax book" and delivers the same to the collector whose duty it is to collect said taxes (Sec. 9943). If then unable to collect the same, during his term, this delinquent list allowed to the collector is delivered to his successor and so on to the next successor until collected, provided before delivery to these successors of the collector, the county court is to examine and cancel all listed which are delinquent more than five years. On this being done, the collector is no longer charged with said delinquent back taxes (Sec. 9925).

It appears in this instance that the collector has returned a "list" with his affidavit to the effect that he had "diligently endeavored to use all means to collect from persons listed the amount shown opposite their name; that I have been unable to find any personal property of any tax payer listed out of which to make the taxes; that I have fully complied with secs. 9915, 9918 and 9938, R.S. 1929". Preceding this affidavit, the collector listed the following: "State Tax $458.79; County Revenue Tax $1531.34; Special Road and Bridge $640.03; Interest and Redemption Tax $463.50; School Tax $1859.43; Total Tax $4953.09".

Section 9938, R.S. Missouri, 1929, provides:

> "Whenever any collector shall be unable to collect any taxes specified on the tax book, having diligently endeavored and used all lawful means to collect the same, he shall make lists thereof, one to be called the 'personal delinquent list,' in which shall be stated the names of all persons owing taxes on personal property, where taxes cannot be collected, alphabetically arranged, with the amount due from each, * *."

It is evident, without comment, that the purported list returned by the collector does not comply with the above section. It does not list the names, alphabetically arranged, and the amount due from each person owing taxes on personal property.

It also appears that the collector filed along with the above purported list, what he terms an "application" to approve the purported delinquent list, in which he states, "I want these delinquent personal taxes approved so that I can show them in my annual settlement, as being taxes that I am charged up with and which I have not as yet collected. I state that in my opinion most of these taxes that are delinquent as stated aforesaid will be collected in full. It is not my purpose in requesting the court to approve these lists as being correct and in approving this certificate that I be discharged in any way for the collection of these delinquent personal taxes for 1938. I state that these taxes are not outlawed, but are due and many can be collected".

While the affidavit and application seemingly are inconsistent, they may not be if viewed from the point that the collector in the application may have meant that the taxpayers, represented in the amounts listed, would voluntarily, or upon suit being filed or upon distress warrant, pay these taxes even though at the present they have no property out of which the tax can be made.

However, we are not concerned with this since the collector has filed no delinquent list which the court can act upon, but when the proper list is returned by the collector, it appears that the terms of Section 9918, R.S. Missouri, 1929, set forth the power and duty of the county court. This section provides:

> "At the term of the county court to be held on the first Monday in March, the collector shall return the delinquent lists and back tax books, * * * * under oath or affirmation, to such court, and settle his accounts of all moneys received by him on account of taxes and other sources of revenue, and the amount of such delinquent lists, or so much thereof as the court shall find properly returned delinquent, shall be allowed and credited to him on his settlement. Before allowing the collector such credit for any delinquent lists, the county court shall make special inquiry and be fully satisfied that he has used due diligence to collect the same, and that he could not find any personal property of the taxpayer out of which to make the taxes. If the court is satisfied that there are any names on the lists of persons who have personal property out of which the taxes could have been made, it shall, in passing upon such lists, strike such names therefrom."

In State ex rel. v. Sanderson, 77 S.W. (2nd) 94 (Mo. Sup.), the court said of this section and the four following at l.c. 96:

> "In brief, these sections provide that the collector shall make an annual settlement with the county court. The county court is required, before approving a settlement, to make special inquiry and be fully satisfied that the collector has used due diligence in making collections. It is also required to fully examine the settlement offered by the collector before approving same."

Thus, the county court has a discretion in approving said settlement and if they do not believe the collector has diligently endeavored to collect the personal taxes, notwithstanding his affidavit, they may strike those names where he did not, out of the list, and he remains charged therewith. This is as it should be because to permit the collector to return as delinquent and uncollectible, taxes which are not so, would be to permit the collector, by this subterfuge, to increase his compensation at the taxpayers' expense. The compensation of the collector for collecting delinquent taxes (Sec. 9969, Laws of 1933, p. 429) is greater than that allowed for collecting current taxes (Sec. 9935, Laws of 1937, p. 547).

CONCLUSION

Therefore, it is our opinion that the county court cannot approve the purported delinquent list returned by the collector because it is not the list required by statute. When the collector does return a proper list, the court should inquire into the delinquent taxpayers and taxes contained therein and if they find the collector has not used due diligence and exerted every lawful effort to collect those taxes, he should not be allowed to return them as delinquent.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

J.E. TAYLOR
(Acting) Attorney General

LLB:VAC

PENAL BOARD: Authority of law for imprisonment in penitentiary is only pursuant to sentence of court for a felony.

May 16, 1939

5-18

FILED
57

Honorable J. E. Matthews
Director of Penal Institutions
Jefferson City, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 22, 1939, which reads as follows:

> "Attached is a copy of a Court Order committing a prisoner to this Institution for safekeeping.
>
> "Since this prisoner was in a hospital before being brought to this Institution, we feel that they have committed him here to keep down expense on their part and have him hospitalized in this Institution. As we have considerable trouble segregating a safekeeper, we do not think they should be sent here merely for hospitalization which seems to be why this man was committed.
>
> "I request that an opinion be rendered covering safekeepers, if this should be by Court Order, the type of form we should accept for committment and what expense should be charged to the County during their stay in this Institution."

We also acknowledge copy of Circuit Court Order in your possession, purporting to commit one, R. H. Neel to the penitentiary for safekeeping, pending a continuance of his cause to the next regular term of court of Cooper County.

Here you have a defendant under arrest and committed to the penitentiary, pending trial on a bailable offense.

Section 648 R. S. Mo. 1929 provides:

> "No person's body shall be imprisoned or restrained unless by authority of law."

Section 3487 R. S. Mo. 1929 provides:

> "If the offense be not bailable, or sufficient bail be not offered, the prisoner shall be committed to the jail of the county in which the same is to be tried, there to remain until he be discharged by due course of law."

Section 3570 R. S. Mo. 1929 provides:

> "An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise. The officer must inform the defendant by what authority he acts, and must also show the warrant if required."

Section 8389 R. S. Mo. 1929 provides:

> "There shall continue to be maintained at the City of Jefferson, in the County of Cole, a state penitentiary and prison, for the confinement and reformation, as well as for the punishment, of all persons sentenced by any court of competent jurisdiction in this state, for the commission of any crime, the punishment for which is confinement in the penitentiary, in which the person so sentenced shall be securely confined, except as herein provided, employed at hard labor, and governed in the manner herein directed."

Section 8413 R. S. Mo. 1929 provides:

> "Whenever any convict shall be delivered to said board, the officer having such convict in charge shall deliver to the board the certified copy of the sentence received by such officer from the clerk of the court, and shall take from the board a certificate of the delivery of such convict."

50 Corpus Juris, page 345, Section 42 reads:

> "The place of confinement of prisoners is that which is designated by law. * * * * "

The Missouri Statutes treat jails as separate institutions from our penitentiary in Chapter 44, Article 9 R. S. Mo. 1929. By statute a circuit court must see to it that prisoners in jail are humanely treated. The court may commit a prisoner charged with crime to the nearest jail of another county. The legislature has provided for the expense of such recommitment to another jail, including medical attention for infectious deseases. (See Sections 8537, 8545, 8551, 8554 and 8555 R. S. Mo. 1929.)

CONCLUSION

We are of the opinion that the penal board pursuant to the above statutes, have no power to receive and imprison any person except after sentence for a crime. We are of the opinion that the board has no right to imprison R. H. Neel awaiting trial for embezzlement, and that his purported commitment to the penitentiary for safekeeping by the court is void and of no legal consequence.

The trial court could imprison in a neighboring county jail for safekeeping, as provided in the statutes, but there is no legal authority to imprison in the penitentiary except where one is sentenced there for a crime.

Respectfully submitted,

APPROVED:

WM. ORR SAWYERS
Assistant Attorney-General

J. E. TAYLOR

WOS/ww

ANIMALS: Charges for feeding and keeping strays are only legally assessed, pursuant to statutory authority.

May 24, 1939

FILED
57

Honorable E. A. Mayes
Assistant Director
State Park Board
Jefferson City, Missouri

Dear Sir:

We acknowledge your letter of May 22, requesting an opinion of this department, which reads as follows:

> "In past years the State Park Board has not taken any legal action against the owners of domestic animals which break over and through lawful fences and do trespass to state parks, but in recent months the State Park Board, acting through its state agents, have resolved to put a stop to these too frequent trespasses. Some farmers living near state parks feel that these parks are a free range for them to graze their domestic animals on, and the situation presents quite an administrative problem.
>
> "At Bennett Springs State Park, we have authorized the Park Superintendent to proceed against the owners of stray animals trespassing in the Park property.
>
> "The Superintendent of the State Park at Bennett Springs notified the justice of the peace at Lebanon, Missouri that stray sheep belonging to one Dampier were trespassing on the park premises, and he also notified Dampier verbally that his sheep were trespassing on the State Park property, and that if they continued, the Park Board had authorized an action in trespass against him.

"The justice of the peace told the Park Superintendent to impound the sheep and notify Dampier in writing about the trespass, but this the superintendent did not do, but drove the sheep to the premises of the justice of the peace and put them in his barn. There the justice of the peace kept them impounded, fed and watered them, and appointed three appraisers to assess reasonable compensation for the taking up, feeding and keeping said sheep. The Park Superintendent made no claim for damages and did not apply for any appraisers to be appointed. The justice of the peace claims $10.00 compensation in this proceeding, and is threatening to render a judgment for such costs against the Park Superintendent. We do not believe the Park Superintendent can lawfully be taxed for these costs in this proceeding. What is your opinion? For your information, I state that the stock law has been enforced in Laclede County for many years, and the park maintains lawful fences."

35 Corpus Juris, page 694, Section 340 reads:

"The general rules relating to costs govern the right to, and liability for, costs in justices' courts. As in other courts costs can be imposed and recovered only where there is statutory authority therefor. * * * * * * * * * * * * * * *"

From the facts stated in your letter, the complaint of the Park Superintendent being to a trespass, the justice could have proceeded upon that theory as provided in Sections 12908, 12909, 12918 and 12919 R. S. Mo. 1929. Instead, the facts show the justice proceeded under the provisions of Article 6, Chapter 88 R. S. Mo. 1929 dealing with stray animals running at large. We look to the particular statutes involved, and the cases decided thereunder, as a premise for our conclusion. Section 12797 R. S. Mo. 1929 provides that any person may restrain stray animals and reads:

"It shall be unlawful for the owner of any animal or animals of the species of horse, mule, ass, cattle, swine, sheep or goat, in this state, to permit the same to run at large outside the enclosure of the owner of such stock, and if any of the species of domestic animals aforesaid be found running at large, outside the enclosure of the owner, it shall be lawful for any person, and it is hereby made the duty of the constable of the township, on his own view, or when notified by any other person that any of such stock is so running at large, to restrain the same forthwith, and such person or officer shall, within three days, give notice thereof to the owner, if known, in writing, stating therein the amount of compensation for feeding and keeping such animal or animals and damages claimed, and thereupon the owner shall pay the person, or officer, taking up such animal or animals a reasonable compensation for the taking up, keeping and feeding such animal or animals, and shall also pay all persons damaged by reason of such animals running at large, the actual damages sustained by him or them. If the owner of such stock be not known, or if notified and fails to make compensation for the taking up, feeding and keeping of animals taken up under the provisions of this article, the same shall be deemed strays, and shall be dealt with in the same manner as required by law with respect to such property as strays, under the stray law. Any failure or refusal on the part of such officer to discharge the duties required of him by this section shall render him liable on his bond to any person damaged by such failure or refusal, which damages may be sued for and recovered in any court of competent jurisdiction."

Section 12798 R. S. Mo. 1929 provides an exception to the written notice provided for in the preceding section and reads:

> "If it shall appear and be proven on trial that the owner or owners of such domestic animals, as set forth in section 12797, shall have actual notice that his or their said animals or stock were restrained, and by whom, and that the parties interested could not agree on the amount of damages demanded, then the three days' notice in writing as required by section 12797 shall not be necessary to a recovery."

Section 12799 R. S. Mo. 1929 provides that the taker-up need not be the same person damaged by a trespass and provides:

> "If the owner of such stock so restrained and the taker-up, or the person damaged by such stock and the owner thereof, cannot agree upon the same, either party may apply to any justice of the peace of the township where said taker-up resides for the appointment of three appraisers to assess the damages done, or reasonable compensation for the taking up, keeping and feeding such stock, and it shall be the duty of the justice of the peace to issue a notice to three disinterested householders of the township to appear at such place in said township as he may designate, and assess the damages or compensation as herein required."

Section 12800 R. S. Mo. 1929 provides:

> "The persons so notified, or any two of them attending, shall take an oath that they will fairly and impartially assess the damages or compensation in controversy, and they shall make out, sign and deliver to each party a written statement of their assessment of damages or compensation, and upon the payment of the same and the expenses of said controversy, the owner of such stock shall be entitled to take the same away, and if refused, he may maintain an action therefor, as in case of wrongful taking or detention of property."

In Worthington vs. Brent, 69 Mo. 205, l.c. 207, the Supreme Court said:

> "The stray law has been on our statute book from the organization of the State, and is not materially different now from what it was in 1825. No definition of a stray is given in any of the statutes; indeed, none was necessary. The object of the law was to encourage farmers to take up such cattle and other animals as were found on their plantations at a season of the year when feeding was usually required, and the main purpose was, by small premiums offered to the taker up, to benefit the owner who might in this way be enabled to trace his lost stock. * * * * * * * * * *"

The above case specifically holds that there was no prohibition against taking up strays on a plantation occupied by the taker up, simply because the taker up knew the owner. It is only a step further to say that strays found on a farm of the taker up, in his barn, are no less strays because they were driven there from the premises of a state park by the Park Superintendent.

It is true that where a person takes up strays as the justice did in this case, he should do so in strict compliance with the statutes, if he expects to claim the compensation allowed by the estray statute, and in Harryman vs. Titus, 3 Missouri 302, the Supreme Court said:

> "Having said this much, we proceed to lay down the rule to be, that the party who seeks to detain property as an estray, must show that he did all on his part, exactly as the law requires it should be done; and secondly that he must show that all the law required of the justice was done by him. * * * * * * * * * This view of the matter establishes the point, that there was no legal taking up of an estray in the case. It, therefore, is unnecessary to take any particular notice of the instructions refused by the court to be given, as required

> by the plaintiff in error. * * * * * *
> The law gives 37 cents to the taker up for that act. Now if the owner applies for the property within the ten days, he is to have his beast if he will pay the 37 cents; if not, the law authorizes the taker up to detain the beast for that reason. But if the owner does not apply for the beast within the ten days, then the taker up is bound to proceed to post the estray; and if he does not do so in good faith, or should proceed to do it in such manner as not to comply with the requisitions of the law, he is from the end of the ten days a transgressor, and in such case the rule is, that if a thing be begun lawfully, but be carried on and ended unlawfully, the transaction is void from the beginning. If it were not so in this case, the taker up would, if dishonest, only arrest or take up the beast, claim his 37 cents, if any one ever demanded the stray, would claim to them on the ground of a taker up, when, at the same time, he would conceal the means of knowledge from the owner. To allow this fee in this case, would be contrary to the spirit of the stray law, which is so anxious to have all things done right, and in due time, that it imposes a penalty of $20 on a person who shall begin the process of taking up, and not go through with it. * * * * * * *"

Where one follows the statute in taking up strays, he has a lien on the property for his lawful charges and cannot be forcibly divested of his possession of the strays until such charges are paid by the owner. The cases in construing the above statutes all say that liability for such charges is on the owner and in Rice vs. Underwood, 27 Mo. 551, l.c. 552, the Supreme Court said:

> "If the plaintiff had complied with the stray law (R. C. 1845, p. 1038), the title to the mules would have been vested in him after the expiration of one year; and, if within one

> year the defendant had claimed them, and proved his right, he would only have been entitled to take them upon payment of 'all costs, the reward, and a reasonable allowance for keeping them.' The plaintiff had a lien on the mules for whatever was due to him, and though he had no right to reclamation against the defendant, if he chose to abandon his property, he had the right of possession until he was paid. By taking the property the defendant admitted that it was worth more than the plaintiff's legal charges on it, and he could not, by committing a trespass, avoid the liability to pay the just demands against it. The law implied an obligation on the defendant, if he took the mules within one year from the time they were taken up, to pay 'all costs, the reward, and a reasonable allowance for taking (keeping) the same', and the plaintiff was entitled to recover his legal charges."

CONCLUSION

The statutes allow any person to be the taker up of stray animals, hence the complainant need not be the taker up. Written notice to the owner is not necessary when the owner has actual knowledge that his sheep are restrained as strays. Where there is no claims for damages by reason of the trespass of the sheep, the statute does not provide for any costs being taxed against the complainant, and to do so by the justice or appraisers is illegal, void and of no effect.

The statute dealing with stray animals running at large, supra, provides contingencies where either the taker up or the owner may be liable for feeding and keeping stray sheep: the taker up, when his charge according to appraisers is exorbitant, otherwise, all feeding and keeping charges fall on the owner. The taker up has a statutory lien for such reasonable charges on the strays in his possession, and he must look to the owner or to his lien for satisfaction of a claim for feeding and keeping stray sheep. This is the legislative scheme and the purport of the statutes, supra.

The justice or the appraisers cannot ignore the statutory scheme by placing costs against persons other than the persons the legislature has provided. The Park Superintendent, not being the taker up or the owner of the sheep could not be legally looked to for the costs in this proceeding, and such is our opinion.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

WOS/ww

CRIMINAL LAW: **Physician is incompetent to testify as to sobriety of a patient whom he is treating for injuries, but a physician is competent to testify as a layman when he is not treating an intoxicated person.**

May 31, 1939

b-1

FILED 57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, which reads as follows:

> "This state of facts concerns privileged communications between doctor and patient as set out in section 1731.
>
> "The facts are these; The sheriff of Morgan County, Mo was called to the scene of a wreck of a motor car on the highway. The driver of the car had the odor of alcohol on his breath, and was injured and bleeding. The sheriff was of the opinion that the driver ran off of the road while the driver was operating a car while intoxicated. The sheriff then brought the driver to town under arrest, and took the driver to a physician for examination as to the extent of injury and for treatment of the wounds. The sheriff did not want to jail the driver until the medical attention was given. The physician made an examination of the injuries and dressed the wounds. While the physician was making the examination and dressing the wounds, the physician

> discovered that the driver was intoxicated. The physician will testify that the driver of the car was sloppy drunk. The driver of the car was too helpless to seek the aid of a physician. He may have been suffering from the shock of the wreck, the injuries or by being partially paralyzed from intoxication.
>
> "Now on preliminary examination the driver in an examination as to whether the driver drove a motor vehicle while intoxicated, the physician was not allowed to testify because the communication of what the doctor learned while treating the driver professionally was priviledged. Is this the rule of evidence. Of course while treating the driver professionally for the wounds, the physician learned that the driver was drunk.
>
> "My question is, suppose I, as prosecuting attorney suggests to the sheriff, that he call a physician to give a drunken driver an examination to determine if the driver is intoxicated, is that a priviledged communication so that I cannot use the testimoney of the physician that the driver is intoxicated? "

From your request it can readily be seen that the intoxicated driver of an automobile became a patient of the physician when he was taken to the office of the physician for treatment of his wounds, and in that case the fact that he was drunk and the observations made by the physician were privileged, and the physician could not testify according to his opinion that the driver of the automobile was intoxicated. It was so held in the case of Owens v. Kansas City, C. C. & S. J. Ry. Co., 225 S. W. 234, l.c. 236, pars. 7,8. where the court said:

> "The record does not disclose that the excluded evidence of the doctors as to statements of plaintiff's husband while in the hospital, which were obtained by them as ' a part of the history of the case,' comes within the ruling in the case of Green v. Terminal R. Ass'n, 211 Mo. 18, 35-44, 109 S. W. 715, and hence error cannot be predicated thereon. The fact that they smelled liquor on his breath and he appeared to be intoxicated was clearly privileged (Kling v. City of Kansas, 27 Mo. App. 231, 244), unless waived, and the record does not show such waiver. In this connection it is not clear to us how the fact of the smell of liquor on his breath was relevant in a case, depending wholly, as this one does, on the humanitarian doctrine."

It was also held in the case of Kling v. The City of Kansas, 27 Mo. App. 231, l.c. 244, 247, where the court said:

> "If a patient suffering from a broken leg, in explaining to his physician the manner in which he received the injury, in order to give needed information concerning the injury, communicate to the physician information that he was under the influence of intoxicating drink at the time of the accident, such information would be excluded. Our conclusion is, that any information necessarily acquired by the physician from the patient, in order to treat him while attending him in a professional capacity is excluded by the statute."

> "The test is, how was the information acquired; it matters not that it could have been acquired in a different way. In our opinion the distinction is supported by neither the spirit nor the letter of the statute, and is not real. The physician called upon the plaintiff as his physician; any information as to the plaintiff's condition as to sobriety, acquired by the physician by seeing him, was necessarily acquired in order to treat him, and is excluded by the statute. The indications that the plaintiff had been drinking, and was under the influence of liquor, were, in part, the appearance of the plaintiff, as stated by the physician. The court properly struck the questions and answers from the deposition."

According to the above cases the court properly ruled that the physician could not state that the driver of the car was intoxicated while being treated, for the reason that the physician was incompetent to so testify on account of said information, so acquired from the patient while attending him in a professional character, was necessary to enable him to prescribe for such patient as a physician. Both cases as set out above, follow the statute as set out in section 1731 R. S. Mo. 1929, which partially reads as follows:

> "The following persons shall be incompetent to testify: * * * * * * * * * * *; fifth, a physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable

> him to prescribe for such patient as a physician, or do any act for him as a surgeon."

In your request you also asked whether or not a physician is competent to testify as to the condition of intoxication of a driver of an automobile when the driver has been taken to the office of the physician solely for the purpose of determining if the driver was intoxicated. In that event their status is not that of physician and patient but only for the purpose of using the opinion of the doctor as to the intoxication of the driver of the car. If the driver of the car is taken to the office of the physician for any treatment whatsoever, the physician would not be a competent witness to testify as to the driver being intoxicated. The physician is only acting as an ordinary layman, who, according to the law, may give an opinion from his observation as to whether a man is sober or intoxicated. The physician under such a statement of facts is only a witness, and the status of patient and doctor does not apply. It was so held in the case of State v. Revard, 106 S. W. (2d) 906, l. c. 909, pars. 7,8, where the court said:

> "Complaint is made that the court erred in permitting witnesses for the state to testify that at the scene of the collision and immediately after it had occurred defendant was or appeared to be intoxicated. No objection was made to any of this testimony except in one instance, viz: While Knapp was on the witness stand, he was asked to state what defendant's condition was as the latter got out of his car, and without objection, answered, 'He was very much intoxicated.' He then described defendant's actions and conduct. Following such description he was asked,'And in your opinion he was intoxicated there at the time when he got out of the car?' to which he answered, 'Yes, sir.' Not only do we think he was qualified to give the opinion expressed, having described the actions

> and conduct of defendant, but there was no objection until after the question had been answered (when objection was offered on the ground that the question called for a conclusion) and there was no motion to strike the answer. The objection came too late. Moreover, Knapp had previously testified without objection that defendant was intoxicated when he got out of his car. This contention is ruled against appellant."

It was also held in the case of Griffith v. Continental Casualty Co. 253 S. W. 1043, l. c. 1047, where the court said:

> "(1) The only fact appearing in the testimony of Dr. Chiles with respect to which he was incompetent to testify was the fact that Griffith had had tuberculosis for a considerable length of time before his death. That fact, however, was established by the plaintiff's evidence in chief before Chiles was called to the witness stand by defendant. It is not perceived how she could have been prejudiced by further evidence of such fact, even though it came from a prohibited source. Chiles was not incompetent to testify to Griffith's statement, that he did not think life worth living and that he had as well jump in the river, for the simple reason that it was not information necessary to enable him to prescribe for Griffith as his patient."

Where the physician is not acting as a doctor for the driver and the driver is not a patient of the doctor, his evidence is competent and the courts have

even held that where there are doctors examining a patient and another doctor is present, but who is merely a by-stander, the bystander is not placed in the position of a physician for the patient and his evidence is competent, although he is a physician. It was so held in the case of Plater v. W. C. Mullins Const. Co., 17 S. W. (2d) 659, l.c. 669, where the court said:

> "The courts permit men to be sent to the penitentiary upon the evidence of trespassers who go upon defendants' land and there discover evidence of the illegal manufacture of whisky. Men are convicted of crime upon evidence procured by tapping telephone and telegraph wires. Eavesdroppers are held to be competent witnesses. Therefore, this court must hold that a plaintiff in a personal injury suit who permits a bystander to assist in an examination of her physical condition runs the risk that that bystander, when called as a witness, will be permitted to state his opinions because of his special skill and training. We hold that the trial court committed error in refusing to permit Dr. Horigan to testify."

CONCLUSION

In view of the above authorities it is the opinion of this department that the evidence of a physician is not competent either in a civil or criminal case where the status of physician and patient exists, and the information to which he will testify was acquired from the patient while attending him in a professional character. It is further the opinion of this department

that where the physician is not treating the driver of the car and the status of physician and patient does not exist his testimony would be competent as to the condition of the sobriety of the driver, the same as an opinion of an ordinary layman based upon the facts of the case.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

PENAL INSTITUTIONS: Reprieves for specified periods are part of the Governor's Constitutional perogative.

June 3, 1939

68

FILED
57

Honorable J. E. Matthews, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Sir:

I acknowledge your request for an opinion dated May 26, 1939, which reads as follows:

> "Attached is a copy of a letter from Mr. R. E. Stone, Superintendent of the Missouri Training School for Boys, Boonville, requesting that the Board give Christmas furloughs to deserving inmates in that Institution.
>
> "We have had this under advisement for sometime and, as yet, have not taken any action as we do not know whether this will conflict with any statute or whether we have the authority to grant these furloughs since the inmates of this Institution are sentenced and cannot be released until they have served their time or have been paroled by the Board of Probation and Parole. Therefore, we would be glad to receive an opinion from your office."

Article 5, Section 8 of the Mo. Constitution provides:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations

> as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same.

Pursuant to the above constitutional provisions, the Governor is authorized to grant "reprieves" for crimes, except treason and cases of impeachment. 20 R. C. L. page 522 defines reprieve as follows:

> "A reprieve, from reprendre, to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. It is merely the postponement of the sentence for a time. It does not and cannot defeat the ultimate execution of the judgment of the court, but merely delays it. * ** * * * * * * "

In the case of State v. Sloss, 25 Mo. 291, l.c. 294, when there was an attempted legislative encroachment on the constitutional perogative of a Missouri Governor to grant reprieves, pardons and commutations, the Supreme Court held such encroachment as unconstitutional and said:

> "Although questions have sometimes arisen whether a power properly belonged to one department of government or another, yet there is no contrariety of opinion as to the department of the government to which the power of pardoning offenses properly appertains. All unite in pronouncing it an executive function. So the framers of our constitution thought, and accrodingly vested the power of pardoning in the chief executive officer of the state."

Under the Missouri Constitution, statutes and judicial decisions, all punishment for crime, after commitment to a Penal Institution, must be executed in strict compliance with the lawful judgment and sentence of the court, except where the Governor shows executive clemency by reprieve, commutation or pardon. The cases hold that the perogrative of clemency, after commitment to a Penal Institution, is exclusively an executive power, not to be infringed upon by any legislative scheme of clemency.

The framers of the Constitution saw fit to give this exclusive perogrative to the Governor, intending to alleviate occasional inhuman treatment of convicts in a rigidly enforced criminal code, which provides penal servitude in a Penal Institution.

This department is of the opinion that the Governor of Missouri, under his exclusive perogrative to grant reprieves, except for treason and cases of impeachment, can grant a reprieve, to any inmate commited by the courts to any Missouri Penal Institution, for a specified period of time, whenever in his discretion he feels that such a reprieve should be granted. The Christmas Holiday Season could be an occasion for an executive reprieve for a specified period of time.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

_____

(Acting) Attorney-General

WOS/ww

SHERIFFS AND OFFICIAL BONDS: Sureties on Sheriff's bonds are not liable for excess bills presented to the County Court by the Sheriff and paid to him.

June 5th, 1939.

6-17

FILED
57

Honorable G. Logan Marr,
Prosecuting Attorney,
Morgan County,
Versailles, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry, which is as follows:

"By your copy of the opinion sent to me concerning mileage to sheriffs for criminal investigations, you held that the sheriff could not charge the county for mileage in making criminal investigations.

"By the audit of the office of the sheriff for 1938 by the state auditors office, there was set up against the sheriff $200.00 for mileage in making criminal investigations. This amount was held due to be returned to Morgan County, Mo. Apparently these are illegal fees charged by the sheriff in his monthly bills presented to the county court. As usual, this officer is insolvent. The county could gain nothing by a suit against the office individually for the return of these illegal fees.

"The question has been raised would the bondsmen be liable on their bond for the return of this mileage paid the sheriff when he had no right to collect the same, as there was no statutory authority for collecting the same or allowing the same. By what rule of law would the bondsmen be liable for these illegal fees?"

Replying thereto, Section 11507, R. S. Mo., 1929, prescribing the terms of the bond that is required to be executed by the sheriff, says in part that

"* * * * conditioned for the faithful discharge of his duties * * * *;"

Section 9754 R. S. Mo., 1929, prescribes the condition of the bond of the Assessor as follows:

"** * * conditioned for the faithful performance of the duties of his office* * * *"

In State v. Gomer, 340 Mo. 107, the Supreme Court of Missouri, in 1936, considered the law with respect to the liabilities of the sureties on the Assessor's bond, and held that the sureties on the Assessor's bond are not liable on the bond for excessive bills presented by the Assessor to the County Court, and by that body paid to the Assessor. The court, at page 124, said:

"When the assessor completes his work he does not decide the question of amount of compensation for himself, but must present a bill for his services, and it is the duty of the county court to investigate and audit his account before entering an order approving it for payment. (As to powers and duties of county court see Jackson County v. Faymen, 329 Mo. 423, 44 S. W. (2d) 849.) If both the assessor and the county court, in good faith, compute this compensation upon the basis they honestly believe the law requires, then surely this is no breach of the bond, which casts liability upon the assessor's sureties.

"It is pointed out in 46 Corpus Juris, 1070, section 402, that 'a bond conditioned on the faithful performance of the duties of the office' has been held not to be breached by an officer claiming and receiving, from the public treasury, compensation in excess of that allowed him by law. (Furlong v. State, 58 Miss. 717; McCrory v. Woods County (Okla.), 150 Pac. 683; Hughes v. Oklahoma County (Okla.), 150 Pac. 1029; Shelton v. State (Oklahoma), 162 Pac. 224; Butte v. Bennetts (Mont.), 149 Pac. 92, Ann. Cas. 1918C, 1019). Some of these cases even go so far as to cover claims based upon false statements. The theory of these cases is that such a bond is not security for an excessive claim for compensation by a public officer, who is not the legal custodian of money out of which he can pay himself and who is, therefore, bound to pay over and account in full therefor except as to the amount he is entitled to retain as his own compensation."

As we view that opinion of the court, it holds that the sureties on a bond such as we are here considering, are not liable for the payment unlawfully by the County Court to an Assessor of a greater amount of money as compensation for his official labors than the law provieds for. In other words, the bond is not breached by the Assessor billing the county for a greater amount of money than the assessor is entitled to receive. That does not mean that the payment to the assessor is legal. It does not mean that the assessor may lawfully retain the excess.

In the Gomer case, at page 125, the Court said:

> "Nevertheless, we do not mean to hold that an assessor or any other officer is entitled to keep more than he is allowed to collect by law for his services even if overpayment is due to an honest mistake of law; * * * *"

The condition of the Assessor's bond is the same as the condition of the Sheriff's bond, and the same law governing the liability of the surety on the assessor's bond applies to the liability of the surety on the sheriff's bond.

By your question, it appears that the Sheriff does not collect this money and then fails to turn over the full amount to the county officer entitled to receive it, but his wrong consists of billing the county for a greater amount of money than the services he has performed justifies. Under that set of facts, it is our opinion that the sureties on the sheriff's bond would not be liable for the excess payment under the direction of the county court to the sheriff. It

is the duty of the county court to carefully audit the bills. They are the guardians of the county funds, and the fact that the sureties on the sheriff's bond are not liable for the payment in excess of the lawful amount that could be paid the sheriff is additional reason why the county court should carefully examine and audit the bills and, if necessary, hear evidence on the same and be advised by the Prosecuting Attorney, whom they are authorized to call upon for legal advice to the end that the county officials are paid properly and are not paid a greater amount than under the law they are entitled to.

Yours truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
(Acting) Attorney General.

DW/RV

RECORDER OF DEEDS: Required to produce original records at trial on order of subpoena duees tecum.

June 7th, 1939.

6-8

FILED
57

Hon. Ernest C. Martin,
Recorder of Deeds,
Pettis County,
Sedalia, Missouri.

Dear Sir:

We desire to acknowledge receipt of your letter of March 7th, 1939, requesting an opinion, which is as follows:

> "Is the Recorder of Deeds required, when subpoenaed with a duces-tecum subpoena, to take the permanent records out of the county's vault and introduce them as evidence in the various courts in the state?"

In considering this question we should observe the following sections:

Section 3045, R. S. Mo., 1929, reads as follows:

> "The record of such re-recorded conveyances shall impart notice to the same extent and shall be admissible in evidence with like effect as the original record."

Section 3049, R. S. Mo., 1929, reads as follows:

> "Where any such instrument is acknowledged or proved, certified and recorded, in the manner herein prescribed, and it shall be shown to the court by the oath or affidavit of the party wishing to use the same, or of anyone knowing the fact, that such instrument is lost, or not within the power of the party wishing to use the same, the record thereof, or the transcript of such record, certified by the recorder under the seal of his office, may be read in evidence, without further proof."

Section 3050, R. S. Mo., 1929, reads as follows:

> "Neither the certificate of the acknowledgement nor the proof of any such instrument nor the record nor the transcript of the record of such instrument, shall be conclusive, but the same may be rebutted."

Section 3051, R. S. Mo., 1929, reads as follows:

> "If the party contesting the proof of any such instrument shall make it appear that such proof was taken upon the oath of an incompetent witness, neither such instrument nor the record thereof shall be received in evidence until established by other competent proof."

Section 3057, R. S. 1929, reads as follows:

> "Copies of such instruments, or of the record of the same, duly certified by the recorder of the county in which the same may have been recorded, shall, upon proof of the loss or destruction of the original instrument, be read in evidence, with like effect and on the same conditions as the original instrument."

From the first four of the above sections it appears that the Legislature contemplated the production of either the record, the transcript of the record, or a certified copy of any instrument which had been recorded and subsequently lost. Section 3057, supra, however, makes it appear that a copy of any lost instrument or of the record of the same, either of which must be duly certified by the Recorder, shall be read in evidence without the production of the original record in your office. It would appear, therefore, that as a practical matter, an application for a subpoena duces tecum requesting you to produce your original records, should be refused by the judge before whom the application is made, if a certified copy can be obtained.

In this connection, the case of State ex rel Miller v. O'Malley, 342 Mo. l. c. 646, states:

> "It may be conceded further that the court's action in issuing or denying a subpoena duces tecum is discretionary or judicial, as opposed to ministerial. For the court must pass upon: the relevancy and materiality of the evidence sought to be brought in, * * * * * *; and the hardships entailed in producing it; * * * * and, of course, the legal question whether it is subject to subpoena."

It is our opinion that whenever you are served with a subpoena duces tecum requiring you to appear with the originals of certain records, you must do so, but as a practical suggestion, it would appear that a conference with your Circuit Judge, and the production of this opinion, would result in his refusing applications for the production of your original records in the future.

Respectfully submitted,

ROBERT L. HYDER,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH/RV

PUBLIC LANDS: State laws respecting federally owned lands are junior to the federal laws thereover.

UNITED STATES GOVERNMENT:

June 17th, 1939.

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FILED

57

Hon. R. E. L. Marrs,
Secretary of the Senate,
Jefferson City, Missouri.

Dear Sir:

We acknowledge receipt of your recent letter with an enclosure of a certified copy of Senate Resolution No. 71, which letter and resolution are as follows:

"I have the honor to inform you that Senate Resolution No. 71 was offered into and adopted by the Senate of the 60th General Assembly on June 7, 1939, certified copy of which I am enclosing herewith."

SENATE RESOLUTION NO. 71.

"Whereas, Article 6, Chapter 88, Revised Statutes of Missouri, 1929 provides, under certain conditions of local option for an open range for stock, and

"Whereas, Certain counties in this state in accord with the Laws of Missouri do make the use of open range lawful and require the owner in such territory to maintain a lawful fence, and

"Whereas, If such lawful fence be not maintained by the owner of the land stock have the right of access to such land, and

"Whereas, The Government of the United States by permission of the State of Missouri has been permitted to acquire by gift or purchase lands for forestry and other purposes, and

"Whereas, Part of such land so purchased by the government of the United States lies within the region of open range; therefore, be it

"Resolved, that the Attorney General is hereby requested to advise the General Assembly of Missouri whether the Government of the United States may deny access to its lands in counties of open range if the said lands be not enclosed by a lawful fence; and, be it further

"Resolved, That upon the adoption of this resolution that the Secretary of the Senate is directed to certify it to the Attorney General of Missouri.

"State of Missouri
Jefferson City
Senate Chamber

I, R. E. L. Marrs, Secretary of the Senate, do hereby certify that the above and foregoing Senate Resolution was offered into and adopted by the Senate on the 7th day of June, 1939, and that the above and foregoing is a full, true and complete copy of said Senate Resolution as fully as the same is on file and appears of record in my office.

In testimony whereof, I have hereunto set my hand at my office in Jefferson City, Missouri, this 7th day of June, A. D. 1939.

R. E. L. MARRS,
Secretary of the Senate."

The Constitution of the United States, Section 3 of Article 4 thereof, at page 28 in the Revised Statutes of Missouri, 1929, in part states:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; * * * * * *."

The Supreme Court of the United States has, on several occasions, held that the property owned by the United States is subject to the power and Government of the United States superior to that of all else. In Gibson against Chouteau, 80 U.S. 92, 13 Wall. l.c. 99, the Court said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations."

In United States v. Grimaud, 220 U.S. 506, 55 L. Ed. 563, see also Light v. United States 220 U.S. 525, 55 L. Ed. 570, the constitutionality of the laws is sustained by which Congress delegated to the Secretary of the Interior power to make rules as to grazing public lands and to charge therefor. At page 569, the court said:

> "It is true that there is no act of Congress which, in express terms, declares that it shall be unlawful to graze sheep on a forest reserve. But the statutes from which we have quoted declare that the privilege of using reserves for 'all proper and lawful purposes' is subject to the proviso that the person so using them shall comply 'with the rules and regulations covering said forest reservation.' The same act makes it an offense to violate those regulations; that is, to use them otherwise than in accordance with the rules established by the Secretary. Thus the implied license under which the United States had suffered its public domain to be used as a pasture for sheep and cattle, mentioned in Buford v. Houtz, 133 U. S. 326, 33 L. Ed. 620, 10 Sup. Ct. Rep. 305, was curtailed and qualified by Congress, to the extent that such privilege should not be exercised in contravention of the rules and regulations. Wilcox v. Jackson, 13 Pet. 513, 10 L. Ed. 271."

In Buford v. Houtz, 133 U. S. 321, 33 L. Ed. 618 (1889), Plaintiff sought to enjoin defendant from pasturing plaintiff's land on the theory that plaintiff owned alternate sections and the Government owned the others, and that the Defendant, in pasturing that part owned by the Government, would pasture that part owned by the plaintiff. The court denied an injunction and held that plaintiff had no authority without fencing his own lands to prevent defendant's sheep from grazing thereon. Speaking of the public lands, the court said at page 620:

"We are of the opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, where they are left open and uninclosed, and no act of government forbids this use. For many years past a very large proportion of the beef which has been used by the people of the United States is the meat of cattle thus raised upon the public lands without charge, without let or hindrance or obstruction. The government of the United States in all its branches has known of this use, has never forbidden it nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement.

"The whole system of the control of the public lands of the United States as it has been conducted by the government, under Acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable. They have always been open to sale at very cheap prices. Laws have been enacted authorizing persons to settle upon them, and to cultivate them, before they acquire any title to them. While in the incipiency of the settlement of these lands by persons entering upon them, the permission to do so was a tacit one, the exercise of this permission became so important that Congress, by

a system of laws called the Pre-emption Laws, recognized this right so far as to confer a priority of the right of purchase on the persons who settled upon and cultivated any part of this public domain. During the time that the settler was perfecting his title, by making the improvements which the Statute required, and paying, by installments or otherwise, the money necessary to purchase it, both he and all other persons who desire to do so had full liberty to graze their stock upon the grasses of the prairies and upon other nutritious substances found upon the soil.

"The value of this privilege grew as the population increased, and it became a custom for persons to make a business or pursuit of gathering herds of cattle or sheep and raising them and fattening them for market upon these uninclosed lands of the government of the United States. Of course the instances became numerous in which persons purchasing land from the United States put only a small part of it in cultivation, and permitted the balance to remain uninclosed and in no way separated from the lands owned by the United States. All the neighbors who had settled near one of these prairies or on it, and all the people who had cattle that they wished to graze upon the public lands, permitted them to run at large over the whole region, fattening upon the public lands of the United States and upon the uninclosed lands of the private individual without let or

hindrance. The owner of a piece of land, who had built a house or inclosed twenty or forty acres of it, had the benefit of this universal custom, as well as the party who owned no land, Everybody used the open uninclosed country which produced nutritious grasses as a public common on which their horses, cattle, hogs and sheep could run and graze.

"It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds or else would be liable for their trespasses upon the uninclosed grounds of his neighbors. Such a principle was ill adapted to the nature and condition of the country at that time. Owing to the searcity of means for inclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation.

"Nearly all the States in early days had wat was called the Fence Law, a law by which a kind of fence, sufficient in a general way to protect the

cultivated ground from cattle and other domestic animals which were permitted to run at large was prescribed. The character of this fence in most of the Statutes was laid down with great particularity, and unless it was in strict conformity to the Statute there was no liability on the part of the owner of cattle if they invaded the inclosure of a party and inflicted injury on him. If the owner of the inclosed ground had his fence constructed in accordance with the requirements of the Statute, the law presumed then that an animal which invaded this inclosure was what was called a breachy animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded.

"The Territory of Utah has now, and has always had, a similar statute, section 2234 of the Compiled Laws of Utah. It is now a matter of occasional legislation in the States which have been created out of this public domain, to permit certain counties, or parts of the State, or the whole of the State, by a vote of the people within such subdivisions, to determine whether cattle shall longer be permitted to run at large and the owners of the soil compelled to rely upon their fences for protection, or whether the cattle-owner shall keep them confined, and in that manner protect his neighbor without the necessity on the part of the latter of relying upon fences which he may make for such protection.

> "Whatever policy may be the result of this current agitation can have no effect upon the present case, as the law of Utah and its customs in this regard remain such as we have described it to be in the general region of the northwest, and the privileges accorded by the United States for grazing upon her public lands are subject alone to their control."

In Light v. United States, 220 U. S.525, 55 L.Ed. 570, the Supreme Court considered the authority of the United States Government over public lands and held that the Federal Government was entitled to injunctive relief against the grazing of the public lands contrary to the regulations promulgated by the Secretary of the Interior. In that case it was contended, among other things, by the adverse party that the United States was subject to the municipal laws of the State of Colorado relating to fences. At page 571 the court defeined the position of the defendant as follows:

> "The defendant appealed and assigned that the decree against him was erroneous; that the public lands are held in trust for the people of the several states, and the proclamation creating reserve without the consent of the state of Colorado is contrary to and in violation of said trust; that the decree is void because it, in effect, holds that the United States is exempt from the municipal laws of the State of Colorado relating to fences; that the statute conferring upon the said Secretary of Agriculture the power to make rules and regulations was an unconstitutional delegation of authority to him,

and the rules and regulations therefore void; and that the rules mentioned in the bill are unreasonable, do not tend to insure the object of forest reservation, and constitute an unconstitutional interference by the government of the United States with fence and other statutes of the state of Colorado, enacted through the exercise of the police power of the state."

At page 573, the court, in holding in favor of the United States, said:

"The defendant was enjoined from pasturing his cattle on the Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture, under the authority conferred by the act of June 4, 1897 (30 Stat. 35, Chap. 2), to make rules and regulations as to the use, occupancy, and preservation of forests. The validity of the rule is attacked on the ground that Congress could not delegate to the Secretary legislative power. We need not discuss that question, in view of the opinion in United States v. Grimaud (just decided), 220. U.S. 506, ante, 563, 31 Sup.Ct.Rep. 480.

"The bill alleged, and there was evidence to support the finding, that the defendant, with the expectation and intention that they would do so, turned his cattle out at a time and place which made it certain that they would leave the open public lands and go at once to the reserve where there was good water and pasturage. When notified to remove the cattle, he declined to do so, and threatened to resist if they should be driven off by a forrest officer.

He justified his position on the ground that the statute of Colorado provided that a land-owner could not recover damages for trespass by animals unless the property was inclosed with a fence of designated size and material. Regardless of any conflict in the testimony, the defendant claims that unless the government put a fence around the reserve, it had no remedy, either at law or in equity, nor could he be required to prevent his cattle straying upon the reserve from the open public land on which he had a right to turn them loose.

"At common law the owner was required to confine his live stock, or else was held liable for any damage done by them upon the land of third persons. That law was not adapted to the situation of those states where there were great plains and vest tracts of uninclosed lands, suitable for pasture. And so, without passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the government did not cancel its tacit consent. Buford v. Hout, 133 U. S. 326, 33 L. Ed. 620, 10 Sup. Ct. Rep. 305. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States ofthe power of recalling any implied license under which the land had been used for private purposes. Steele V. United States, 113 U. S. 130, 28 L. Ed. 952, 5 Sup. Ct. Rep. 306; Wilcox v. Jackson, 13 Pet. 513, 10 L. Ed. 271.

"It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the state where it is located; and it is then argued that the act of 1891 (26 Stat. at L. 1103, chap. 561, U. S. Comp. Stat. 1901, p. 1537), providing for the establishment of reservations, was void, so that what is nominally a reserve is, in law, to be treated as open and uninclosed land, as to which there still exists the implied license that it may be used for grazing purposes.

"But 'the nation is an owner, and has made Congress the principal agent to dispose of its property . . . . Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' Butte City Water Co. v. Baker, 196 U. S. 126, 49 L. Ed. 412, 25 Sup. Ct. Rep. 211. 'The government has, with respect to its own lands, the rights of an ordinary proprietor to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale.' Camfield v. United States, 167 U. S. 524, 42 L. Ed. 262, 17 Sup. Ct. Rep. 864. And if it may withhold from sale and settlement, it may also, as an owner, object to its property being used for grazing purposes, for 'the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' United States v. Beebe, 127 U. S. 342, 32 L. Ed. 123, 8 Sup. Ct. Rep. 1083.

"The United States can prohibit absolutely or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. Stearns v. Minnesota, 179 U. S. 243, 45 L. Ed. 173, 21 Sup. Ct. Rep. 73. It is true that the 'United States do not and cannot hold property as a monarch may, for private or personal purposes.' VanBocklin v. Anderson (Van Bocklin v. Tennessee), 117 U. S. 158, 29 L. Ed. 847, 6. Sup. Ct. Rep. 670. But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, Sect. 3, Art. 4, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.' 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' Kansas v. Colorado, 206 U. S. 89, 51 L. Ed. 971, 27 Sup. Ct. Rep. 655.

"'All the public lands of the nation are held in trust for the people of the whole country.' United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. Ed. 640, 11 Sup. Ct. Rep. 57. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement, or to suffer them to be used for agricultural or grazing purposes, nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the trust it may disestablish a reserve, and devote the property to some other national

and public purpose. These are rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it. Even a private owner would be entitled to protection against wilful trespasses, and statutes providing that damage done by animals can not be recovered, unless the land had been inclosed with a fence of the size and material required, do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there. Lazarus v. Phelps, 152 U. S. 81, 38 L. Ed. 363, 14 Sup. Ct. Rep. 477; Monroe v. Cannon, 24 Mont. 324, 81 Am. St. Rep. 439, 61 Pac. 863; St. Louis Cattle Co. v. Vaught, 1 Tex. Civ. App. 388, 20 S. W. 855; Union P. R. Co. v. Rollins, 5 Kan. 176.

"Fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn losse their cattle under circumstances showing that they were intended to graze upon the lands of another.

"This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve. He could have obtained a permit for reasonable pasturage. He not only declined to apply for such license, but there is evidence that he threatened to resist the efforts to have his cattle removed from the reserve, and in his answer he declares that

> he will continue to turn out his cattle, and contends that if they go upon the reserve the government has no rememdy at law or in equity. This claim answers itself.
>
> "It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts, the court properly granted an injunction."

In Golconda Cattle Co. v. United States, 201 F. 281 (1912), the Court held that the cattle Company had no authority to build a fence enclosing its land along with Government land, so the Government could not be reached by others, and this, notwithstanding, the fence built, was all on the land owned by the Cattle Company. At page 288, the court said:

> "We are not at all unmindful of the general right of an owner of a tract of land to build a fence thereon. It is fundamental that the rights of individual proprietorship which carry with them right to inclose or fence one's own land must be carefully guarded; but at the same time, as was held by the Supreme Court in Camfield v. United States, supra, the rights of the government in its proprietorship of the public domain do not exist by the sufferance of individual owners. It has a power over its own property analogous to the police power of the several states, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. Here the surrounding is in no sense confined to the land of

> the Golconda Company, for, of the total 37,000 acres included, 26,000 acres are public land. That is to say, the Golconda Company, by maintaining miles of fence along only the outside of its own 11,000 acres and connecting such fences with natural or other barriers, has separated one immense tract consisting not only of 11,000 acres belonging to it, but also of 26,000 acres of public land. The serious significance of the act is even more apparent when we realize that within the barriers there is public land more than sufficient to comprise 162 homestead entries."

As the basis for this ruling, the court at page 291 said:

> "It is said that enforcement of the decree of the District Court may be an invasion of the constitutional rights of the appellant, in that it would constitute a taking of private property for public use. But under the doctrine laid down by the Supreme Court in the Camfield case, supra, the United States has a clear right to legislate for the protection of the public lands and to exercise what is called a police power to make the protection effective, even though there may be some inconvenience or slight damage to individual proprietors. There being nothing in the facts of this case to take it out of this rule, we must hold that no rights of appellant have been infringed."

In United States v. Brighton Ranche Co., 26 F. 218, the court held the Federal Government would be entitled to a mandatory injunction to regulate the fence from government land and said that no rights as against the federal government were acquired by those who used the public lands, but that they were merely licensees and said:

"Something was said in the argument in respect to the government tolerating such occupation of its public land, and the answer alleges that it has been the policy of the government to permit occupation similar to that of the defendant. The case of Rector v. Gibson, 111 U. S. 276, is cited in support of this view. Doubtless the government has and does tolerate in a certain sense the occupation of the public lands, and wherever such occupation is either under the homestead or pre-emption act, or other acts, with a view to the purchase of the land, the occupation may be considered rightful. But the answer fails to disclose an occupation with any such intent, and the only occupation disclosed is one, not for the purpose of subsequent purchase, but with the idea of getting the benefit of the land for grazing purposes. Even if the policy of the government heretofore had been to tolerate the occupation and inclosing of tracts of government land for grazing purposes, the fact that an action is now commenced to put an end to such occupation is conclusive that the policy of the government is changed, and no rights are acquired against the government by a hitherto unchallenged occupation. So long as the government does nothing, an individual might, perhaps, not challenge the occupation by defendant; but the right of the government to interfere, to challenge the occupation, and to compel the defendant to desist from it, is not lost by mere delay in enforcing it."

In United States v. Bernard, et al., 202 F. 728, the 9th Circuit Court of Appeals in 1913 held that the Federal Government was entitled to equitable relief and damages for the reasonable value of such public lands as were fenced and used by the defendant, and this, notwithstanding

the Federal Government would not have received any rental or increment from the use of said land if they had not been so used by the defendant, and the court allowed judgment for Six Hundred ($600.00) Dollars actual damages in favor of the United States for such use. At page 731 the court said:

> "Notwithstanding that the acts of the appellee were deliberately done with full knowledge of the statute, and were continued in disregard of numerous notices to abate the inclosure, and that the value of the use of the inclosed public land was the full amount sued for, the appellees contend that no damages are recoverable by the government, for the reason that the public land of the United States has not been injured by their acts, that they have destroyed no government property, that the general public was licensed to pasture on the lands, and that others would have used the pasture on the lands if the appellees had not inclosed them. These reasons are not sufficient. It is true there has been no destruction of government property by the appellees, as in the case of cutting and removing timber, or taking turpentine sap from pine trees on government lands; but the appellees, by their wrongful act, have obtained the sole benefit of that which belonged to the United States, and was of value, the right to the use of which the government might have leased and thereby obtained revenue. It is no answer to the claim of the government for damages to say that the government would not have used the land or derived any pecuniary benefit therefrom, and that the government had licensed the public to use it. The license was a general one, and was for the benefit of all

> the people who were in a situation to avail themselves of it, and it was for the public good, and the fact that the government would have received no money consideration for the use of the pasture lands inclosed by the appellees is no ground for saying that it may not recover damages measured by the actual value of that which belonged to the United States, and which the appellees took without authority of law, and against the prohibition of the law. The fact that a plaintiff in an action for continued trespass would have made no use of the land which the defendant has wrongfully used to his advantage and profit will not prevent the plaintiff from recovering the actual value of that which had been so used and acquired by the defendant. The measure of damages for an appropriation of land by a continuing trespass is the worth of the use of the property."

Omaechevarria v . Idaho, 246 U. S. 343, 62 L. Ed. 763, appears to sustain the validity and effectiveness of a statute of Idaho which prohibits certain classes of stock from being grazed on the public lands owned by the Federal Government. At page 769 the court said:

> "The Idaho statute makes no attempt to grant a right to use public lands. McGinnis v. Friedman, 2 Idaho, 393, 17 Pac. 635. The state, acting in the exercise of its police power, merely excludes sheep from certain ranges under certain circumstances. Like the Forcible Entry and Detainer Act of Washington, which was held in Denee v. Ridpath (decided March 4, 1918) (246 U. S. 208, ante, 669, 38 Sup. Ct. Rep. 226) not to conflict with the Homestead Laws, the Idaho Statute was enacted primarily to prevent breaches of peace.

> The incidental protection which it thereby affords to cattle owners does not purport to secure to any of them, or to cattle owners collectively, 'the exclusive use and occupancy of any part of the public lands.' For every range from which sheep are excluded remains open not only to all cattle, but also to horses, of which there are many in Idaho. This exclusion of sheep owners under certain circumstances does not interfere with any rights of a citizen of the United States. Congress has not conferred upon citizens the right to graze stock upon the public lands. The government has merely suffered the lands to be so used. Buford v. Houtz, 133 U. S. 320, 326, 33 L. Ed. 618, 620, 10 Sup. Ct. Rep. 305. It is because the citizen possesses no such right that it was held by this court that the Secretary of Agriculture might, in the exercise of his general power to regulate forest reserves, exclude sheep and cattle therefrom. United States v. Grimaud, 220 U. S. 506, 55 L. Ed.563, 31 Sup. Ct. Rep. 480; Light v. United States, 220 U. S. 523, 55 L. Ed. 570, 31 Sup. Ct. Rep. 485."

The same principle upheld in the Idaho case last above was applied in 1930 by the Circuit Court of Appeals for the 9th district in the case of Lamoreaux v. Kinney, 41 Fed. (2) p. 30, where the court, at page 31, said:

> "There is an implied license that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them, when they are left open and unenclosed and no act of the government forbids their use; Buford v. Houtz, 133 U. S. 320, 10 S. Ct. 305, 33 L. Ed. 618; and any unlawful interference with that right is an offense against the United States. McKelvey v. United States, 260 U. S. 353, 43 S. Ct. 132, 67 L. Ed. 301. But the right thus conferred is subject to regulation by the state or territory in which the public land lies."

The statutes referred to in Senate Resolution No. 71 appear to be similar to those of the State of Idaho considered by the Supreme Court of the United States. In the Idaho Case above referred to it will be observed that the statute of Missouri under consideration, (Section 12797, R. S. Mo. 1929,) is directed towards prohibiting a person who owns stock from permitting them to run outside of their own land. The inquiry does not seem to contemplate that the Federal Government would turn its cattle on the public lands owned by the Federal Government, but is rather directed toward the question of whether the Federal Government without erecting a fence around its own lands may prevent the stock owned by other people from grazing on said lands. By the above observations it is indicated that the Federal Constitution places the power in Congress to make all rules and regulations that may be appropriate with reference to the control of the public lands that the Congress may constitutionally delegate to the Secretary of the Interior the power to make such rules. The Federal Government is sovereign with reference to the Government of the lands owned by the Federal Government, and where there may be conflict between the control if attempted to be exercised by the Federal Government and that of the State Government, the authority of the federal government over the federally owned lands, is supreme.

The Federal Government, although having the authority to prevent the grazing by the public of its lands, has not always been fit to exercise that authority. On the contrary, in the earlier days of the Nation, the dispostion of the Federal Government was to encourage the use of the federally owned lands by the public in order that the Federal Government indirectly be benefitted because its citizens raised the cattle that supplied the meat for the Nation. In more recent times the Federal Government, through Congress, has enacted laws by which the grazing of its lands is restricted.

We have not found a case holding that the Congress did not have that authority. On the contrary, the cases appear to hold that the public merely uses or grazes the public federally owned lands under the permission of the Federal Government and acquires no rights thereto. By so doing, the nearest approach to authority of the state laws over the federally owned lands we find is illustrated in the Lamoreaux Case, above referred to, and also the Idaho Case. Those cases do not seek to confer authority on the individuals in opposition to the dominion and government of the lands, by the Federal Government, but they merely hold that insofar as the Federal Government does not exercise its authority to prevent entirely the pasturing of the federally owned lands, the state, within whose borders such lands are situate, may pass laws providing that certain classes of stock privately owned within the state may not be given equal rights with certain other classes of stock and the pasturing thereof on the public lands.

CONCLUSION.

It is our opinion that the Government of the United States may, by the enactment of legislation as if and when it sees fit to do so, deny access of stock to its lands which

are situate in the State of Missouri, and this is true, notwithstanding Federal Government Lands are not inclosed by lawful fences.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

DW/RV

COUNTY: ~~Not~~ liable for hospital expense of person committed to Missouri Training School.

FILED
57

June 20, 1939

Mr. J. E. Matthews, Director
Department of Penal Institutions
Jefferson City, Missouri

Dear Mr. Matthews:

We are in receipt of your letter of June 16th, together with attached correspondence. Your letter is as follows:

> "Attached is a copy of a letter from Mr. R. E. Stone, Superintendent of the Missouri Training School for Boys, Boonville, a copy of Mr. Stone's letter to Mrs. Vernie Goff Bryson, who is evidently a Juvenile Officer in Jasper County, and a copy of Mrs. Bryson's letter to Mr. Stone, relative to the case of inmate Lawson Fanning, an inmate at the Missouri Training School recently received from Jasper County, who had a fractured leg when he was received at the Institution.
>
> I am sending copies of these letters and I think they fully explain the apprehension, injury received by this boy and how it was handled, however, the question is whether or not the cost of hospitalization and medical services required on this boy's leg should be borne by the Missouri Training School or by Jasper County.
>
> We have authorized our Superintendent to give this boy all of the medical attention necessary since the Institution received him in this condition. However, we believe the cost should be borne by Jasper County and would appreciate receiving an opinion from you covering this case."

For a fuller statement of the facts, we set out Mr. Stone's letter addressed to you under date of June 12th, as follows:

> "I am attaching copies of correspondence concerning Lawson Fanning, because I think a legal question is involved here that needs interpretation and instruction for us for future guidance.
>
> As I get the story, this boy came into Missouri from Eureka Springs, Arkansas, and stole a car. He was in custody only a few days when he was sentenced to this school, and regardless of the fact that the boy's statement disagrees with that of Mrs. Bryson's, the fact remains, nevertheless, the boy's leg was fractured while in Jasper County. It may be the physician there was conscientious in his examination, but on the face of it it doesn't appear to have been a thorough one. To me it looks like a case of panning off to the State of Missouri a subject of Arkansas, and that Jasper County is attempting to avoid the expense. The condition of the boy's ankle is such that we authorized Dr. Winn to make the correction, and the $150 approximate expense referred to, provided Dr. Winn receives a small surgical fee. This, of course, will be eliminated if the State bears the expense.
>
> We have had a few similar instances of this, but nothing of such seriousness. But it would be well if a ruling could be set up so it would dispell any arguments as to whose responsibility it is. Will you please therefore advise us as quickly as possible how we are to proceed on this and similar matters."

Your "question is whether or not the cost of hospitalization and medical services required on this boy's leg should be borne by the Missouri Training School or by Jasper County."

Section 8358, R. S. Mo. 1929, provides that each county in the state is to make certain payments to the State Prison Board for each person committed to the Missouri Training School for Boys, in part as follows:

> "There shall be paid to the State Prison Board the sum of fifteen dollars per month for the support, maintenance, clothing and all other expenses of each person committed to said reformatory, from the time of his reception into said institution until his discharge therefrom: * * *."

"Expense" is defined as "the laying out or expending of money or other resources". (Standard Dict.) See also, 12 Am. & Eng. Ency. (2d Ed.) 394.

To determine whether the general words "all other expenses" would include necessary medicine and the services of a physician, we must resort to the rule of "ejusdem generis", which is stated in the case of Puritan Pharmacudical Co. v. Pennsylvania Railroad Co., 77 S. W. (2d) 508, 230 Mo. App. 848, to be:

> "that, where general words in a statute follow specific words, designating special things, the general words will be considered as applicable only to things of the same general character as those which are specified."

The specific words in the statute are "support, maintenance and clothing".

In the case of Eastland v. Williams Estate, 45 S. W. (Texas Civ. App.) 412, l. c. 415, the court said:

"We think that necessary medicines and the services of a physician in sickness should be classed under the head of 'maintenance'. See Webst. Int. Dict., Black Law Dict., and And. Law Dict. 'Maintain', 'Maintenance'."

Applying the foregoing rule of ejusdem generis, it is evident that the payment required of the county court to the prison board for each person sent to the reformatory includes medicine and the services of a physician. We are therefore of the opinion that the cost of hospitalization and medical expenses required on the boy's leg should be borne by the Missouri Training School and not by Jasper County.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

CRIMINAL PROCEDURE: Venue of jail break is in county where prisoner is confined from a county having no jail.

June 26, 1939

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of June 24th, 1939, which reads as follows:

"Robert Denny was charged with a felony by affadavit in the justice court, and after being apprehended he waived any preliminary examination, and was by the justice duly and legally committed to jail.

"Morgan County does not have any jail, and this prisoner Robert Denny was legally and lawfully committed and lodged in the county jail at Boonnville, Cooper county, Mo, which has been used as the jail for Morgan County for many years. He is the prisoner of Morgan County amd maintained at the expense of Morgan County. While Robert Denny was in the Boonville jail awaiting trial in the circuit court, to the circuit court of Morgan County, Mo, Robert Denny broke jail at Boonville, Mo, and left the state. He has been located, and the question has been raised as to where to file the charge for breaking jail.

"Section 3916 seems to be the statute to use, but where is the venue of this crime? Should this charge for be filed in Morgan County or in Cooper county. Robert Denny was the prisoner of Morgan County, but he was lodged in the jail at Boonville and he broke jail in Cooper county."

Section 3916 R. S. Mo. 1929, reads as follows:

"If any person lawfully imprisoned or detained in any county jail or other place of imprisonment, or in the custody of any officer, upon any criminal charge, before conviction, for the violation of any penal statute, shall break such prison or custody and escape therefrom, he shall, upon conviction, be punished by imprisonment in the penitentiary for a term not exceeding two years, or in a county jail not less than six months."

It will be noticed in the above section that it states "If any person lawfully imprisoned or detained in any county jail * * * * *". According to your request the sheriff of Morgan County placed the defendant Robert Denny in the county jail of Cooper County. I am presuming that he was lawfully committed by the sheriff, in accordance with sections hereinafter set out. It will also be noticed in section 3916, supra, it is stated "shall break such prison or custody and escape therefrom". This section should be construed to mean the jail where the defendant is lawfully committed, and in accordance with sections hereinafter set out, it would mean the jail of Cooper county.

Section 8545 R. S. Mo., 1929, reads as follows:

"It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

It will be noticed under this section that where a jail is not situated in any county it authorizes the sheriff of any county in which a jail is not situated to commit any person in his custody to the nearest jail of some other county. Under this authorization the sheriff of Morgan county lawfully committed the defendant to the jail of Cooper County, where he remained under the orders of the Judge of the Circuit Court of Morgan County, and not under the orders of the sheriff. In other words, the sheriff of Morgan County has lost jurisdiction over the defendant, and in accordance with sections hereinafter set out, the defendant is only under the jurisdiction of the CircuitCourt of Morgan County and the sheriff of Cooper County. It will also be noticed under section 8545, supra, that the section orders the sheriff of Cooper County to safely keep the prisoner and the responsibility of the sheriff of Morgan County has ceased.

Section 8546 R. S. Mo. 1929, reads as follows:

"When any person shall be committed to jail, in conformity to the next preceding section, it shall be the duty of

> the sheriff of the county in which said jail is situated to take, or cause to be taken, the person thus committed, together with the day and cause of his capture and detention, before the circuit court of the county appointed for the trial of such prisoner, on the first day of the next term of such court."

It will be noticed under this section, and in accordance with your statement of facts, that the sheriff of Cooper County has the sole custody and the responsibility of safekeeping the defendant and having him appear before the Circuit Court of the county from which the defendant was sent, to the county jail of Cooper County.

Section 3377 R. S. Mo. 1929, reads as follows:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

Under this section it is mandatory that the defendant be punished in the county in which the offense is committed, except as may be otherwise provided by law. Under the statutes of Missouri breaking jail is not one of the exceptions to this section which describes the venue of a case. In view of the fact that the sheriff of Morgan County has lost jurisdiction of the prisoner, and the sheriff of Cooper County has the sole custody of the prisoner, the venue of the case is situated in Cooper County.

CONCLUSION

In view of the above authorities it is the opinion of this department that the charge of breaking jail, while

being confined in the county jail of Cooper County before a conviction, should be filed in Cooper County and not Morgan County.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

PARK BOARD: Powers of maintenance and improvement are limited to territorial bounds of State Parks.

June 30, 1939

1-6

FILED
57

Honorable E. A. Mayes
Assistant Director
State Park Board
Jefferson City, Missouri

Dear Mr. Mayes:

We acknowledge your request for an opinion, dated June 27, 1939, which reads as follows:

> "From time to time the State Park Department is asked to do work on Sugar Lake in Buchanan County which adjoins a part of Lewis and Clark State Park or, more correctly, Lewis and Clark State Park is on a part of the shore line of Sugar Lake. The same situation obtains in the case of Big Lake State Park which is on a part of the shore line of Big Lake in Holt County. In each case the length of the shore line which is in the State park is a relatively small part of the shore line of the entire lake, possibly about one-fiftieth of the entire shore line.
>
> "The question has arisen regarding the authority of the State Park Department to use the State park appropriation to do work which will benefit these lakes. It is true that any improvement in the lake will improve that part of the shore line which adjoins the park. We are asked to do such things as build dams some distance from the park, to pump water into the lake, etc. In the event maps of these particular parks are needed in order to render an opinion on this matter, we will be glad to supply them and we will be glad to furnish the legal description of these parks.

> "The legal question involved is, does the State Park Department have authority by law to spend money on land or water which is not included in the legally described land to which the State Park Department has title and over which the State Department has jurisdiction?"

The State Park Board is a creature of the statutes. It is elemental law that the powers of the board are statutory. Laws of 1937, page 520 creates the State Park Board and prescribes its duties and powers. Section 2 reads as follows:

> "The State Park Board shall have the power to acquire by purchase, eminent domain or otherwise, all property necessary, useful or convenient for the use of said Park Board or the exercise of its powers hereunder necessary for the recreation of the people of the State of Missouri. In the event the right of eminent domain be exercised, it shall be exercised in the same manner as now or hereafter provided for the exercise of eminent domain by the State Highway Commission. Said Park Board shall have the power to make and promulgate all rules and regulations as it may deem necessary for the proper maintenance, improvement, acquisition and preservation of all state parks. Said park board is hereby authorized to employ such persons or assistants as may be necessary and may fix the compensation of persons thus employed within the amount appropriated therefor by the Legislature. All vouchers for the payment of bills or for compensation shall be drawn and approved by the Director of State Parks and when presented to the State Auditor shall be paid out of the funds appropriated for such purposes."

Thus we see that the State Park Board has power to acquire real estate and power to make rules for maintenance, improvement, acquisition and preservation of all state parks.

Where the language of the legislative act granting power is plain and unambiguous, there is no occasion for statutory construction. In construing a statute that created and gave the St. Louis Board of Education the "supervising control, government and management of the public schools and public school property", the Supreme Court in State ex rel. v. Board of Education, 294 Mo. 106 l.c. 115; 24 S. W. 85 said:

> "What is the business committed to the care of the Board of Education? It is clear from Section 11457 that it is charged with the supervising control, government and management of the public schools and public school property. These are the affairs 'committed to their charge,' and the court has power to require the board to account for its official conduct in the management and disposition of all of the business and affairs committed to its charge; not simply of the funds and property which are, comparatively, of minor importance. This construction gives effect to the intention of the Legislature."

CONCLUSION

We believe the language of the act, creating and giving the State Park Board power, is clear and unambiguous. The board's powers are limited by legislative intent, expressed in the language of Section 2, supra, and the only proprietary power the board has is power to acquire and power to make rules and regulations necessary for the proper maintenance, improvement, acquisition and preservation of all state parks.

Not one word is said in the act which could be reasonably interpreted as giving the board power, as a state agency, to spend money maintaining or improving non-park lands or in

maintaining or improving waters abutting on State Park land, the ownership of which is in some other person or corporation other than the State Park Board.

We are of the opinion that the State Park Board has no authority to spend money for improvements, such as dams and wells for water supply, on lands or on lakes or streams not located within the bounds of the legally described lands in which the State Park Board has title. The jurisdiction of the State Park Board, in spending money for maintenance and improvement is limited to the territorial confines of state parks. When such improvements are located in state park land, the expenditures by the State Park Board would be legal, so long as the improvements be maintained without damage to neighboring property owners.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

_____

(Acting) Attorney-General

WOS/ww

SHERIFFS

~~SHARES:~~ Entitled to mileage in each case when serving five warrants on the same defendant.

July 13, 1939. 7/24

FILED 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

We acknowledge your request for an opinion, which reads as follows:

> "Five charges of grand larceny were filed against the same defendant. All five warrants were served on the defendant. The sheriff made only one trip in serving the five warrants. He has put on his warrants the same mileage for each warrant. He contends that he served all five warrants at the same time and that he is entitled to mileage on each warrant as they arose on different cases.
>
> "The difficulty with this arose when the defendant was given one preliminary examination and the one preliminary examination was allowed to do for all five charges. The grand larceny was for a truck load of cattle stolen at different times from different owners, but all cattle shipped out of the assembled place at the same time in one truck. The justice of the peace allowed mileage only on one warrant. The sheriff seeks to have the justice certify up in the transcript of the cases his mileage on all the warrants.
>
> "Is the sheriff entitled to mileage on all five warrants in arresting the defendant and lodging him in jail?"

As to the taxation of costs in criminal cases, the Missouri rule is laid down in Ring vs. Vogel, 46 Mo. App. 374 l. c. 377 as follows:

> "Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation."

The rule could well be stated that where an officer puts his finger on the statute which allows him costs, then he should be allowed such costs.

We look to the statutes where a sheriff claiming costs for serving a state warrant for grand larceny might come within the provisions of the statutes relating to costs in performing such an official duty. Under the statutes grand larceny is an offense, the sole punishment of the same being imprisonment in the state penitentiary. Section 3828 R. S. Mo. 1929 provides:

> "In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

Section 3851 R. S. Mo. 1929 provides:

"Whenever the state or county shall be liable under the provisions of this article, or any other law, for costs incurred in any examination of any felony, or in the trial of any misdemeanor before any justice of the peace, it shall be the duty of such justice to make out, certify and return to the clerk of the circuit or criminal court of the county a complete fee bill, specifying each item of service and the fee therefor, together with all the papers and docket entries in the case; and it shall thereupon be the duty of such clerk to make out a proper fee bill of such costs, which shall be properly and legally chargeable against the state or county, which shall be examined by the prosecuting attorney, and proceeded with in all respects as a fee bill made out for costs incurred in such court of record."

Section 11789 R. S. Mo. 1929 provides:

"No mileage fees for serving any writ, summons or other legal process shall be collected unless the sheriff shall actually travel the distance for which he makes such charge: * * * "

Section 11792 R. S. Mo. 1929 provides:

" * * * Ten cents for each mile actually traveled in serving any venire summons, writ, subpoena or other order of court * * * "

CONCLUSION

Under Section 3851, supra, where the state or county are liable to the sheriff for costs in serving a warrant, the Justices duty is to make out, certify and return to the clerk of the circuit court a "complete fee bill", specifying each item of service and the fee therefore. Mileage is an item of service which a sheriff can lawfully claim in any criminal case.

The legislature, by the use of the word "any" in Section 3851, supra, intended that a Justice be empowered to itemize a fee bill yet not omit statutory mileage charges of the sheriff for each mile actually traveled in serving a warrant in any particular case. The statute is general and makes no exception where there be several felonies charges against the same defendant, hence the Justice has no right except to do his statutory duty in making up a complete fee bill for the circuit clerk in any case. The state warrant in each case is for a particular crime and the sheriff's right to statutory mileage costs follows any and all separate charges, so long as the Justice is convinced that the distance was actually traveled by the sheriff in serving the process.

The fact that the statutes permit the sheriff to serve any number of state warrants on the same trip is no reason to preclude his statutory mileage in any case.

From the facts stated in your letter we are of the opinion that the sheriff is entitled to a fee bill in all five cases.

Respectfully submitted,

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOS:LB

SHERIFF FEES: Sheriff not entitled to a fee for transporting prisoner when confined in jail in adjoining county because of insufficiency of local jail.

July 19, 1939

FILED 57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your letter of July 1, 1939, in which you request an opinion as to the right of a sheriff to charge a fee or mileage for bringing a prisoner confined in an adjoining county, because of the insufficiency of the local jail, back to the local county for the purpose of signing a recognizance. Section 8545 R. S. Mo. 1929 is the authority provided in the statute for using the jail of another county where the local jail is insufficient. It reads as follows:

> "It shall be lawful for the sheriff of any county of this state, when there shall appear to be no jail, or where the jail of such county shall be insufficient, to commit any person, or persons in his custody, either on civil or criminal process, to the nearest jail of some other county; and it is hereby made the duty of the sheriff or keeper of the jail of said county to receive such person or persons, so committed as aforesaid, and him, her or them safely keep, subject to the order or orders of the judge of the court for the county from whence said prisoner was brought."

The following section 8546 provides that it shall be the duty of the sheriff of the county in which said jail is situated, to take or cause to be taken the person thus committed before the Circuit Court of the county appointed for the trial of such person. The following section 8547 again makes it the duty of the sheriff or keeper of the jail to bring the confined party before the court.

From the above, it is apparent that your sheriff did not have a right to any fees for returning a prisoner to Morgan County to sign a bail bond and that he was not entitled to release the prisoner on recognizance, the prisoner being confined under the custody of the sheriff of the adjoining county.

We call your attention to the further fact that under section 11791, setting out the fees of sheriffs in cases where the prisoner is transported to another county, the court having jurisdiction of the offense must allow the fees of the sheriff and that therefore, he could not properly present such a bill in his monthly accounts to the county court.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

RLH/ww

ASSESSMENTS:
TAXATION :

Personal property on which the United States Government holds a mortgage is taxable to the mortgagor.

July 20, 1939 7/21

FILED 57

Mr. W. H. Massingill
Assessor of Atchison County
Rock Port, Missouri

Dear Sir:

This will acknowledge receipt of your letter of July 14, 1939, submitting for our opinion this question: Is corn "sealed" by the United States Government because securing a loan made by the government, assessable as personal property to the owner thereof?

We assume that by the use of the word "sealed" you mean that the corn has been secured or fastened in a crib or storage place by the government.

Section 9742 R. S. Mo. 1929 provides:

> "For the support of the government of the state * * * * * taxes shall be levied on all property, real and personal, except as stated in the next section."

The following section (9743) does not under any construction attempt to exempt the personal property with which we are concerned from taxation, except insofar as it may exempt from taxation the note secured by the mortgage on the corn, which note is owned by the government.

Section 9756, Laws of 1937, page 570 requires certain property to be listed with the assessor. After the enumeration of certain items, it reads: "eleventh, all other property not above enumerated", (there are some exceptions made which do not effect this question) and also provides there shall be listed "every other species of property not exempt by law from taxation". These broad terms would include the corn that has been sealed by the government.

Personal property covered by mortgage securing a note is nowhere exempt from taxation by the laws of this state. The mere fact that in this instance the United States Government is the mortgagee has no bearing on the question. This is to be seen by what is said in the case of Reynolds vs. Stepanek, 99 S. W. (2d) (Mo. Supreme) l.c. 68, where it is said:

> "* * * * * a mortgage is but a security for the payment of the debt or the discharge of the engagement for which it was originally given, and until the mortgagee enters for breach of condition, and in any respect until final foreclosure, the mortgagor continues the owner of the estate. * * * *"

By the provisions of Sections 9745 and 9746 R. S. Mo. 1929, personal property is made assessable to the owner thereof, and in this instance the mortgagor as above illustrated is the owner of this corn.

CONCLUSION

Therefore, it is our opinion that the fact that the United States Government holds a mortgage on personal property does not exempt said property from taxation to the owner in this state.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

LLB/ww

SHERIFFS: Misappropriation of money constitutes embezzlement.

August 2, 1939

FILED
57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We have your request with reference to Sheriff A. S. Ball receiving $1706.00 of funds from his predecessor in office, and converting said money to his own use.

This conversion of public funds which came to him as bailee, or which were received by him by virtue of his office as sheriff, is a criminal offense under Section 4086, R. S. Mo. 1929.

Since there are several different ways in which this money could have been embezzled, it may be well to prepare an information or indictment in several counts. State v. Bouslog, 266 Mo. 73, 81.

As to the sufficiency of indictments, you may look at the following authorities: State v. Martin, 230 Mo. 680; State v. Manley, 107 Mo. 364; State v. Skinner, 210 Mo. 373; State v. Howell, 296 S. W. 370, 317 Mo. 330.

As to elements of the offense and the official character of a person converting it, see State v. Noland, 111 Mo. 473.

As to the admissibility of certain evidence, namely, the conclusion of witnesses from the examination

of books, see State v. Matkins, 34 S. W. (2d) 1; State v. Colson, 30 S. W. (2d) 59.

As to money embezzled by means of checks, the above authorities deal with that question.

I call your attention to the fact that intent is not an element of the crime (State v. Martin, supra), and the time of conversion is immaterial (State v. Findley, 101 Mo. 217, 222).

I think the above and foregoing outline will be of sufficient help to you in the trial of this case to fully answer your request for an opinion.

It is, therefore, the opinion of this office that said sheriff should be prosecuted for embezzlement of funds which have come to him by virtue of his office.

Yours very truly

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:HR

ELECTIONS: Grand Jury may open ballot boxes in any election for the purpose of investigating fraudulent elections.

August 16, 1939

8-18

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri.

Dear Sir:

In answering your request concerning the use of ballot boxes, ballots, poll books and other papers before a grand jury for the investigation of illegal elections in Versailles, Missouri, I am herein setting out your opinion upon which you ask the approval of this Department:

> "1 - The only time that any ballots and election poll book can be opened and examined is by the county clerk and his committee in an election contest; and then all that is revealed is the result, as set out in his report to the court.
>
> "2 - That even in a primary election, these ballots cannot be examined and as to how any voters may have voted."
>
> "3 - A Grand jury cannot force the examination of these ballots and the poll books and disclose how any voter voted in the election. In fact the law seems to be that the grand jury is not entitled to have the ballots and books for examination."

"4 - And if the grand jury did get the ballots and poll books, and did vote and return a true bill for illegal voting, the evidence found in the grand jury room would not then be used as evidence in the trial of the case in the circuit court on the theory that as to how any voted may have voted cannot be disclosed as this would destroy the sacredness of the ballot."

Article 8, Section 3 of the Constitution of Missouri reads as follows:

"All elections by the people shall be by ballot. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter who presents it. All election officers shall be sworn or affirmed not to disclose how any voter shall have voted: Provided, That in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence."

This section amended a previous section in the matter and was passed in the Constitutional Convention of 1924. Previous to the enactment of Section 3 of Article 8 of the Constitution of Missouri, the previous section in this matter provided for the opening of ballot boxes on contested elections only. The previous section was passed by the Constitutional Convention of 1875, and could not be construed to apply to primary elections for the reason that primary elections were not held and were not authorized until Article 3 and Article 4, containing section 4756 and section 4795, Chapter 60, R. S. Mo. 1889, was enacted. In sections 4756 and 4795, as above mentioned, primary elections were first authorized.

As said above, Article 8, Section 3 of the Constitution of Missouri, supra, was passed by the Constitutional Convention of 1924, and specifically mentions that ballot boxes can be opened for the purpose of contested elections, grand jury investigations and the trial of all civil and criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation.

It was so held in the case of State ex rel. v. O'Malley, 117 S. W. (2d) 319, paragraph 8, and reads as follows:

> "It has long been the law that before the 1924 amendment the proviso of section 3, art. 8, did not authorize the opening and use of ballots as evidence in grand jury investigations of election frauds, Ex parte Arnold, 128 Mo. 256, 30 S. W. 768, 1036, 33 L.R.A. 386, 49 Am. St. Rep. 557; State ex rel. Feinstein v. Hartmann,

> supra, Mo. Sup., 231 S. W.982; In Re Oppenstein, 289 Mo. 421, 233 S. W. 440; State ex rel. Murphy v. Landwehr, supra, 290 Mo. loc.cit. 159, 234 S. W. loc.cit. 658. Now, this may be done even in the investigation of fraud at primary elections. State ex rel. Dengel v. Hartmann, 339 Mo. 200, 96 S. W. (2d) 329. And it is plainly intimated that the power extends to frauds in bond elections. State ex rel. Jackson County v. Waltner, supra, 340 Mo. loc.cit. 142, 100 S. W. (2d) loc.cit. 274. We there held election contests are purely statutory, and cannot be maintained in the absence of an authorizing statute; but we added, 'the law affords other means of uncovering fraud in elections.' The present proviso says the ballots 'may be opened, examined, counted, compared with the list of voters and received as evidence' in (among other instances) 'grand jury investigations.' The opening part of the section to which this proviso is appended as an exception guards the secrecy of the ballot in 'all elections by the people.' Bond elections come within that designation and are therefore subject to the proviso."

It is true that no statutory provision has been made to allow the opening of ballot boxes in grand jury investigations in which there is a violation of any law relating to elections, but the Supreme Court of this state has held that Article 8, Section 3 of the Constitution of Missouri is self-enforcing.

It was solheld in the case of State ex rel. v. O'Malley, 117 S. W. (2d) 319, paragraphs 9 and 10, where the court said:

"A constitutional provision may be self-enforcing in part and not so as to another part. State ex inf. Barker v. Duncan, 265 Mo. 26, 41-43, 175 S. W. 940, 944, Ann.Cas. 1916D, 1. Undoubtedly, the part of the section permitting the opening of ballots in election contests is not self-enforcing, in the sense that further provision must be made by statute for such contests. But the part which provides for the use of the ballots as evidence in grand jury investigations is self-enforcing, and no legislative default can thwart it."

CONCLUSION

In view of the above authority it is the opinion of this department that your opinion, as set out in paragraphs 1, 2, 3 and 4, is not the present law of this state, and the grand jury may open the ballot boxes in any election, including a primary election, for the purpose of securing evidence in any case in which the violation of any law relating to elections is under investigation.

Respectfully submitted,

Approved;

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:RV

AGRICULTURE, DEPT. OF:
EGG INSPECTION:

Owner of "egg-breaking establishment" not required to take out "egg-trafficking license."

8-25

August 22, 1939

FILED
57

Honorable Jewel Mayes, Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "This is to thank you in advance for a ruling on Article 4, Chapter 93, Revised Statutes, 1929. This Article 4 was transferred to the State Department of Agriculture by an act of 1933, and certain sections were directly amended by House bill 346 of the 1939 Legislature solely to definitely change the administrative authority to the 'State Department of Agriculture' and 'Commissioner of Agriculture.'
>
> "Enclosed is an office-memorandum submitted by Chief Inspector John E. Clary, suggesting the need for this ruling. We are presuming that the 'egg-breaking license' does not grant the right to 'traffic in eggs', since the licenses were provided by two entirely separate acts of the Legislature of 1919.
>
> "In Section 13059 (enacted in 1919, page 365) there is the provision for a $2.00 traffic license for all traffickers of eggs in less than carlots, and also a $10.00 license for

all traffickers of eggs in carlots.

"Under a separately enacted act of 1919 (page 357), Section 13065, etc. provides for a license for 'egg-breaking establishments'.

"A ruling is needed to settle a question that has been brought up, as to whether an 'egg-breaking establishment' must also have the $2.00 or $10.00 'egg traffic license' in addition to the $50.00 'egg-breaking establishment license'. The $50.00 'egg-breaking license' was provided by a separate act of the same 1919 Legislature."

Section 13059, R. S. Missouri, 1929, provides as follows:

"That for the purpose of enforcing the provisions of this article it is hereby required that ten days after this article takes effect, any person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs, including those retailers who buy direct from the producer and who sell in lots of one case or more, shall procure a license from the state food and drug commissioner to conduct such business. Such officer upon receipt of proper application upon forms such as he may prescribe, accompanied by an annual license fee of two dollars ($2.00) for a person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs in lots of less than one carload shall thereupon issue to such person, firm or corporation an annual license to engage in such business; and such person upon receipt of a proper application upon forms such as he may prescribe accompanied by a license fee of ten dollars

($10.00) for a person, firm or corporation that shall engage in the business of buying, selling, dealing in or trading in eggs in lots of one carload or more, shall thereupon issue to such person, firm or corporation an annual license to engage in such business."

Section 13065, R. S. Missouri, 1929, provides as follows:

"All persons, firms or corporations who engage in the business of removing eggs from their shells in the manufacture of frozen, liquid, desiccated or any form or whole eggs, yolks, whites, or any mixture of yolks and whites, for food or manufacturing purposes, whether without the addition of any other ingredients, shall, before engaging in such business, apply to the state food and drug commissioner for the inspection to be made of his establishment. Thereupon, the state food and drug commissioner, or duly authorized inspectors, shall inspect the establishment and equipment of said egg-breaking establishment, and they shall also ascertain if said establishment complies in method and equipment with the sanitary laws of this state and the rules and regulations that from time to time shall be made and established by the state food and drug commissioner for the regulation of these establishments. If, after such inspection, it shall appear that the said establishment complies with the provisions of the sanitary law and the rules and regulations governing egg-breaking establishments, then, upon payment to the state food and drug commissioner of an inspection

> fee of fifty dollars, he shall issue a permit to the person, firm or corporation to conduct such establishment. All inspection fees under this article shall be paid into the state treasury. Such permits shall begin on January 1st and expire on December 31st of each year and the inspection fee shall be prorated for the first year for every person, firm or corporation engaging in the business for the remainder of the year; and any person or persons engaging in business between January 1st and April 1st shall pay an annual inspection fee of fifty dollars; after April 1st and before July 1st, an inspection fee of thirty-seven dollars and fifty cents; after July 1st and before October 1st, an inspection fee of twenty-five dollars; after October 1st, an inspection fee of twelve dollars and fifty cents. Every permit shall be posted in a conspicuous place in the office or establishment of any person or persons holding such permit."

The question presented by your request is whether a person, firm or corporation who has a permit to conduct "an egg-breaking establishment" is also required to obtain an "egg-trafficking license".

In the construction of the statutes it is a cardinal rule that the intent and purpose of the Legislature as expressed in the statute must be ascertained and given effect. State v. Toombs, 25 S. W. (2d) 101; Thompson v. Lamar, 17 S. W. (2d) 916, 322 Mo. 514.

Sections 13059 and 13065 were both passed in 1919 by the Fiftieth General Assembly. However, each statute was contained in a separate act. Section 13059 is found in the Laws of Missouri, 1919, page 364, while Section

13065 is in the Act on page 356 of the Laws of Missouri, 1919. An inspection of these two acts will disclose that they are entirely separate and distinct from each other and were intended to apply to two different types of business. Each act provides for a license or permit and for a penalty for failure to comply therewith.

It is apparent that Section 13059, supra, requires a license only of those who are engaged in the business of dealing or trading in eggs, that is, not only buying eggs but also selling them. This construction is based not only upon the title to the act which states that the statute is "to provide for a license of dealers in eggs" but also upon the fact that it is difficult to see how a person could be engaged in the business of only buying eggs.

However, even if Section 13059, supra, is construed so as to require a license of a person engaged in the business of buying eggs, still the owner of an "egg-breaking establishment" would not be required to obtain such a license. The reason for this is that the owner of an "egg-breaking establishment" is not engaged in the business of buying eggs but his business is the "removing eggs from their shells in the manufacture of frozen, liquid, desiccated or any form or whole eggs, yolks, whites, or any mixture of yolks and whites, * * *" The buying of eggs by the owner of the "egg-breaking establishment" is ancillary to but not the business of such owner.

However, if the owner of the "egg-breaking establishment" engages in the business of buying and selling eggs in the shell along with his "egg-breaking establishment", then he is required to take out a license under Section 13059, supra.

CONCLUSION.

It is, therefore, the opinion of this department that a person who purchases eggs and removes them from

their shells and changes them into another form is required only to purchase an "egg-breaking license" under Section 13059, R. S. Missouri, 1929, and he is not a person who is engaged in the business of buying eggs so as to require him to obtain a license under Section 13059, R. S. Missouri, 1929.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

VENUE: Ordinarily venue in a criminal case for removing and concealing mortgaged property is in the county of the residence of the defendant.

8/21

August 25, 1939

FILED
57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion as to the venue of an offense of removing or concealing mortgaged property with the intent to hinder, delay and defraud the mortgagee.

Section 4100 R. S. 1929 is the statute setting out the offense of disposing of mortgaged property and is as follows:

> "Every mortgagor or grantor in any chattel mortgage or trust deed of personal property who shall sell, convey or dispose of the property mentioned in said mortgage or trust deed, or any part thereof, without the written consent of the mortgagee or beneficiary, and without informing the person to whom the same is sold or conveyed that the property is mortgaged or conveyed by such deed of trust, or who shall injure or destroy such property, or any part thereof, or aid or abet the same, for the purpose of defrauding the mortgagee, trustee or beneficiary or his heirs or assigns, or shall remove or conceal, or aid or abet in removing or concealing such property,

> or any part thereof, with intent to hinder, delay or defraud such mortgagee, trustee or beneficiary, his heirs or assigns, shall, if the property be of the value of fifty dollars or more, he deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding six months, or by a fine of not less than one hundred dollars, or by both such fine and imprisonment. And if such property be of less a value than fifty dollars he shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by imprisonment in the county jail not exceeding six months, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

The statute sets out three separate offenses which are:

(1) selling, conveying or disposing of mortgaged chattels;

(2) injuring or destroying such chattels; and

(3) removing or concealing same with the intent to hinder, delay or defraud the mortgagee, his heirs or assigns.

Section 3377 R. S. 1929 is the general venue statute and is as follows:

> "Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

This general statute will apparently cover every offense set out under Section 4100, except that of removing mortgaged chattels with the intent to hinder, delay or defraud, since the selling, injuring or destroying and the concealment of property must take place at a definite location.

A search of Missouri cases reveals only a few in which the defendant was charged with and convicted of removing mortgaged chattels with the intent to defraud, and in none of these cases was the question of venue directly raised. Each of the cases mentioned charged the defendant in the county of his residence, which in all cases was the county in which the mortgaged chattels were located.

In the case of State vs. Frank Miller 255 Mo. 223, the defendant resided in St. Louis, Missouri, and gave a chattel mortgage for a part of the purchase price of furniture. The defendant loaded the furniture on a freight car at the Union Station where it was transported to Wisconsin. No question of the jurisdiction of the court in St. Louis City was raised and an inference may be drawn that the venue was proper.

A search of the cases in other jurisdictions fails to reveal any case in which this question was directly passed upon. In two of such cases, however, the courts raised a similar hypothetical question. In State vs. Julien 48 Iowa Reports 445, the defendant was charged with selling or concealing mortgaged property in Plymouth County. The facts revealed that the defendant removed the property from Plymouth County but sold same in the State of Kansas. We find the following in the opinion of the court, l.c. 447:

> "It is true the property could not be legally sold, but the defendant cannot be convicted for a sale unless it was made in that county. An intent to sell, conceal, or dispose of, wherever formed, does not constitute a crime. It is difficult to see how a sale in Kansas can relate back so as to become a sale in Plymouth county in this State. Nor can a concealment at Decatur, Nebraska,

> or elsewhere, by relation, constitute and make a concealment in such county. Elasticity is an unknown quantity or quality in a criminal statute. The State v. Lovell, 23 Iowa, 304.
>
> *
>
> There is no evidence tending to show where the defendant was when he started to Kansas. He may have been in either Sioux or Plymouth county. If the defendant started from either place and went to Kansas, and there sold the property without the consent of the mortgagee, we think this would amount to a concealment or disposal of the property in such county, for while so removing the property he was 'hiding or putting it away.'"

In the case of Robberson v. The State 3 Tex. App. Reports 502, the defendant was charged with fraudulently disposing of a bale of cotton. The facts showed that the cotton was removed from one county and sold in another, the indictment being filed in the county from which the cotton was removed. The argument of the state's attorney is quoted at length in which we find the following, l.c. 503:

> " * * * But, suppose the cotton had been removed from the latter county, out of the state, where would the venue lay? I say, in the county where the mortgage was given, and subsisting at the time of such fraudulent removal, selling, or disposition."

The court in its opinion did not contradict this statement by the state's attorney but approved same by implication in its opinion where we find the following, l.c. 506:

> "This prosecution is not pretended to be based upon a removal of the property beyond the state, but can only be maintained on the clause making it penal to sell the property; which necessitates the inquiry as to whether, under this clause, the prosecution could be maintained in a county other than the one in which the selling took place."

All of the cases emphasize the consideration of the provisions of the mortgage itself which, in this state, ordinarily provides that the property shall not be removed from the county of the defendant's residence without written consent of the mortgagee.

We are of the opinion, after a consideration of all the above authorities, that the venue for the offense of removing mortgaged property with intent to hinder, delay or defraud the mortgagee, his representatives, heirs or assigns, ordinarily lies in the county where the mortgaged chattels were lawfully situated by authority of the mortgagee at the time of such fraudulent removal where the property is removed from this state.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
RLH:RT

COUNTY BUDGET ACT: Current revenue coming in during the current year can be used during that year.

October 17, 1939

1018

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Mr. Marr:

This is in reply to your letter of some time ago requesting an opinion of this Department, your letter being as follows:

> "The following are items of independent revenue collected during the year by the county clerk. These items consist of revenue from the sale of products from the county poor farm; $97.00 collected from Cooper County for refund in keeping a prisoner for them in the Cole County jail; fees from the office of the prosecuting attorney for convictions in criminal cases; Liquor and Beer licenses; Fees earned by the county clerk; sale and collections from sewing room products.
>
> "Because these items of income are unknown quantity when the budget is made, there is some doubt whether this current income was figured in the 1939 budget in January.
>
> "There is a contention that current revenue is unestimated and unapportioned in the 1939 budget, and is revenue to be left on hand for use in the budget of 1940, although duly collected in 1939.

"Now the fees collected by the prosecuting attorney under the constitution and statutes goes to the common school fund, of which there can be no question.

"But the other revenue is general revenue. The county court has to meet a $1300.00 payment on a tractor; the county agent must be paid the monthly allowance; the county clerk and the prosecuting attorney at entitled to additional salary voted by the legislature; none of the above items being figured in 1939 budget."

The main purpose of the County Budget Act was to place the respective counties on a budget which would confine each county to its anticipated revenue for any given year, thereby preventing the county from going into debt beyond its resources.

The Budget Act, Laws of Missouri, 1933, pages 341 et seq., did not completely abolish the former system originally under Sections 9874, 9985 and 9986, R. S. Mo. 1929, but emphasized the cash system by creating priorities among the classes.

By Section 12, of Article X of the Constitution of Missouri, the revenue of a current year cannot be used to pay accounts of previous years unless there be a surplus, but under the provisions of said section counties are entitled to expend all of their anticipated revenue for the current year for current expenses. The excess or funds arising from delinquent taxes may be used to pay prior years' indebtedness. This rule is well stated in State ex rel. v. Johnson, 162 Mo., l. c. 629.

Applying the above statements to the questions which you present, we think that the items of $97.00 collected from Cooper County for the refund in keeping of

prisoners, liquor and beer fees, fees earned by the county clerk, sales and collections from sewing room products, can be placed in the general revenue fund or may be placed to the credit of any class which is in need of the same in order to preserve priorities.

We are in accord with your statement that fees collected by the prosecuting attorney in the matter of fines and forfeitures should go to the credit of the school fund.

We do not think there is any provision in the County Budget Act which prevents the court from using miscellaneous revenue for any legitimate purpose provided that the five classes of the Budget Act have received all of the revenue to which each class is entitled, and, in the event there are no prior liens on the miscellaneous fund, it can be used for the additional pay of the County Clerk and the Prosecuting Attorney.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

W.J. BURKE
(Acting)Attorney-General

OWN:EG

AGRICULTURE:
COMMERCIAL FEEDING: Feed for livestock and poultry containing rice hulls in any form may not be sold as a commercial feed in this state.

November 1, 1939

11-4

FILED
57

Honorable Jewell Mayes
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department based upon the following statement of facts:

> "This Department has need for your interpretation of Section 12,671 of the State Feed Law, and especially the forbiddance relating to the mixing or adulterating of any registered livestock or poultry feed with 'rice hulls.'
>
> "Is this Department justified in interpreting this Section as forbidding the mixing or adulterating of any registered livestock or poultry feed with ground or pulverized rice hulls?"

Section 12671, R. S. Mo. 1929, in so far as it applies to your question, provides as follows:

> "Any person who shall mix or adulterate any feed with rice hulls, chaff, peanut hulls, dirt, ground or crushed corncobs, sawdust, weed-seeds, the viability of which has not been destroyed except in poultry feeds or with more than five per cent of mineral substances with the exception that this five per cent limitation shall not apply to mineral feeds, or who shall mix or adulterate any feed with materials of little or no feeding value, or with substances in-

> jurious to the health of domestic animals or poultry, or who shall sell, offer or expose for sale or distribution any feed so mixed or adulterated shall be guilty of a violation of this article. * * *"

From our research on this question, we fail to find where this section of the statute has been before the Missouri courts for construction.

Since your request indicates that there are some who think this law applies only to rice hulls which are unground or unpulverized, we will have to look to the statute and by construction determine whether or not the lawmakers intended that it apply to rice hulls in every form.

In the case of Bowerman v. Lackawanna Mining Co., 98 Mo. App. 308, 316, the court announced a rule of statutory construction which is generally applied. The rule is as follows:

> " * * * then in interpreting the statute we should, we think, select and give it that shade of meaning which will make the statute serve what appears to have been the purpose of the Legislature in its enactment."

Another rule applicable here is announced in the case of Missouri Granitoid Co. v. George, 150 Mo. App. 650, 657, wherein the court states:

> "Statutes are not to be construed so as to pervert the very object aimed at."

In support of the view that the statute does not apply to feeds containing ground or pulverized rice hulls, this department has received a brief and suggestions from interested parties. We note that these suggestions are in support of feed containing ground or pulverized rice hulls for domestic animals, but no suggestions are offered that such feed would not be injurious to poultry. These parties also take the position that the purpose of the act including rice hulls in

the prohibited class was to prevent them from being placed in the feed only for the reason that such hulls in their original form when taken into the stomach and digestive tracts of domestic animals or poultry, would cut and injure such organs of the animals or poultry, and for that reason alone should not be placed in commercial feeds.

Referring to this statute again, we concede that that was one of the purposes of the act, but we also think that feeds mixed or adulterated with materials of little or no feeding value are prohibited. Referring again to the act, it will be noted that chaff, peanut hulls, dirt, ground or crushed corncobs and sawdust are prohibited, not because they contain sharp particles like rice hulls do, which would cut the intestines of animals or poultry, but because they have little or no feeding value. Even though the rice hulls are ground or pulverized, there seems to be a difference of opinion as to whether or not they would contain small particles which would still cut the intestines of poultry or young stock.

In a treatise entitled "Feeds and Feeding" by Morrison, 20th Ed., which is considered an authority on the subject, we find at page 355, paragraph 573, that the author has the following to say about rice hulls in feed:

> "Rice hulls are tasteless, tough, and woody. They are heavily charged with silica, have sharp, roughened edges, and are said to be irritating and dangerous to the walls of the stomach and intestines. In any event, they are digested to only a small extent by animals and furnish but about one-third as much digestible nutrients as wheat straw. They should therefore never be fed to stock. Yet they are still occasionally used by unscrupulous persons for adulterating stock feeds."

As rice hulls contain about one-third as much nutrients as wheat straw, then it seems that they would come within the class named in the foregoing statute as containing little or no feeding value.

It is suggested in the brief submitted in support of using rice hulls when ground or pulverized that this section

does not prohibit the mixing of rice hulls with commercial feed unless such mixing destroys the "viability" of such feed. As a basis for this suggestion, the following language of the law is used:

> "Any person who shall mix or adulterate any feed with rice hulls, chaff, peanut hulls, dirt, ground or crushed corncobs, sawdust, weed-seeds, the viability of which has not been destroyed * * *."

We think the term "viability" as used in that section refers to the weed-seeds and not to the rice hulls, chaff, peanut hulls, dirt, ground or crushed corncobs or sawdust. Weed-seeds with undestroyed viability are prohibited for the purpose of preventing foreign weeds being introduced into this state.

In our research on the question of using rice hulls in any form in commercial feeds, the weight of authority does not recommend such use for the reasons (1) that the hulls of the rice cut the intestines of animals and poultry and they are thereby injured; (2) that rice hulls have very little feeding value.

Doctor Hogan of the Missouri University, who is considered by Missouri officials as an authority on animal nutrition, makes the following statement on this subject under date of October 7, 1939, to the Department of Agriculture:

> "There is some confusion among feed dealers and possibly feed control chemists as to the meaning of the term 'Rice Hulls'. It is my understanding though that according to the Association of Feed Control Officials 'Rice Hulls' is that part of the plant that encloses the true rice kernel. This material would be comparable in a way to oat hulls, however, rice hulls have much less feeding value than do oat hulls. It would be almost impossible to pick out any part of another plant that would be worth as little as 'Rice Hulls'. There is no excuse or justification whatever for ever putting this

material in a feed. For your information I will enclose the percentage of digestible protein and digestible total nutrients of rice hulls and of two other very low grade feeds:

	Digestible Protein	T D N	N R
Rice hulls	0.1	9.9	98.0
Wheat straw	0.8	35.7	43.6
Oat hulls	0.8	38.3	46.9

This is copied from Morrison's Feeds and Feeding. This table indicates very clearly that no feeder could afford under any circumstances to use 'Rice Hulls'.

"In addition to the lack of feeding value rice hulls are stated to be actually injurious. They contain a very high percentage of silica and have sharp cutting edges."

While the view that the grinding or pulverizing of rice hulls removes the objection that when they are so ground or pulverized they do not have the sharp cutting edges and therefore will not injure poultry or animals to which they are fed, yet such grinding and pulverizing does not add to the feeding value of rice hulls. Chaff, peanut hulls, dirt, ground or crushed corncobs or sawdust may not have any particles in them which would cut or injure the intestines of animals or poultry to which they are fed, yet, since they have little or no feeding value, they are prohibited by this statute, and for the same reason we think rice hulls in any form are prohibited from being mixed with commercial feeds.

CONCLUSION

From the foregoing, it is the opinion of this department that the Department of Agriculture should not interpret the foregoing statute so as to authorize the mixing or adulterat-

ing of any registered livestock or poultry feed with ground or pulverized rice hulls.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:HR

COUNTY COURT: In order to render the county liable for blood hound harness and red lenses purchased by the sheriff, the sheriff must be a lawfully authorized agent of the county.

November 9, 1939

1110

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated November 2, 1939, which reads as follows:

> "Just equipment for the office of the sheriff is the County liable for through the county court? The sheriff has informed the county court that he is authorized by an opinion of the attorney general to purchase all necessary equipment and the county must pay for the same. That includes guns, tear gas guns, submachine guns, handcuffs, etc. Now the sheriff bought a set of six red lenses to put in spot lights on the car of the sheriff and his deputies. These lenses to be used in case of wrecks and other warning signs on highways, and the lenses are to remain the property of Morgan County. The State Penitentiary gave a blood hound to the office of the sheriff. A collar, muzzle and dog harness were bought for this blood hound and charged up to Morgan County by the sheriff.
>
> "The county court of Morgan County, Missouri, has turned down these last two mentioned bills and as a reason said county was liable for these expenditures because the same were not necessary equipments to the office of the sheriff.

Section 12109 R. S. Mo. 1929 reads as follows:

> "If a claim against a county be for work and labor done, or material furnished in good faith by the claimant, under contract with the county authorities, or with any agent of the county lawfully authorized, the claimant, if he shall have fulfilled his contract, shall be entitled to recover the just value of such work, labor and material, though such authorities or agent may not, in making such contract, have pursued the form of proceedings prescribed by law."

It is plain, from a fair and simple construction of the words of Section 12109, supra, that in order to render the county liable for materials furnished, those materials must be bought either (1) under contract with the county court, or (2) under contract with a lawfully authorized agent of the county. According to your statement of the case, as set forth in your request, the sheriff of your county, without a semblance of authorization from the county court, purchased the articles mentioned and charged them to the county. The sheriff, not being the authorized agent of the county, could not render the county liable on a contract such as that. Indeed, in Kansas City Sanitary Co. v. Laclede County, 269 S. W. 395, l.c. 398, it is said:

> "Section 9507 requires that the agent purchasing supplies for the county be lawfully authorized, and this requirement is not done away with, even though the claim may not be defeated, because the prescribed legal steps have not been followed."

(Section 9507 is now Section 12109, supra)

CONCLUSION

Our opinion, in view of the clear manner in which the legislature has spoken in Section 12109, supra, is that Morgan County (absent a subsequent ratification of the contract) is not liable for the purchase price of these red lenses and bloodhound equipment purchased by the sheriff, he having no authority to act as agent for the county in making such purchase.

We are enclosing two other opinions written by this department which deal with related matters, and which may be of interest to you.

Respectfully submitted,

J. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RT
Enc.

TAXATION:
SALE OF LAND TO TRUSTEE:
THE TRUSTEE MAY NOT BE
DEPUTY COUNTY COLLECTOR:

Deputy county collector may not act as trustee. Authority of the trustee to collect fees for service.

November 17, 1939

11-20

FILED
57

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This is in reply to your request wherein you submit the question of whether or not a deputy collector may act as a trustee for the county court to purchase lands sold for delinquent back taxes by virtue of the provisions of Section 9953a, Laws of Missouri, 1939, page 851; and

Whether or not such deputy collector trustee can make a good title to lands so purchased; and

Whether or not such trustee would be permitted to collect the compensation authorized to be paid to trustees for such sales; and

Also, your letter of November 8th, which supplemented your first request wherein you ask the question of whether or not costs must be paid a deputy collector who buys the lands sold and in which sale the deputy collector acts for the collector; and

The question of what the ten per cent commission to the trustee is based upon.

In your request you refer to our opinion dated November 30th, 1937, wherein we held that neither the county collector nor his deputy are authorized to bid in at sales or purchase lands offered for sale for delinquent taxes by the county collector. In view of that opinion, then you ask the question of whether or not the fact that the deputy collector who has been appointed trustee would alter our conclusion taken in

the foregoing opinion. The trustee mentioned in your letter is appointed by virtue of the provisions of Section 9953b, page 851, Laws of Missouri, 1939, which provides in part as follows:

> "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. * * * * "

This section provides that the court may appoint some suitable person with discretionary authority to bid at the sales in which lands are sold and to protect the taxes and prevent loss to the taxing authorities from inadequate bids. Since we have held in the opinion heretofore referred to that the deputy collector would not be authorized to bid at sales or purchase lands offered for sale for delinquent taxes by the collector, we do not think that the fact that the county court would appoint such deputy collector as trustee to bid for it would alter our views taken in the opinion.

In connection with this opinion we would like to particularly call your attention to the statement of the Supreme Court in McLeod v. Burkhalter, et al., 57 Miss. 65, 66, the court said:

> "* * * Besides, persons charged with the administration of the fiscal affairs of the people must be content with the gains provided for in the fees and salaries allowed by law, and should not be permitted to augment them by speculations in the funds or property which come under their official control. * * * * * * * * * * "

CONCLUSION.

It is, therefore, the opinion of this department that the deputy county collector would not be a proper person and it would be against public policy to name him to act as trustee for the taxing authorities to purchase lands sold for delinquent taxes by virtue of the provisions of Section 9953b, page 851, Laws of Missouri, 1939.

II.

You next submit the question that in case such deputy collector is a trustee and has bought lands at such sales and has taken title as such trustee, are the acts of such deputy collector void or voidable, and can he make a good title to the lands which he has so purchased and is holding as trustee?

If the deputy collector is not authorized to act as such trustee and he does as such regardless of such unauthorization, then we think he would come within the classification of a de facto officer. Since we have held in our first conclusion that such deputy collector is not qualified to act as the trustee to represent the county court at delinquent land sales, then this question here would involve the question of whether or not such deputy's acts would be void or voidable. We think that such deputy collector appointed as trustee would be a de facto appointee. In St. Louis County v. John Sparks, 10 Mo. page 80, the question of the acts of a de facto officer was considered by the court and there the rule was stated as follows:

> "The appointment of a person to an office, who has not the necessary

> qualifications, is not void. He is de facto an officer, and his acts, until his removal, are valid."

Following the rule announced in the St. Louis County case it would seem that even though the deputy collector, acting as such trustee, does not possess the necessary qualifications to act as such trustee, yet any act which he would perform as such trustee would be valid.

CONCLUSION.

Therefore, if such deputy collector trustee buys land and takes title as a designated trustee, then he may make a title to such lands and convey the interest that he has obtained as trustee.

III.

On the question of whether or not such deputy collector trustee would be entitled to the compensation provided by the statute for the trustee on the resale of lands granting that such appointment is against public policy, in view of the fact that he is acting as a de facto officer, we think the rule is applicable which is announced in State, ex rel., v. Clark, State Auditor, 52 Mo. 508, wherein it is held that he who has the commission is entitled to the emoluments of the office until his authority is revoked by proper proceedings. And in the case of Dickerson v. City of Butler, 27 Mo. App. 9, l. c. 14, the court said:

> "* * * It must be considered as the settled law of this state that, in an action for fees, the title to the office cannot be decided, and that a de facto officer, while in possession of the office, can recover the fees of the office. * * * * "

CONCLUSION.

Following the rule announced in the above cases

it is the opinion of this department that the trustee, though he may not have the qualifications to act as such, is a de facto officer and is entitled to the emoluments of the office during the time that he is acting as such.

IV.

In your supplementary request of the 8th, you requested an opinion on whether or not the costs must be paid by a deputy collector who buys in at his own sale and also the question of just what the ten per cent commission is based upon.

You will refer to Section 9953b, page 851, Laws of Missouri, 1939, and it will be seen that the trustee is not entitled to this ten per cent commission until he sells this land. Since we have ruled above that the trustee, even if he is a de facto trustee, is entitled to the fees for his services. That being the case the trustee, who is a deputy collector, if he buys in the land for the proper officials, and sells them he would be entitled to the ten per cent commission. Said Section 9953b, supra, provides in part as follows:

> "* * * Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees. * * * * * * * "

You will note from the language of this section that the trustee is to receive not in excess of ten per cent of the price for which he sells lands and lots which he is holding as such trustee.

CONCLUSION.

We are, therefore, of the opinion that the trustee, even though he is a deputy collector, if he performs the

acts of a trustee, is entitled to the commission authorized by the statute for such services.

We are further of the opinion that the basis of the compensation to which such trustee is entitled for selling lands which he has purchased as such official is ten per cent of the sale price for which such lands and lots are sold.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

COUNTY JAIL: The Morgan County jail must be maintained within the corporate limits of the county seat of justice, Versailles. A part of the Morgan county home can not be maintained or used as the county jail, because it is outside the corporate limits of the Morgan county seat of justice, Versailles.

November 29, 1939

FILED
57

Mr. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Your request for our opinion by your letter dated November 3, 1939, in the following terms, was received:

> "I am asking for an opinion as to whether the county court can remodel and rebuild a part of the county home belonging to Morgan County, with the said county home situated outside the city limits of the city of Versailles, and 1½ miles from the city limits of said county seat, into a jail for Morgan County, Mo? Does this jail have to be built in the county seat of Morgan County, Mo., within the city limits?"

Your letter dated November 25, 1939, with enclosure, was also received, and it in part states:

> "Section 12061 has been called to the attention of the court. All the court is trying to do is to alter and repair an old building, a building that they own, although the said building is outside the city limits of the city of Versailles, the county seat or the seat of justice. It w uld seem that section 12061 would apply if the county was build-

ing a new building and did not have any land in the city limits?"

Your letter dated November 28, 1939, was also received.

Section 12043, R. S. Mo. 1929, Mo. Stat. Ann. page 6406, provides:

> "There shall be erected and maintained in each county, at the established seat of justice thereof, a good and sufficient courthouse and jail."

The above quoted Section 12043 plainly requires that the jail of Morgan County be maintained within the corporate limits of its seat of justice, which is the county seat, Versailles.

Regarding the powers of the county court concerning county buildings, the Supreme Court, in Wolcott v. Lawrence County, 26 Mo. 272, l.c. 275, 276, said:

> "It can not act like general agents, whose acts may bind their principals if performed within the general scope of their agency, though in violation of private instructions unknown to those who deal with them; for it has no power over the subject except such as is given by law; and every person who deals with the county court, acting in behalf of the county, is bound to know the law that confers the authority. There is no difference in this respect between public and private agents; and if the county court exceeds its special and limited authority, conferred by the statute, in a material matter, the county will not be bound."

Because of the foregoing authority, a building outside of

the said seat of justice legally could not be used as the county jail, although the county does have authority under Section 12071, R. S. Mo. 1929, Mo. Stat. Ann. page 6416 to alter and repair county buildings.

Section 12058 R. S. Mo. 1929, Mo. Stat. Ann. page 6410, in part provides:

> "The county court of any county in this state shall have power to acquire by purchase, for such county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary; * * * ."

Section 12061 R. S. Mo. 1929, Mo. Stat. Ann. page 6411, in part provides:

> "If there is no suitable ground for that purpose belonging to said county within the limits of the original town known as the established seat of justice, the superintendent shall select a proper piece of ground anywhere within the corporate limits of the town known as the county seat, * * * ."

We believe that said Sections 12058 and 12061 are applicable to the acquisition of county property and not to the repair thereof.

With reference to your letter of November 28, 1939, we agree with you that other than at the county seat of justice, the only place where a county jail legally can be maintained is at "such other towns or sites where circuit court is held according to law," within the meaning of Section 12045, R. S. Mo. 1929, Mo. Stat. Ann. page 6407, and Sheidley v. Lynch 95 Mo. 487.

CONCLUSION

The Morgan County jail must be maintained within the corporate limits of the county seat of justice, Versailles. A part of the Morgan county home can not be maintained or used as the county jail, because it is outside the corporate limits of the Morgan county seat of justice, Versailles.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
EH:RT

CRIMINAL LAW: Negroes cannot be barred from county jury panel by conspiracy or scheme without subjecting the jury panel to a motion to quash.

December 4, 1939

12-6

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 29th, 1939, which reads as follows:

> "The circuit court is now the jury commissioner under the 1939 session acts, Judge Sevier requested the names and addresses of the juror in the boxes from the different townships of this county, in not less than 400 names. The county court requested the clerk to prepare and send in the names in the boxes, the talesmen from which the county court has been selecting the jurymen. They advise with me about the qualifications of several people. The question was raised by my office concerning the qualified negro talesmen that should be put in the boxes of the different townships as talesmen. It was my opinion that under the decision of the Supreme Court in 111 S.W. (2) 110, State vs Logan, which is based upon the Scottsboro cases by the Supreme Court of the United States that these qualified and competent negroes should

not be excluded as talesmen. The facts are that out of the list prepared there are no negroes in the boxes as talesman. There are about 400 negroes in this county and many are qualified and competent persons to serve as jurors, yet they are not put in the township boxes in the townships where they live. As a matter of fact that in the history of Morgan County no negro ever did serve on the jury. They are not in the jury boxes as talesmen and they have no chance to ever be called as jurymen either on grand or petit juries. They are left out, deliberately, excluded systematically excluded and denied the equal rights and the equal protection of the laws.

"Rarely, rarely, does a negro ever have to stand trial in Morgan County, either in a criminal or civil cases. The last one tried was in 1931. The county court wants to know if they have to put negro jurymen in these boxes as talesmen although there are negroes up for trial in the circuit court? They wanted to know if negroes should be on the regular juries and sit in on the trial of the rights of other people? They want to know what the county courts are doing in the other counties of this state? Do these negroes have to be on the juries when no negro legal rights are involved?"

Section 11772, Laws of Missouri, 1939, page 679, reads as follows:

"In all counties in this state which now constitute, or may hereafter constitute,

> a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in Sections 8754 and 8755, Revised Statutes 1929. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this State which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of $1300.00, per annum, to be paid in equal monthly installments out of the State Treasury."

This section amended Section 11772, R. S. Mo., 1929, to the effect that it also applies to judicial circuits consisting of more than one county and one court.

Section 8754 R. S. Mo., 1929, reads as follows:

> "The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative popu-

> lation, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed."

It will be noticed under this section that the county court of each county shall select names from each township according to the relative population of the township to the population of the county. It will also be noticed under this section that the names selected are placed upon a separate slip of paper of the same size and placed in a box with a sliding lid.

According to the information furnished us in your request, none of the names furnished the county court is that of a negro. You also further say that in the history of Morgan County no negro has ever served on a jury, for the reason that no names of negroes have been placed in the jury boxes.

Section 8755 R. S. Mo., 1929, reads as follows:

> "The clerk of the county court so situated as to be unable to see the names on such slips shall, publicly, in the presence of said court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned; and in the same manner shall continue to draw names from each of the remaining townships, separately and singly, until he shall have drawn the names of twenty-four persons who shall serve as

> petit jurors at the next ensuing term of said court for which said petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn: Provided, that in all cases where the county court shall fail to select such jurors and alternates according to the provisions of articles 1 and 3 of this chapter the sheriff of the county shall summon such petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, and not less than ten days before the first day of the term of the court for which such jurors are summoned; and the sheriff when ordered by the court demanding such jury shall summon petit jurors during such term from the bystanders, after the list of alternate petit jurors has been exhausted; and provided further, that no person shall be summoned as such standing juror twice within the period of one year in any court of record."

Under this section the clerk of the county court draws out the names separately and singly from one township until he gets the number of names required from such township for jury panels. If none of the townships turn in names of negroes, it would be impossible for a negro to be placed upon the county jury panel.

In the case of Norris v. Alabama, 294 U. S. 587, 55 Supreme Court 579, 79 L. E. 1074, the court said:

> "In 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2688 were negroes. The male population over twenty-one years

of age numbered 8801, and of these 666 were negroes.

"The qualifications of jurors were thus prescribed by the state statute (Ala. Code, 1923, sec. 8603): 'The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot

*(591)

*read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.' See Gen. Acts (Ala.) 1931, No. 47, p. 59."

The court in the same case further said: (l.c.1080).

"We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of

> the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted."

Also, in the case of State v. Logan, 126 S. W. 256, l.c. 258, the court said:

> "The legal issue involved is one of discrimination against and not one of a chance to have negroes on the jury. Upon the first appeal the cause was remanded because of discrimination against negroes for jury service; but Ellison, J., speaking to the instant issue, said (341 Mo. loc. cit. 1172(3), 111 S. W. 2d loc. cit. 114 (4): 'It is not the law that the appellant was absolutely entitled to have negroes on the jury that tried him, or even on the panel from which that jury was drawn. It may happen that no negroes (or members of any other particular class of our citizens) will be on the regular panel for a given term of court, or on the special venire for a particular case. If that occur in due course and good faith because of the ratio of white to negro population, or because of actual disqualifications, pure chance or the like, it is within the law; but if the defendant be deprived by design of the chance of having negroes on the jury which is to try him, the Federal Constitution may be invoked. The fact that no negroes were drawn in the particular case is not conclusive against the State; and the fact that negroes might

not have been drawn in due course is not conclusive against the defendant.'

"The panel of thirty was selected from forty-one talesmen. Six of the forty-one were negroes; of which number four disqualified for cause. Appellant's real complaint is against the exercise by the State of its six statutory peremptory challenges in striking the names of the two negroes from the jury list and thereby depriving appellant of an opportunity to have negroes on the trial jury. The record contains no showing of discrimination."

CONCLUSION

Under the above authorities it is the opinion of this department that if no negroes' names are placed in the county jury wheel, as provided under Section 8754, supra, by reason of a conspiracy, or common scheme to prevent the placing of the names of negroes in the county jury wheel, any panel drawn therefrom in a criminal case would be subject to a motion to quash which should be sustained. We are not holding that a negro must be upon the panel in any particular case, but we are holding that some negroes should be placed in the panel county jury box in the same proportion as the negro population bears to the white population, so that there is a chance that a negro may be drawn on a jury panel.

This opinion is rendered in compliance with the holding of the United States Supreme Court and the Supreme Court of the State of Missouri, as here-

inabove set out.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

CRIMINAL COSTS: In a preliminary the county or state is not liable for the costs when the defendant is discharged.

December 7, 1939

12-9

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under recent date, which reads as follows:

"I want an opinion on the facts in this case.

"A felonious complaint was filed by a complaining witness against x, y, and z. The charge was stealing cattle. On the preliminary examination, x, who actually stole the cattle, and who sold the same, got up in court before the justice and took all the blame for the crime and exonerated y and z. The justice of the peace bound x over to the circuit court, and on a plea of guilty was sent to the penitentiary for the crime. y and z were discharged of implication in the crime and released. When the transcript in x case was certified to the circuit court, only the costs incident to the arrest and apprehension as to x was included in the costs. These costs include the sheriff costs as to the arrest, commitment and the mileage as to x. Now the justice of the peace presents a fee bill for the costs accrued in the apprehension and arrest of y and z, said costs being

made by the sheriff. These costs on y and z being those costs accrued prior to the preliminary examination.

"I want to know who is liable for these costs? Should these costs have been certified up to the circuit court by the justice as part of the costs in the case against x?"

Section 3831 R. S. Missouri, 1929, reads as follows:

"In all cases where any person shall be committed or recognized to answer for a felony, and no indictment shall be found against such person, the prosecutor, or person on whose oath the prosecution was commenced, shall be liable for all the costs incurred in that behalf; and the court shall render judgment against such prosecutor for the same, and in no such case shall the estate or county pay such costs."

Section 3832 R. S. Missouri, 1929, reads as follows:

"If a person, charged with a felony, shall be discharged by the officer taking his examination, the costs shall be paid by the prosecutor or person on whose oath the prosecution was instituted, and the officer taking such examination shall enter judgment against such person for the same, and issue execution therefor immediately; and in no such case shall the state or county pay the costs."

It will be noticed in both of the above sections the phrase "and in no such case shall the state or county pay the costs," appears. It will also be noticed that in section 3831 a mistake has been made by the printer

in which the word "estate" appears when it should be "state". Under the two above sections, and under the facts as stated in your request, neither the state nor the county is liable for the costs incurred in the prosecution of y and z.

Under section 3831, supra, the word "prosecutor" appears, which means any person other than the prosecuting attorney or state officer.

Section 3510 R. S. Missouri, 1929, partially reads as follows:

> "* * * but the prosecuting attorney shall not be liable for costs in any case."

Inasmuch as section 3510, supra, states that the prosecuting attorney shall not be liable for costs in any case, and in view of the fact that under section 3831, supra, it is stated that in no such case shall the state or county pay such costs, it is very plain and unambiguous and needs no construction.

In the case of State v. Thatcher, 92 S. W. (2d) 640, l.c.643, the court said:

> "* * * the language of the enactment is perfectly clear and unambiguous. In such case there is nothing to construe, and no intent contrary to the evident intent can rationally or permissibly be implied. * "

CONCLUSION

In view of the above authorities, it is the opinion

of this department that where three defendants are charged with a felony in a justice court, and, on the preliminary examination one of the defendants was bound over to the circuit court and two of the defendants are discharged, neither the state nor the county is liable for the costs pertaining to the two defendants who were discharged. If the complaint was signed by an individual other than the prosecuting attorney, the costs could be adjudged against the prosecutor, meaning the one who signed the complaint.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

CRIMINAL LAW: Under the so-called habitual criminal act, prior conviction and sentence to Intermediate Reformatory at Algoa is sufficient to satisfy its terms.

December 14, 1939

12-15

FILED
57

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of December 12th, 1939, which reads as follows:

> "W. C. was convicted of a felony about five years ago, and was sentenced to The Intermediate Reformatory at Algoa. That was his first felony offense.
>
> "Now he is up for another felony charge in the circuit court. It is my intention to charge this defendant under the terms of section 4461, relating to the second offense. I have examined the statutes and I cannot find wherein the fact that defendant was sent to the Intermediate Reformatory would keep me from filing against this man under section 4461. I want an opinion as to whether the fact the defendant was sent to the Intermediate Reformatory would keep him from being liable for additional punishment under section 4461?

Under your above set of facts, doubtless the sentence in the prior conviction was imposed under the provisions of Section 8474, R. S. Missouri, 1929, which reads thus:

"If any male person seventeen years of age and less than twenty-five years of age be convicted of a felony for the first time, and he be not guilty of treason or murder in the first or second degree, or any offense for which capital punishment is provided, the court trying such person may sentence him to the custody of the officials of the intermediate reformatory to be confined at said reformatory for the term prescribed by the statutes of this state and fixed by the court or jury as a punishment for such offense. It shall be the duty of the officials in charge of said reformatory to receive all such convicted persons."

Section 4461 R. S. Missouri, 1929, reads as follows:

"If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life;

> second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

Your question, then, resolves itself to whether, in order for the provisions of Section 4461 R. S. Missouri, 1929, to apply it is necessary that there was actual confinement in the penitentiary as result of the prior conviction alleged.

In the case of State v. Marshall, 34 S. W. (2d) 29, 326 Mo. 1141, the appellant presented that precise point to the court and the court held:

> "The defendant contends that section 3702, R. S. 1919, known as the habitual criminal act, 'only applies to those persons who have actually be imprisoned in the penitentiary,' and that the allegations of the information are not sufficient to bring this case within the provisions of section 3702, because, according to the allegations of the information, the defendant, though previously convicted of stealing a motor vehicle, was punished therefor by imprisonment in the city workhouse of the city of St. Louis for one year and not by

imprisonment in the penitentiary.

"Section 29(a) of the Motor Vehicle Act of 1921, provides that: 'Any person who shall be convicted of feloniously stealing, taking or carrying away any motor vehicle, * * * shall be guilty of a felony and shall be punished by imprisonment in the penitentiary for a term not exceeding twenty-five years or by confinement in the county jail not exceeding one year, or by fine not exceeding one thousand dollars ($1,000) or by both such fine and imprisonment.' Laws of 1921, 1st Ex. Sess., p. 105.

"Section 3702, R. S. 1919, provides that: 'If any person convicted of any offense punishable by imprisonment in the penitentiary, * * * shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished,' etc. (Our italics.) * * "

The court in the Marshall case, supra, in construing the so-called habitual criminal act held that the emphasis was to be placed on the words "punishable by imprisonment in the penitentiary." In the case set forth by you, an analogous situation to that in the Marshall case is presented, and it appears from your facts as given that there was a prior conviction of an offense "punishable by imprisonment in the penitentiary."

CONCLUSION

It is therefore the opinion of this Department, in view of the above authorities, that in order to satisfy the provisions of the so-called habitual criminal act, Sec. 4461 R. S. Missouri, 1929, it is not necessary that there shall have been actual confinement in the penitentiary under the prior conviction, but that a sentence to the Intermediate Reformatory at Algoa is sufficient.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

RPCW:RW

BUILDING AND LOAN: Directors may contract with association; when.

January 26, 1939

1-3 FILED 58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammon:

This department is in receipt of your request for an official opinion to which you attach the following letter:

"Poplar Bluff Loan and Building Association, as you may know, owns a number of pieces of property. It is necessary from time to time to make repairs on these properties, and we also keep them insured.

"We have on our board of directors insurance agents, plumbers and material men. These members write insurance and furnish material and labor on and for these properties. This, as I understand, has been a custom for many years.

"Outside insurance agents, plumbers and material men severely criticise the association for this practice, and claim that the directors have monopolized the business. This criticism is detrimental to the best interest of the association.

"As I understand the law, the directors of this institution are trustees in charge of and administering the business of the association for the benefit of the share-

holders and cannot legally deal with the trust estate, or the property thereof, for profit or gain.

"I would like very much to have the benefit of your opinion in this matter, and also the opinion of the Attorney General as to the legality of the practice.

"I do not want to be understood as intimating that any director has been guilty of any unfair practice in his dealing with the association. Our directorate is made up of some of our best citizens, men of the utmost integrity, and if the practice is improper, they are not subject to criticism for they are laymen and are merely following a long established practice, or custom."

It is the rule as stated in 9 Am. Jur. 122, that:

"The powers and duties of officers of Building and Loan Associations are those which usually appertain to the officers of corporations generally."

The general rule is given in 14A Corpus Juris 118, citing Missouri cases that:

"A director may deal or contract with a corporation where he acts in good faith and the corporation is represented by a quorum of disinterested directors or other independent officers or agents authorized to contract for it. Such a contract is not void per se nor is it voidable."

This view is taken in Frankford Exchange Bank v. McCune, 72 S. W. (2d) 155, in which the court said:

"This case, in our view of it, as well as in the view which the lower court seems to have entertained, is to be largely determined by the general rules of law which have to do with the relationship which exists between a corporation and its officers. Such relationship is one of trust and confidence, the natural consequence of which is that the officers have no right to use their official positions for the benefit of anyone except the corporation itself. For such reason they have no right or authority to represent the corporation in any transaction in which they are personally interested in obtaining an advantage at the expense of the corporation, such a dual status or assertion of adverse interest being wholly inconsistent with the obligation of the fiduciary relationship which they bear to the corporation. This does not mean that an individual officer or director of a corporation may not deal with it, provided he deals openly with other agents of the corporation who are themselves disinterested and who have full power to act in the premises, since in such an instance he represents only himself and not the corporation, and the interests of the latter are cared for and protected by officers and agents who themselves have no adverse interests at stake in the matter. It necessarily follows, however, that corporate officers and directors cannot deal with themselves and for the corporation at the same time, and that contracts and dealings between the corporation and its officers are invalid when they run counter to the trust relationship which must at all times exist."

CONCLUSION

It is, therefore, the opinion of this department that directors of a Building and Loan Association may con-

tract and deal with the Association provided they deal openly with other agents or directors of the Association who are themselves wholly disinterested and there is no fraud or collusion in arriving at the contract or deal.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

AMO:WW

BOND INVESTMENT COMPANIES: Commissioner of Finance has the power to examine Bond Investment Companies.

March Twenty-Ninth
1 9 3 9

3770

FILED
58

Hon. J. W. McCammon, Supervisor
Bureau of Loan Supervision
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter dated March 24, 1939, requesting our opinion as to whether Section 5064, R. S. Mo., 1929, gives you the right and power to examine into the affairs of Bond Investment Companies. Your letter is lengthy, consequently, I will not quote it.

On July 28, 1936, this Department rendered an official opinion to Hon. Dwight H. Brown, Secretary of State, relating to Bond Investment Companies, and Page 5 of said Opinion reads:

> "Section 5064 of said Article provides that the Supervisor of Building and Loan Associations shall have the power to examine into the affairs of such a company. However, by virtue of Section 5285, R. S. Mo. 1929, the power of examination now vests with the Commissioner of Finance."

We are of the opinion that our ruling made on July 28, 1936, correctly rules the law as to the Commissioner of Finance having the power to examine Bond Investment Companies. However, we will go more fully into detail in explaining the above quoted portion from our opinion of July 28, 1936.

Section 5064 is part of Article 13, Chapter 32, R. S. Mo., 1929, and in part reads as follows:

> "The Supervisor of Building and Loan Associations is hereby made ex-officio Supervisor of Bond Investment Companies. He shall have like

power to examine into the affairs of these companies as is now or may be provided by law for the examination of Building and Loan Associations. * * * "

Section 5064 was Section 10337 of the Revised Statutes of 1919.

In 1919, there was a Department of Building and Loan Associations and a Supervisor who administered the affairs of said Department. In addition to examining Building and Loan Associations, the Supervisor also had the power to examine co-operative companies (Section 4986 R. S. Mo. 1929) and Bond Investment Companies (Section 5064 Supra). However, in 1921, the Legislature created a State Department of Finance and transferred all the duties of the Supervisor of Building and Loan Associations to the Commissioner of Finance. Laws of Missouri 1921, Page 393. The 1921 laws are now found in Article 1, Chapter 34, R. S. Mo. 1929, of which Sections 5282 and 5285 are part of said Article and Chapter.

Section 5285, R. S. Mo., 1929, reads in part as follows:

"The Department of Finance shall have charge of the execution of the laws * * * relating to Building and Loan Associations and cooperative companies organized and existing under and by virtue of the laws of this State * * * * it being the purpose and intention of this Article that the Department of Finance herein created shall have and exercise the jurisdiction heretofore possessed and exercised by the State Banking Department * * * * the Bureau of Building and Loan Supervision, the Supervisor of Building and Loan Associations, and the Soldier Settlement Board * * * * the Bureau of Building and Loan Supervision, the office of Supervisor of Building and Loan Associations, * * * * are hereby abolished and all the powers and duties thereof provided by the laws of this State, are hereby conferred upon and vested in the State Depart-

> ment of Finance, and all the provisions of the laws of this State conferring duties and powers upon the foregoing Department, Bureau, Officers, and Board, or requiring reports thereto, insofar as compatible with the provisions of this article, are hereby adopted and incorporated herein by reference and made a part hereof."

In addition to Section 5285, the 1921 Laws, in creating the State Department of Finance, added a section which is not found in the 1929 Revision, which Section was numbered 10 and found at Page 397, and reads: "All Acts and parts of Acts inconsistent with this Act are hereby repealed." Thus, it is seen that in 1921, the Legislature abolished the office of Supervisor of Building and Loan Associations and conferred all his powers and duties upon the newly created State Department of Finance. In 1925, the Legislature repealed all the laws relating to Building and Loan Associations, which were then found in Article 9, Chapter 90, R. S. Mo. 1919, and re-enacted a new law. Laws of Missouri 1925, Page 146. In the 1925 Law at Page 162, Section 38, is found which reads:

> "It shall be the duty of the Commissioner of Finance of the State of Missouri to administer and enforce the provisions of this Act."

In 1927 (Laws of 1927, Page 123) the Legislature created a State Bureau of Building and Loan Supervision. This law is found in the Revised Statutes of 1929 as Article 1, Chapter 35. Section 38 of the 1925 Law was made to read that the Supervisor should administer and enforce the provisions of Article 2, Chapter 35, (Section 5622). From the Laws of 1921 until the Laws of 1927, there was not in existence the office of Supervisor of Building and Loan Associations, and, consequently, all of the powers and duties exercised by him prior to the Laws of 1921 were placed in the Commissioner of Finance and remained as part of the Commissioner's duties until the Laws of 1927 took away some of them. Section 5579, R. S. Mo., 1929, in creating a State Bureau of Building and Loan Supervision,

only placed the Supervisor in charge of the execution of the laws relating to Mutual Savings Fund, Building and Loan Associations organized and existing under and by virtue of the laws of this State. Said Section further provided: "It being the purpose and intention of this Article that the State Bureau of Building and Loan Supervision and the Supervisor of Building and Loan Associations, herein created, shall have and exercise the jurisdiction heretofore possessed and exercised by the State Department of Finance and Commissioner of Finance over Building and Loan Associations, and all of the powers and duties heretofore conferred upon and vested in the State Department of Finance and Commissioner of Finance over Building and Loan Associations are hereby abolished and all of the powers and duties thereof vested by the laws of this State in the Department of Finance and/or in the Commissioner of Finance relating to the Supervision of Building and Loan Associations are hereby conferred upon and vested in the State Bureau of Building and Loan Supervision and the Supervisor of Building and Loan Associations insofar as compatible with the provisions of this Article, and the same are hereby adopted and incorporated herein by reference and made a part hereof."

Therefore, in 1927, the Legislature created a new Bureau of Building and Loan Supervision and took away from the Commissioner of Finance the supervision of Building and Loan Associations. We are unable to find any statute which replaced Bond Investment Companies under the jurisdiction of the Bureau of Building and Loan Supervision.

In 1931, Laws of Missouri, 1931, Page 141, the Legislature repealed and re-enacted Chapter 35, R. S. Mo., 1929, and only made it part of the Supervisor's duties to examine and execute the laws relating to Building and Loan Associations.

From the above and foregoing, we conclude that in 1921 the duties of the Supervisor under Section 5064 were placed with the Commissioner of Finance and have remained a part of the Commissioner's duties from that date until the present time. As the Bureau of Building and Loan Supervision was abolished in 1921, and re-created in 1927, probably, through inadvertance, the 1919 Statute which is

now Section 5064 was carried forward in the Revision of 1929 without correction or change. State ex rel Cantley, State Commissioner of Finance, vs. Meyer Tailoring Company et al, 25 S. W. (2d) 98, was an action under Article 9, Chapter 32, R. S. 1929, brought in the name of the Commissioner of Finance, even though Section 4991 appearing in the 1929 Revision made it the duty of the Supervisor to administer the laws relating to cooperative companies. Said Case was decided after the 1927 Law creating the Bureau, and Section 4991 is similar to Section 5064 in that the Revision of 1929 left the examination of cooperative companies and Bond Investment Companies under the Supervisor of Building and Loan Associations.

As hereinbefore stated, we adhere to our Opinion of July 28, 1936.

APPROVED:

Yours very truly,

ARTHUR O'KEEFE
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

JLH
AO:RW

POLICE BILL:
AMENDMENTS TO: Lawmakers may not infringe upon the appointive powers of the Governor in enacting legislation.

May 6, 1939

5-8

FILED
58

Honorable Arthur S. McDaniel
Representative
Dunklin County
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on the constitutionality of two proposed amendments to House Bill No. 688 which is now pending before the General Assembly. These amendments are as follows:

> "The duly elected City Council of any City affected by this Act shall designate to the Governor, within two (2) weeks after his inauguration, or within two (2) weeks after a vacancy occurs, its choice of political parties and the Governor shall appoint the said Police Commissioners from the political party designated."
>
> "The Governor shall appoint the Commissioners from the political party having the largest number of members on the City Council of any City affected by this act."

The question involved in these proposed amendments is would they be an infringement by the lawmakers upon the appointive powers of the Governor.

Under Section 11 of Article V of the Constitution

the power of appointment of officers is vested in the Governor. Under the police bill as it is proposed the commissioners shall be appointed by the Governor.

This proposed amendment seems to be an attempt on the part of the lawmakers to limit this power of the Governor to a certain extent by providing that the city council of the city affected shall choose the political party from which the commissioners shall be appointed by the Governor.

The second amendment does not attempt to designate any other agency nor to limit the Governor in his constitutional powers of appointment other than stating that the commissioners shall be appointed from the political party having the largest number of members on the council affected by the act.

We think in the case of State ex rel. v. Wright, 251 Mo. 335, that the court has laid down the rule which would be controlling on this question. At l.c. 335 the court said:

> "In conferring this power of appointment on the Governor, the Legislature had the power to attach such conditions to it and to require such qualifications in those appointed by the Governor as it saw fit, so long as those conditions were not shared by others with the Governor, or thrown upon others, wholly or in part, for their determination, and so long as the qualifications were not so drastically restrictive of the executive volition as to become for one of these three reasons in conflict with the constitutional provision requiring the separation and the retaining separate of the three co-ordinate branches of government. * * * * * * * * * * * * * "

By applying the rule laid down in the Wright case, supra, it seems that the first amendment proposed the

city council by designating to the Governor its choice of political parties from which the commissioners shall be selected by the Governor would be sharing in the powers of appointment of the Governor and would, therefore, be in violation of the constitutional provision relating to powers of appointment by the Governor.

The second proposed amendment does not provide that the power of appointment by the Governor shall be shared with any other party or parties. It simply provides that the commissioners shall be selected from the political party having the largest number of members on the city council. We do not think this amendment would infringe upon the powers of the Governor to the extent that it could be said it is unconstitutional.

CONCLUSION.

From the foregoing it is the opinion of this department that the first proposed amendment to House Bill No. 688 would be in violation of the provisions of the Constitution as to the powers of appointment by the Governor and would, therefore, be unconstitutional.

As to the second proposed amendment it is the opinion of this department that it would not be an infringement upon the powers of appointment of the Governor and would, therefore, be constitutional.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

BUILDING AND LOAN: Agreement between Federal Association and State Association covered by joint faithful performance bond that Federal Association shall have priority does not meet requirements of Section 5591, Laws of Missouri, 1931, p. 147.

May 25, 1939

5-24

FILED
58

Honorable J. W. McCammon, Supervisor
Bureau of Building and Loan Supervision
Jefferson City, Missouri

Dear Mr. McCammom:

This Department is in receipt of your request for an opinion which reads as follows:

"We have received from the Baltimore Avenue Building and Loan Association, a state chartered institution under the jurisdiction of this Bureau, a blanket bond covering the officers and employees of that association. Attached to this bond is an agreement whereby the bond provides joint coverage on the same officers and employees of a companion institution, known as the Baltimore Avenue Federal Savings and Loan Association. The Federal association is not subject to the jurisdiction of this department.

"It appears to me that this agreement, above mentioned, gives preference to the Federal chartered association and, therefore, does not provide, under all circumstances, full coverage in behalf of the state chartered institution. This Bureau feels that $10,000.00 is the minimum amount of bond coverage that should be in force to protect the shareholders of the state chartered association. My question then is whether or not, under the terms of the agreement and the bond, there is full compliance with Section 5591, Missouri Statutes."

The agreement which accompanies your request provides that in the event of a loss covered by the bond, which loss affects the Federal association and the State association, all sums recovered on said bond shall be paid to the Federal association before any amount shall be paid to the State association. Laws of Missouri, 1931, Section 5591, p. 147, provides in part as follows:

> "All officers and employes of any building, loan and savings association doing business in this state, whether created under this article or any previous laws of this state, who have the custody or handling of any of the funds or securities of such association, or who sign or endorse checks of said association, shall give such security for the faithful performance of their duties as the by-laws may require, and no such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations. All such bonds shall be filed with the supervisor of building and loan associations, or some depository designated by the supervisor of building and loan associations: Provided, that the supervisor of building and loan associations may require of any officer at any time such additional security, or such increase of said bond, or new bond, as he may, upon sufficient cause shown, deem necessary for the protection of the corporation and its members.

As was said in State ex rel. Wagner vs. Farm and Home Savings & Loan Association, 90 S. W. (2d) 93:

> "Building and loan associations are quasi public financial institutions, and for the protection of them the

> state of Missouri has by the act of 1931, provided special inquisitorial, supervisory, and regulating laws which are specific, adequate, complete and therefore exclusive."

The statute above, providing for a faithful performance bond to be given by certain officers and employees of an association, is designed to protect and secure the shareholders of such association. Such statutes are to be construed liberally in favor of those protected and must be strictly construed so as to fulfil the statutory requirements and thereby promote the object in the mind of the legislature. 59 C. J. 1106.

Section 5591, supra, provides that all officers and employees who have custody of funds must give a faithful performance bond. To countenance such an agreement as the one in question would vitiate the bond insofar as it relates to the officers of the state association and would render it an instrument of doubtful protection to the shareholders. A bond, with such an agreement attached thereto, would not meet the requirements of the statute as set forth above.

CONCLUSION

It is therefore the opinion of this Department that an agreement entered into between a State Building and Loan Association and a Federal Building and Loan Association, which have a joint bond to permit the Federal Association to have priority in the collection of any losses covered by said bond, does not meet the requirements of Section 5591, Laws of Missouri, 1931, p. 147.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO:VC

BUILDING & LOAN ASS'NS: (1) Officer or employee may furnish individual bond without "faithful performance of duty clause: (2) Bond cannot be cancelled without ten days notice in writing: (3) Supervisor of Building and Loan Associations may prepare form of individual bond in compliance with House Bill 166.

August 17, 1939

9-25

FILED
58

Mr. J. W. McCammon, Supervisor
Bureau of Building & Loan Supervision
Jefferson City, Missouri

Dear Sir:

Answering your request of August 14th, 1939, in reference to part of section 5591 R. S. Missouri, 1929, as set out in House Bill 166, passed by the Sixtieth General Assembly, and approved by the Governor, we submit the following:

I

Your first query in this request reads as follows:

"First, does the provision added to Section 5591, when it becomes effective, eliminate the statutory necessity of any Missouri state-chartered building and loan association, or officer or employee thereof, furnishing a bond containing the 'faithful performance of duty clause' providing such association or officer or employee thereof furnishes a bond containing such conditions and provisions as are required by the Federal Savings and Loan Insurance Corporation."

Section 5591 R. S. Missouri, 1929, being part of chapter 35, Laws of Missouri, 1931, page 147, which chapter repealed chapter 35, R. S. Missouri, 1929, reads partially as follows:

"The number, title and functions of the officers of any corporation created by virtue of this or any previous article, their terms of office, the time of their election, as well as the qualification of electors, and the time of each periodical meeting of the officers and shareholders of such corporation, shall be provided for in the by-laws. No person shall be eligible to become or shall continue a director unless he shall be the owner of at least five shares of capital stock of such corporation, and not delinquent in any manner thereon. All officers and employes of any building, loan and savings association doing business in this state, whether created under this article or any previous laws of this state, who have the custody or handling of any of the funds or securities of such association, or who sign or endorse checks of said association, shall give such security for the faithful performance of their duties as the by-laws may require, and no such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations. All such bonds shall be filed with the supervisor of building and loan associations, or some depository designated by the supervisor of building and loan associations: Provided, that the supervisor of building and loan associations may require of any officer at any time such additional security, or such increase of said bond, or new bond, as he may, upon sufficient cause shown, deem necessary for the protection of the corporation and its members.
* * * * * * * * * * * * * * "

This section described the bond as conditional only "for the faithful performance of their duties as the by-laws may require". It also provided that the supervisor of building and loan associations may require at any time additional security, increase of said bond, or a new bond, as he deems necessary, for the corporation and its members.

The proviso to section 5591 in House Bill 166 passed by the Sixtieth General Assembly, and approved by the Governor, added the following provision:

" * * * shall give such security for the

faithful performance of their duties as the by-laws may require, and no such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations; provided, however, that in lieu of security for the faithful performance of duties, the security or bond hereby required may contain such conditions and provisions as are required by the Federal Savings and Loan Insurance Corporation to be contained in securities or bonds furnished by all such officers and employees of an association insured by said Insurance Corporation; and further provided that any such security or bond shall provide that a cancellation thereof either by the surety or by the association shall not become effective unless and until ten days notice in writing shall have first been given to the supervisor and, - if the association to which such security or bond is given be insured thereby, - to the Federal Savings and Loan Insurance Corporation.
* * * * * * * * * * * * "

The wording in section 5591 House Bill 166 is very clear and not ambiguous or contradictory. In construing this section one must take into consideration the intention of the legislature in enacting the proviso. The original section 5591, Laws of Missouri, 1931, page 147, contained the phrase " for the faithful performance of their duties". The wording of the House Bill 166, section 5591 contains the same phrase and the proviso particularly states " in lieu of security for the faithful performance of duties", the security or bond hereby required may contain such conditions and provisions as are required by the Federal Savings and Loan Insurance Corporation * *" Clearly it was the intention of the legislature by the proviso to allow a different bond to be given than that set out in the main part of the section, as the bond contains certain conditions as set out and as required by the Federal Savings and Loan Insurance Corporation. In arriving at the construction of the statute and the intention of the legislature, one must read the original section in connection with the amending section to ascertain the purpose of the amending proviso.

In the case of Wallace v. Woods, 102 S. W. 2d 91, par. 9-11, the court said:

"'The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object, and "the manifest purpose of the statute, considered historically," is properly given consideration. * * * 2 Lewis, Sutherland on Stat. Const. (2d Ed.) sec. 363; Endlich on Interpretation of Statutes, sec. 329; and Maxwell on Statutes (5th Ed.) 425.' Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S. W. (2d) 920, loc. cit. 925. We must determine the question involved upon the statute we now have rather than upon the original enactment. Words used must be read in the light of the amendments made, and might take a broader meaning as the application of the statute was broadened. We can best decide the present meaning of this section by considering the various steps taken to change it from what it was at first to what it is now."

In the case of O'Malley v. Continental Life Ins. Co., 75 S. W. 2d 837, par. 4-5, the court said:

"The legislative intent in the enactment of the law is to be sought and effectuated. This is the rule of first importance in statutory interpretation. To ascertain such intent we invoke as aids such of the auxiliary rules of interpretation as may seem to bear with incidence as direct as may be upon the matter in hand. Briefly stated, these in substance recognize and require that the language of the act be considered (25 R. C. L. sec. 216, p. 961); that each word be accorded its ordinary meaning, generally speaking; and that in construing a word or expression of a statute susceptible of two or more meanings the court will adopt that interpretation most in accord with the manifest purpose of the statute as gathered from the context (Id., sec. 237, p. 994)."

In the case of Smith v. Equitable Life Assurance Society, 107 S. W. 2d 191, par. 4, the court said:

> "In determining the effect of an amendment of a statute the court must always proceed upon the basis that the Legislature intended to accomplish something by the amendment. Holt v. Rea, 330 Mo. 1237, 52 S. W. (2d) 877."

In view of the wording of the section as set out in House Bill 166, the purpose of the amendment and the a bove cited authorities, our opinion in answer to the first query of your request is as follows:

It is the opinion of this department that the provision added to section 5591 in House Bill 166, passed by the Sixtieth General Assembly, and approved by the Governor, when effective, eliminates the statutory necessity of any Missouri state-chartered building and loan association its officers or employees thereof furnishing a bond containing the "faithful performance of duty" clause, providing such association or officer, or employee, thereof, furnishes a bond containing such conditions and provisions as are required by the Federal Savings and Loan Insurance Corporation.

II.

The second query in your request reads as follows:

> "Second, although the forms of blanket bonds being used by building and loan associations have been standardized so that such bonds, as furnished by various surety companies, contain the same provisions and coverage, no such standardization has been effected with regard to individual bonds. It can be seen, therefore, that this office, in the event your answer to question number one is in the affirmative, will receive individual bonds containing varied degrees of coverage. We may visualize surety companies effecting limitations of coverage and modification of terms in line with reductions in premium costs in an effort to secure new business. In an effort to forestall such a condition, which would result in an insufficiency of security, does the supervisor, with the assistance of your staff, have the right to prepare a

form of individual bond and require its use by all surety companies? If so, will it be necessary for the Bureau to have printed and made available for distribution to all surety companies the bond forms so prepared and required?

It will be noticed that part of section 5591 House Bill 166, contains the following phrase, at lines 18 to 21, inclusive:

"No such officer shall be deemed qualified to enter upon the duties of his office until such security is approved by the board of directors and the supervisor of building and loan associations."

Under this part of Section 5591 of House Bill 166, the supervisor of the building and loan association shall approve the bond and in accordance with this authority could formulate the proper bond to comply with chapter 35, as set out in House Bill 166.

Section 5591 at lines 37 to 42, inclusive, provides:

"Provided, that the supervisor of building and loan association may require of any officer at any time such additional security, or such increase of said bond, or a new bond, as he may, upon sufficient cause shown, deem necessary for the protection, of the corporation and its members."

Under that part of section 5591 the supervisor of building and loan associations may require of any officer at any time additional security, increase of a bond, or even may require a new bond, which he may deem necessary for the protection of the corporation and its members. Under the authority of this part of section 5591, the bond being under the supervision of the supervisor of building and loan associations, he may require any form that he sees fit to comply with chapter 35, which is now House Bill 166.

Therefore, it is the opinion of this department that the supervisor of building and loan associations has the

right to prepare a form of individual bond and require its use by all surety companies, providing said bond complies with chapter 35, as set out in House Bill 166, and does not require additional conditions or provisions that are in conflict with chapter 35, now House Bill 166.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

_____

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

ELECTIONS: Persons convicted of violating Section 7783(g) are disqualified from voting.

January 3, 1939

1-5

FILED
59

Mr. Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

We have your request of December 29th for an opinion, which is as follows:

> "Section 10178 R. S. Mo., 1929, (P. 39 Election Laws 1937-38) provides:
>
> ' . . . nor shall any person convicted of felony or other infamous crime, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; . . . '
>
> "In view of the foregoing section, I would like an opinion from your office as to whether or not an otherwise qualified voter who had been previously convicted under Sec. 7783 (g) R. S. Mo. 1929 and his punishment fixed at a fine of $50.00 is qualified to vote at a general election.
>
> "There are many other graded felonies where the punishment is fixed by the jury at imprisonment or a fine rather than the maximum, which may be 2 or more years in the penitentiary. Is a person convicted under any of these

various sections and whose punishment is fixed at less than a term in the penitentiary, disqualified from voting because of having been convicted of a felony?"

Section 7786(c) R. S. Mo. 1929 provides in part as follows:

"Any person who violates * * * pp. (f) or (g) of Section 7783 shall be deemed guilty of a felony * * * * "

Section 7783 (g) is as follows:

"Driving in intoxicated condition: No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

Thus, it appears that persons who are convicted of violating Section 7783(g) R. S. Mo. 1929, have been convicted of a felony. The Missouri Constitution (Article VIII, Section 2) disqualifies for the purpose of voting any person who has been convicted of a felony.

Therefore, it is the opinion of this office that a person who has been convicted under Section 7783 (g) is disqualified from voting because of having been convicted of a felony.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
FER:RT

SCHOOLS: Rural School District may purchase land adjacent to a school for road purposes.

March 1, 1939

FILED 57

Mr. Frank W. McGraw
County Superintendent of Schools
Marshall, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of February 23, 1939, which reads as follows:

> "I am writing you at the request of one of my rural school boards relative to the purchasing of a right-of-way for a road to the school building.
>
> "It so happens when this school district was formed, the building erected, private roads let to it and no provision was made for a public road. In later years the private roads have been closed and the board has now an opportunity to purchase a right-of-way.
>
> "We are requesting you to advise us what authority the board has to purchase this road and what whould be the necessary and lawful procedure in paying for it.
>
> "The board consulted Mr. James, our County attorney, but he seemed to think the matter had not been dealt with in our courts. The proposition does not involve but only about two or three hundred dollars of expense and the board has sufficient money on hands to purchase the right-of-way but are in doubt to whether they have authority to proceed."

Section 9215 R. S. Missouri, 1929, provides as follows:

> "Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more schoolhouses, or the board of education in city, town or consolidated school district, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for schoolhouses, libraries, offices and public parks and playgrounds, or additional grounds adjacent to schoolhouse site or sites, and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors, or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way in article 2, chapter 7, R. S. 1929, and upon such condemnation and the payment of the appraisement, as therein provided, the title of said lot or land shall vest in the board of directors or board of education aforesaid for use in trust for the district and the purposes for which the same was so selected and located. All laws or parts of laws in conflict with this law are hereby repealed."

This section is applicable to all classes of schools and applies especially to rural school districts. Under this section any district shall select at the annual or special meeting additional grounds adjacent to school house site or sites. Also, this section provides for condemnation under eminent domain, as described in condemnation of right-of-way, in article 2, chapter 7, R. S. Missouri, 1929. This article was amended in the Session Laws of 1931, at page 171, only to the effect of interlining "telephone" and "street railway", and in no way effects the procedure of the condemnation. This section was

upheld in the case of Gladney et al, v. Gibson and School District of Elsberry, Missouri, 208 Mo. App. 70, and also in the case of Corley v. Montgomery, 226 Missouri Appeal 795.

It will be noticed by the above section 9215, supra, that it especially sets out or additional grounds adjacent to school house site or sites. Under your request you state that you have agreed upon the purchase of the land and in that event it would not be necessary to follow condemnation proceedings.

CONCLUSION.

In view of the above authorities it is the opinion of this department that a rural school board may by agreement with the owners of land, purchase land, for any purpose, that is adjacent to the school site.

It is further the opinion of this department that the rural school board may purchase land for a right-of-way into the school site for the reason that said land would be adjacent to the school site.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RW

ELECTIONS: Board of Election Commissioners of St. Louis County to make canvass alone of election returns.

March 10, 1939

3-17

FILED
59

Board of Election Commissioners
Of St. Louis County
Clayton, Missouri

Gentlemen:

We have your letter of recent date in which you submit for an opinion from this office the following question:

> "Is it necessary for the Board of Election Commissioners of St. Louis County to have personally present at the time canvass of election returns is made by us two justices of the peace, or two judges of the County Court?"

Your question has arisen due to the reading of Section 10322, R. S. Mo. 1929, which reads as follows:

> "The clerk of each county court shall, within five days after the close of each election, take to his assistance two justices of the peace of his county, or two judges of the county court, and examine and cast up the votes given to each candidate, and give to those having the highest number of votes certificates of election."

However, at page 229, Laws of 1935, will be found an act relating to registration and elections in your county. Section 1 of said act provides, among other things,:

> " * * the conduct of elections, including primary elections, held in such counties, shall be governed by the provisions of this act. All elections and registrations in said counties under this act, shall be also governed by the general election or registration laws so far as the same are not inconsistent or in conflict with this act."

The question, therefore, to determine is whether or not the act which applies expressly to your county contains provisions as to the manner of canvassing election returns, which are inconsistent with the general statute (Section 10322) above quoted.

Section 43, Laws of 1935, page 257, provides as follows:

> "Within eight days after the close of such election, the board of election commissioners, who are hereby declared a canvassing board of such county, shall publicly open all the returns, and shall make abstracts or statements of the votes."

Section 24, Laws of 1935, page 247, provides in part as follows:

> "The board of election commissioners created hereunder and hereby shall have full and complete power to conduct any and all elections in such county and to receive and certify the returns thereon. And it shall be the duty of said board of election commissioners to certify such returns to the proper officer upon whom falls the duty of issuing certificates of elections."

It will be seen that the special act governing elections in your county grants to the Board of Election Commissioners the power and charges them with the duty of canvassing the returns of elections held in your county. Such provisions are inconsistent with the provisions of Section 10322, R. S. Mo. 1929, and consequently they prevail over said Section 10322. A reading of the act governing elections in your county indicates that the Legislature intended to have the duties ordinarily performed by the county clerk in connection with election matters carried out by the Board of Election Commissioners.

CONCLUSION

It is, therefore, the opinion of this office that it is not necessary for the Board of Election Commissioners of St. Louis County to have present at the time canvass of election returns is made two justices of the peace or two judges of the county court.

Respectfully submitted,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
HHK:RT

SCHOOLS: Directors of town school district cannot dispose of building or school house site until another building or school house site has been provided.

March 28, 1939

4-5

FILED
59

Hon. Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 8, 1939, requesting an opinion on the following:

> "Mr. C.E. Stephens, president of school district c-3, Greenville, Missouri, has requested that I ask you for an opinion on behalf of the board of directors.
>
> "The school building and other property belonging to this district is located in the Wappapello Dam basis and the federal government is seeking to acquire title to all that they own. The main building cost in the neighborhood of $100,000.00 and is located within the corporate limits of Greenville and the town of Greenville is to be abandoned and flooded upon the completion of the dam.
>
> "Mr. Stephens wants to know if the school board, which is a six-man board, has the authority to option the property to the government."

Section 9194, R.S. Missouri, 1929, pertaining to the classification of public schools provides "all districts governed by six directors in which is located any city of the fourth class, or any incorporated town or village, shall be known as town school districts". We gather from your request that school district C-3, Greenville, Missouri, is a town school district.

Section 9330, R.S. Missouri, 1929, provides as follows:

> "* * * whenever there is within the district any school property that is no longer required for the use of the district, the board is hereby authorized to advertise, sell and convey the same, and the proceeds derived therefrom shall be placed to the credit of the building fund of such district."

Section 9269, R.S. Missouri, 1929, is as follows:

> "The title of all school house sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district.

It will be noted that the board of directors in such school district is authorized by statute to sell the school property, but that the above quoted sections place certain restrictions upon the sale. These are that the property be no longer required for the use of the district and that no school house or school site shall be sold until another site or school house is provided for such district.

While there is nothing to prevent the district from optioning this property for sale to the federal government, the above statutes would of course prevent the exercise of that option because it is apparent that no new school house or school site has been provided for the school district C-3.

In Consolidated School District No. 6 v. Shawhan, 273 S.W. l.c. 184, the court, in speaking of the duty of a school director on taking office, said:

> "By accepting such trust each director obligates himself to perform the duties as the law directs."

Thus, under the above statutes, the directors are obligated not to sell school buildings or sites unless another site or building has been provided.

CONCLUSION

Therefore, it is the opinion of this department that the directors of a town school district may not option their property for sale and complete said sale until the school district no longer requires the property proposed to be sold, and if said property be the school house or school site, until there has been provided another school house or site.

Our suggestion is that a friendly condemnation suit will have to be brought by the federal government in order to obviate the above statutes.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

J. E. TAYLOR
(Acting) Attorney General

LLB:VAC

PHYSICIANS: Must not operate on adults without consent or on minors without obtaining consent of parents, on inmates at Intermediate Reformatory.

March 28th, 1939.

H-2nd

FILED
59

Dr. John W. McHaney,
Institutional Physician,
Intermediate Reformatory,
Jefferson City, Missouri.

Dear Doctor McHaney:

We wish to acknowledge your letter of March 21st, as follows:

"I would appreciate an opinion regarding any liability which might occur to myself or the state from the performance of corrective operations upon inmates of Algoa Reformatory.

"Such operations being hemorrhoidectomies, herniotomies, circumcisions, and tonsillectomies.

"These would be done only upon the request of the inmate.

"The fact that a large percentage of the inmates are under legal age - would this require written consent of the parents for such operations.

"I would appreciate your opinion on the above questions."

48 C. J. Section 120, page 1130, discusses the subject of operations by physicians and surgeons with and without consent:

> "Where a patient is in possession of his faculties and in such physical health as to be able to consult about his condition, and no emergency exists making it impracticable to confer with him, his consent is a prerequisite to a surgical operation by his physician; and a surgeon who performs an operation without his patient's consent, express or implied, commits an assault for which he is liable in damages. The patient's consent may be implied from circumstances; thus, if he voluntarily submits to an operation, his consent will be presumed, unless he was the victim of false and fraudulent misrepresentations. If the patient is for any reason not competent to consent, the consent of some one who, under the circumstances, would be legally authorized to give it may be obtained. Where an emergency arises calling for immediate action for the preservation of the life or health of the patient, and it is impracticable to obtain his consent or the consent of anyone authorized to speak for him, it is the duty of the physician to perform such operation as good surgery demands, without such consent. And if, in the course of an operation to which the patient consented, the physician discovers conditions not anticipated before the operation was commenced, and which, if not removed, would endanger the life of the patient, he will,

> although no express consent be obtained or given, be justified in extending the operation to remove and overcome them. But the removal of a bone during the course of an operation, contrary to the understanding between the surgeon and the patient, renders the surgeon liable in damages. The implied appointment of the surgeon as the legal representative, during the period of unconsciousness, of a patient who has appointed no other person, does not give the surgeon a license to operate on the patient against his will or by subterfuge, or to perform a different operation than that consented to, or one involving risks and results not contemplated."

In the case of Fausette v. Grim, 186 S. W. (Mo. App.), 1177, l. c. 1181, the court on a motion for rehearing in pointing out that a patient's consent to an operation was an essential prerequisite to the surgeon's right to perform an operation, said:

> "No doubt a patient's consent to an operation is an essential prerequisite to the surgeon's right to perform an operation, if the patient is in possession of his faculties or is in such condition that consent can be obtained. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N.S.) 609, 8 Ann. Cas. 197; Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303. And if a surgeon should obtain the patient's consent by a false and fraudulent representation, the surgeon might be liable upon that cause of action. Pratt v. Davis, supra. In such case he

> would perhaps be liable to an action for deceit. 2 Am. & Eng. Ency. of Law (2d Ed.) 803; 30 Cyc. 1579."

In the case of Schloendorff v. The Society of the New York Hospital, 211 N. Y. 125, 105 N. E. 92, l. c. 93, the court in holding that where the operation is performed by the surgeon without obtaining the patient's consent, the surgeon is guilty of assault for which he is liable in damages, said:

> "Every human being of adult years and sound mind has the right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages, except in cases of emergency where the patient is unconscious, and where it is necessary to operate before consent can be obtained."

As to the necessity of a physician or surgeon obtaining the consent of parents before operations on minors, we find the following statement in 48 C. J. Section 121, page 1181:

> "* * * * * it has been held that in case of an emergency a surgeon may operate on a child without waiting for authority from the parents, where it appears impracticable to get it. But in the absence of an emergency an operation performed on a child without

> the consent of the parents is a legal wrong; and adult sisters of the child, who are its temporary custodians, have no authority to give consent under such circumstances. Only a reasonable and diligent effort on the part of the physician to find the parents and advise them of the situation has been required."

In the case of Moss v. Rishworth, 222 S. W. 225, a parent sued a physician for performing an operation on his 11 year old daughter without his consent, alleging that the operation resulted in the death of the child.

The child, who had been living with its parents, was placed by the father in the immediate care and custody of her older sister, Clara, who had 3 years experience in training to become a graduate nurse. She took the child to a doctor to ascertain whether an operation was needed for removal of adenoids. An examination disclosed badly diseased tonsils and the appearance of adenoids. The doctor advised the sister that a real necessity existed for an operation to remove the diseased tonsils and adenoids.

Having agreed upon a date for the operation, the child returned with her sister Clara and another sister, Nellie, who had two years training as a nurse, and after an examination the operation was performed, but before coming from under the influence of the anesthetic the child died.

The court in holding that before an operation may be performed, a physician must obtain the consent of his patient, if competent to give it, said:

> "The authorities are unanimous in holding that a surgeon is liable for operating upon a patient, unless he obtains the consent of the patient, if competent to give such consent, or, if not, of some one who, under the circumstances, would be legally authorized to give the requisite consent. If a person should be injured to the extent that he is unconscious, and his injuries of such nature as to require prompt surgical attention, a physician called to attend would be justified in applying such treatment as might reasonably be necessary for the preservation of his life or limb, and consent on the part of the injured person would be implied upon the ground of an existing emergency. Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L. R. A. (N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303; Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, 7 L. R. A. (N.S.) 609, 8 Ann. Cas. 197; Rolater v. Strain, 39 Okl. 572, 137 Pac. 96, 50 L. R. A. (N.S.) 880; Schloendorff v. Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N.S.) 505, Ann. Cas. 1915C 581."

And in holding that the temporary custody of the sister did not give her authority to give consent to the operation, but that only the father could give consent, said:

"The evidence shows that there was an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it. In fact, it is not contended that any real danger would have resulted to the child had time been taken to consult the parent with reference to the operation. Therefore the operation was not justified upon the ground that an emergency existed.

"The physicians, acting in good faith, in assuming the sisters had authority to give consent, undertook to perform the operation, and, although the operation was skillfully performed and without negligence, death ensued, either as the result of the operation or of administering the anesthetic, or both. The sisters were but the temporary custodians of the child, and as such temporary custodians had no authority to give consent to perform the operation in the absence of an emergency. The parent was the only one who could legally give consent to perform it, and, if not given, the physicians' act in performing it was a legal wrong. If performed without the consent of the parent, it would amount to a technical assault for which the child could have recovered had she survived the operation, and it follows that, under article 4695, the cause of action would survive to the defendant in error, not dependent, however, upon the extent of the injuries to the minor child.

> "It is insisted that the paramount interest of the child alone must be considered in determining whether such an operation shall be performed, and that if her health demanded an operation, and that, if skillfully performed, no cause of action would arise, even though it resulted disastrously. The law wisely reposes in the parent the care and custody of the minor child, and neither a physician nor those in temporary custody of the child will be permitted, in a case of this character, to determine those matters touching its welfare."

In the case of Browning v. Hoffman, 90 W. Va. 568, 111 S. E. 492, it was shown that when the necessity of an amputation of the leg of the patient, a young boy, became known at 2:30 o'clock p.m. of the second day, efforts were made to apprise the parents, and obtain their consent. The father was absent, and the mother, who was not found for several hours thereafter, when notified protested against the operation without the assent of the husband, who didn't return until 9:00 o'clock p.m., and then refused to permit the assistant physician to perform the operation. The court in holding that it was error to instruct the jury unqualifiedly that it was the duty of the assistant physician promptly to notify the parents or grandparents of such necessity, the grandmother, who was at the hospital, not being shown to have had authority to assent to the amputation, and it not being known to the physician that the boy resided with the grandparents, said:

> "An instruction which, in view of all these facts and circumstances, imposed absolute duty from the physician promptly to inform parents or grandparents of the necessity of amputation, is clearly misleading and prejudicial. It ignores the evi-

> dence of negligence of the parents and futility of notice to them, if it had been given. Except in very extreme cases, a surgeon has no legal right to operate upon a patient without his consent, nor upon a child without the consent of its parent or guardian. Rishworth v. Ross, 191 S. W. 843; Mohr v. Williams, 1 L.R.A. (U.S.) 439; Rolater v. Strain, 51 L. R. A. (U.S.) 880; 30 Cyc. 1577; 21 R. C. L. 392."

We must next determine whether the legal principles as above outlined are also applicable to inmates in prisons or reformatories. Although we have been unable to find any cases in point, we fail to see why there should be a different rule for inmates, both adult and minor, as it applies to the obtaining of consent by the physician before the performance of an operation, or on what grounds a different rule would be justified.

50 C. J. Section 27, page 339, in pointing out the duties of a jailer or warden states that:

> "Among other duties imposed are the duty to receive and keep prisoners; the duty to preserve the health of the prisoners, and a fortiori to preserve their lives; the duty to supply food and board to the prisoners; and the duty to keep the jail clean and sanitary."

50 C. J. Section 28, page 339, states that:

> "For a breach of the duty of the jailer or warden to keep the jail sanitary and warm, or to furnish food, he is liable for injury proximately resulting therefrom to a prisoner."

We merely cite the above duties of jailers and wardens to point out that an inmate does not lose all his rights as a human being, by reason of his having committed a crime. If a jailer or warden may become liable to a prisoner for injuries proximately resulting from failure to keep the jail sanitary and warm, or to furnish food, such personal and natural rights which may involve the inmate's chance of living deserves, of course, the greatest of respect and protection.

Section 8495, Revised Statutes of Missouri, 1929, provides that among other duties of the physician of the Intermediate Reformatory, he shall:

> "First, attend at all times to the necessities of the sick convicts, whether they are in the hospital, in cells or elsewhere, and bestow on them all necessary medical services; * ****"

From the foregoing we are of the opinion that the physician of the Intermediate Reformatory for Young Men may perform, without personal liability, corrective operations upon an inmate at said Reformatory, where the inmate requests it and gives his consent, and may also perform corrective operations upon minors, provided the legal consent of the parents of said minor is obtained.

With respect to the state's liability, we find the following statement in 59 C. J. Section 337, page 194:

> "A state is not liable for the torts of its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability and consented to be so liable, the only relief the aggrieved person has in such case being an appeal to the legislature;*
> * * * * "

From the foregoing we are of the opinion that should the physician of the Intermediate Reformatory perform corrective operations upon inmates without their consent, or in the case of minors, without the consent of their parents, the state would not be liable for the tortious acts of the physicians.

Respectfully submitted,

MAX WASSERMAN,
Assistant Attorney General.

APPROVED:

(Acting) Attorney General

MW:RV

TAXATION: Buildings owned by lessees are subject to taxation separate from the land.

April 15th, 1939.

FILED
59

Hon. Robert A. McIlrath,
Prosecuting Attorney,
St. Francois County,
Farmington, Missouri.

Dear Mr. McIlrath:

This will acknowledge receipt of your inquiry of April 7th, 1939, which reads as follows:

"Enclosed herewith please find a blank form, the usual form of a lease agreement between St. Joseph Lead Company, who now owns the land generally in the Lead Belt towns of this county, to persons who have leased the surface right for home building purposes and for building sites for commercial purposes throughout the Lead Belt.

The members of the County Court are in a quandary. Some of them desire that the value of buildings and inprovements built on these lease-holds within the term of the lease, which is usually from twenty to thirty years, should be assessed against the lessee.

Many of these buildings and improvements are valuable commercial buildings and some are moderately expensive dwellings. Some members of the court and Board of Equalization think that the buildings and improvements should be assessed to the

lessee instead of to the lessor.

We desire from your office to determine whether the improvements on these lease-holds should be assessed to the lessor or lessee under the terms in conditions set forth in the enclosed sample copy.

Generally the lease rent on dwellings is twenty dollars per year and on commercial buildings fifty dollars per year, payable quarterly."

Section 9742, Revised Statutes, 1929, reads as follows:

"For the support of the government of the state, the payment of the public debt, and the advancement of the public interest, taxes shall be levied on all property, real and personal, except as stated in the next section."

Section 9746, Revised Statutes, 1929, reads as follows:

"Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

The two foregoing sections lay down two premises from which we must start, viz:

(1) That all property except such as is specifically exempted is subject to taxation; (2) That the owner of property is the one to whom taxes should be assessed, and who should pay the taxes. There is no claim that the buildings are not property, nor is there any claim that the buildings inquired about in your letter are exempt from taxation. The only question to be determined is to whom should the buildings be assessed and who should pay the taxes thereon.

While, generally speaking, permanent improvements erected upon the land become a part of the real estate, yet parties can contract in such a manner as to have the ownership of the improvements in one person and the ownership of the land in another. This doctrine of law has been stated thus, in the case of People v. Board of Assessors, 93 N. Y. l. c. 311:

> "The title and ownership of permanent erections by one person upon the land of another, in the absence of contract rights, regulating the interests of the respective parties, generally follows and accrues to the holder of the title of the land, but it is perfectly competent for parties by contract to so regulate their respective interests that one may be the owner of the buildings and another of the land.

In determining whether the lease involved in the foregoing case was such a one as treated ownership of the buildings in the lessee, the court said, l. c. 312:

"It remains to inquire whether by the lease in question the relators have a legal interest in the buildings erected by them, which the law will regard as property, and to the possession and enjoyment of which they are lawfully entitled.

They are now in possession of the property rented by them and have been for a period of upwards of twenty-five years, subject only to the annual payment of ground rent to their lessors. By their lease they are entitled to retain this possession for all time, unless in the meanwhile their lessors elect to pay for their property, and thus terminate their ownership.

The lessees have simply entered into an executory contract of sale of their buildings, optional with their vendees as to whether it shall be executed at some future time, or the erections shall continue to be possessed by and remain the property of the lessees.

Until the exercise of this option on the part of the lessors the buildings undoubtedly continue the property of the lessees with all of the rights and obligations which pertain to such ownership. The circumstance that the interest of the lessees may be forfeited for any cause by their own act does not affect the status of the property as to its present ownership.

> In a general sense all property is liable to be forfeited in some way through the acts of the owners, but this fact does not affect the title to the property until the cause of forfeiture be committed and the penalty enforced. Conditions more or less onerous are frequently inserted in conveyances of property, but when a grantee enters into possession of the property conveyed and while he continues in possession he is the legal owner of whatever the conveyance purports to grant him."

We think the terms of the lease submitted with your request make the lessee of the land in question the owner of the buildings and improvements. The lease requires the lessee to erect a building on the land within a certain time and in excess of a certain cost, and also provides that if the lessor elects to conduct its mining operations from the leased tract, it will compensate the lessee for damages to his buildings or improvements. It further provides that at the expiration of the term of the lease the lessee may remove the buildings from the said leased tract. All of these provisions clearly indicate an intention on the part of the contracting parties that the ownership of the buildings should be in the lessees, whereas the ownership of the land is in the lessors.

Cases involving the taxation of buildings separate from the land upon which they rest, have heretofore been before the Courts of Missouri. In the early case of Leach v. Goode, 19 Mo. 502, the court said:

> "When a lease is made, without any stipulation about taxes the landlord is bound to pay the taxes upon the property; but if the tenant, by the erection of buildings, which, by the terms of lease, continue his property, and which he is either authorized to remove, or is entitled to be compensated for by the landlord, enhances the taxes, the landlord is not bound to pay taxes upon the improvements."

The case of State ex rel. v. Mission Free School, 162 Mo. 332, was a case where land owned by charitable organization was leased to a party who subsequently erected a large and valuable building upon it. Suit was brought against the charitable organization and the lessee seeking to have the land and the leasehold interest of the lessee sold for taxation. There was no assessment of the separate interest of the lessee in the lease-hold and the building. In the course of the opinion the court said, l. c. 336:

> "As there was no assessment of Thompson's building by the assessor, and as his ownership is distinct from that of the Mission Free School, the assessment of his building as a part of the school's lot was clearly erroneous, as the law requires all property in this State to be assessed to the owner if known, and this lease was open to the assessor. As said on the former appeal, Thompson is not to be subjected to the tax on the ground, nor the school, even if not wholly exempt, to pay the tax on his building. The fact that the lot of the Mission Free School is

or was exempted under its articles of incorporation will not exempt the building of Thompson, in which the school has no interest, or title under its lease. It is true, counsel for Thompson insists that Thompson's interest can not be taxed bacause there is no specific statute authorizing his interest in such a case to be taxed.

In this view we do not concur. All property except such as is specifically exempted by the Constitution and the statute made in pursuance thereof, is subject to taxation, and we can see no difficulty in assessing the separate and distinct property of Thompson in this building any more than would be encountered in assessing the property of any other individual. Whether it is real or personal property, or whether the State is bound to regard it as personalty, is not now the question. The point is, is it separately liable to taxation as his property? We hold that it is. And it is Thompson's duty to list it just as every other taxpayer is required to list his property or suffer the penalties. The point may be new in this court, but has often been solved in other jurisdictions. (People ex rel. Muller v. Board of Assessors, 93 New York, 308; People ex rel. v. Commrs. of Taxes, 82 N. Y. 459; Russell v. City of New Haven, 51 Conn. 259; Smith v. Mayor, 68 N. Y. 552).

> In most states the interest of Thompson under a lease like this is real estate, and as our statute provides that the words "real estate" shall be construed to include all interest and estate in lands, tenements, and hereditaments (sections 4917 and 4916, Revised Statutes, 1889), little doubt can exist that Thompson's interest in this realty and building should be assessed as real estate. As it is obvious he has not been assessed at all, no judgment can be rendered against him in the present action, but the statute supplies the remedy in such cases.
>
> We think it is equally clear that the assessment against the Mission Free School of the value of Thompson's building, in which it has no interest under its lease, is illegal, and as the judgment is in its nature such an entirety that this court can not separate the respective obligations of the two defendants, it must be held erroneous as to both."

The foregoing case seems to us clearly to hold that where buildings on leased land are owned by the lessee, they should be assessed separately from the land. Where the lease is silent as to taxes, it has been held that the taxes on improvements removable by the tenant must be paid by the tenant.(73 A.L.R. 828n).

The lease submitted with your inquiry provides that the lessee should pay all taxes against the leased land, and clearly shows an intention that the lessor shall not be liable for taxes of any kind. However, the lease indicates that the parties must have assumed that the improvements and the land would be assessed together and the lessee pay the entire taxes.

While it is competent for the parties to so contract that the ownership of the improvements shall be separate from the ownership of the land, yet they could not contract for a different method of assessment than that provided by law, since the assessment and collection of taxes are regulated by law.

CONCLUSION

It is therefore the opinion of this office that where buildings and improvements upon leased lands are owned by the lessee, they should be assessed and taxed separate from the land and that the owner of such buildings and improvements is liable for taxes on the same. It is further our opinion that buildings on land leased in accordance with the form of lease enclosed with your request are owned by the lessee and should be assessed to him.

Yours very truly,

APPROVED:

HARRY H. KAY
Assistant Attorney General.

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

ASSESSORS: (1) Compensation for taking list containing only undivided interest in real estate in counties of 40,000 or less.
(2) Compensation for entering tract so owned in land book.

May 6, 1939

5-3)

FILED
59

Mr. S.T. McIntyre
Marion County Assessor
Hannibal, Missouri

Dear Sir:

This will acknowledge receipt of your letter of April 1, 1939, which reads as follows:

> "In the past we have had quite a lot of difficulty in assessing property belonging to two persons or more as one tract and one valuation. For instance a party by the name of M.B. Burgher owns a half interest, C.E. Rendlen one-fourth int, and S.O. Osterhout, one-fourth int. Mr. Burgher has insisted upon paying and undivided one-half interest and he always wishes to pay his taxes in either October or November. Now this is not the only case but there are many of the same type in this County.
>
> "For the past year, I have been assessing each one with their undivided interest or at least I show the interest each one owns, and make a list for each one and charge for three tracts as I make three separate entries in the book and of course charge for each assessment list.
>
> "Sometimes the party owning the undivided interest own other property and

of course only charge for the one list but where they do not own other property I of course charge for the list.

"According to Section 9913 I do not see how the Collector could split the property unless the assessor would show the interest owned by each one.

"Will you kindly advise if I am not correct in making a charge for the list and tracts as outlined above?"

The questions which seem to be involved are: May the assessor charge for taking a list containing only real estate when the person from whom the list is taken owns only an undivided interest in the land and that undivided interest is all that is listed? May the assessor be paid, not to exceed the three cents per tract, for entering such an undivided interest, as a tract, in the land list book?

On January 26, 1938, we rendered an opinion to O.G. Schell, St. Elizabeth, Missouri, in which the compensation of assessors in counties the size of Marion (under 40,000) was discussed. We enclose a copy. In that opinion, we concluded that an assessor was entitled to thirty five cents for each list taken containing real estate (of course the list should contain all other property, real or personal, owned by the person in the county). A person listing an undivided interest, owned by him, in land, is in fact giving a list of the real estate he owns. The assessor is entitled to thirty five cents for each list, even though it only contains real estate (see enclosed opinion). While we find no cases or statutes which undertake to cover such a situation, we think the assessor is entitled to receive thirty five cents for taking a list containing only an undivided interest in real estate.

Section 9806, Laws of 1931, page 359, provides that the assessor "shall be allowed a fee of three cents per entry for making real estate (and personal assessment)

books, all the real estate (and personal property) assessed to one person to be counted as one name, * * *: Provided, that nothing contained in this section shall be so construed as to allow any pay per name for the name set opposite each tract of land assessed in the numerical list." (Parentheses ours).

It will be noticed that this statute first allows three cents per entry of tracts in the land list, stating that all real estate assessed to one person is to be counted as one name. Then the proviso says this is not meant to allow any pay per name entered opposite each tract of land assessed in the land book. In other words, it first says pay three cents for each name and then not pay three cents for each name. This is a direct conflict in said section and renders it a nullity insofar as any pay is given for entering the names of the owners of a tract of land in the land book. As was said in the case of State v. Gomer, 101 S. W. (2d) 57, l. c. 64:

> "It seems impossible to harmonize the provision 'all real estate * * * assessed to one person to be counted as one name' with the provision in the same section that it was not to 'be so construed as to allow any pay per name' for assessing land. One would seem to cancel the other * *."

In the Gomer case at l. c. 66, the court in its sixth conclusion, said:

> "That as compensation for making the numerical assessment in the land list, an assessor should be paid such amount as may be allowed by the county court not to exceed the sum of 3 cents for each and every tract so assessed; but that all contiguous tracts in the same section and all contiguous lots in the same square or block which can be consolidated into one tract, lot, or call shall be counted as one tract."

As we understand this case, the assessor is paid for entering the tract in his land book, not for entering the name of the owner or owners. By Section 9780, R.S. Missouri, 1929, the assessor is required to consolidate all lands owned by one person in a section into one tract, thus making one tract, so far as compensation for entering the tract in the land book is concerned.

This statute provides for the consolidation of tracts and we find none which authorizes the assessor to separate a tract of land when in fact there is no separation. What this would amount to if the assessor were to make separate entries on each owner's interest would be three entries of the same land. Such a duplication is not authorized and neither is the assessor entitled to the three cents per tract entered on such a duplication. He is paid for entering the land, not the owner's name. Once entered, it is there and the mere fact that the owner listed did not completely own said land does not keep it from being the entry of the land.

Such entry should be made describing the land and listing the owners' names without any reference to their interest. It is of no concern of the assessor what interest in the land the owners entered own. His duty is to enter the land, the owner's name, and fix its value.

Section 9913 operates to protect the interest of the owners if some co-owner does not raise his portion of the taxes, and not to authorize the assessor to separately assess a value on each undivided interest.

CONCLUSION

Therefore, it is our opinion that the assessor of a county containing 40,000 or less inhabitants is entitled to thirty five cents for taking a list containing only an undivided interest in real estate. He is not, however, entitled to three cents for entering an undivided interest of land in the land book, but must enter the whole tract, place the owner's name opposite, and make one charge of three cents for entering the tract in the land book.

Respectfully submitted,

APPROVED By:

LAWRENCE L. BRADLEY
Assistant Attorney General

J.E. TAYLOR
(Acting) Attorney General

COUNTY COLLECTOR: It is mandatory on the county collector to withhold fees to witnesses or grand jurors for delinquent taxes, even though the taxes are in a larger amount than the warrants.

May 10, 1939

FILED
59

Hon. John T. McKay, Jr.
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

In answer to your request of May 3rd, in reference to the payment of criminal costs and fees upon delinquent taxes, will say that I am enclosing an opinion rendered by this department on the 15th day of December, 1937, to Mr. Alfred Moeller, Prosecuting Attorney of Ste. Genevieve County. In that opinion this department held that a county collector cannot collect partial payment of state, county and school taxes. The facts in that request were very much different than in your request. Your request reads as follows:

> "There has arisen in my county some difference of opinion as to the duties of the County Treasurer with reference to the disposition of criminal costs as provided by Sections 3854, 3855 and 3856 of the Revised Statutes of 1929.
>
> "The County Treasurer now has on hand around $800 criminal cost paid to him by the State of Missouri belonging to various witnesses, officers and jurors, each of whom at the time said costs were payable and demand was made, were indebted to the County in an amount greater than the amount of criminal costs due them.
>
> "Section 3854 provides that in the event the indebtedness of a claimant of fees equals or

> exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees. Most of these claimants are indebted to the County by reason of owing back personal taxes and the amount which they claim as criminal cost is insufficient to extinguish any one year's taxes.
>
> "The Treasurer has not disbursed any of this money due to the fact that he does not believe as treasurer and ex-officio collector he has any authority to collect the delinquent personal taxes in installments, the claimants of these fees being unable to pay the balance of their taxes, and has asked me to get an opinion from you as to the procedure he should follow in disbursing these criminal costs."

Section 3853, R. S. Missouri, 1929, provides the method of certifying criminal costs. Section 3854, R. S. Missouri, 1929, provides for the payment of fees and the proceedings thereunder. This section partly reads as follows:

> "* * * Provided further, that after deducting the amount of the indebtedness of the claimant, if any, on account of any or all of the various causes hereinbefore enumerated, the treasurer shall pay him the balance, giving duplicate receipts for the separate amounts paid, one of which shall be filed with the county clerk, who shall charge the treasurer with the same, but if the indebtedness

> of the claimant equals or exceeds the amount of his fees, the treasurer shall give him credit for the amount of his fees, stating on what account, and shall make duplicate receipts for the same, one of which he shall deliver to the claimant and the other he shall file with the county clerk, who shall charge the treasurer with all such receipts, and in his regular settlements with the county court the treasurer shall make a full and complete exhibit of all his acts and doings under section 3853 to 3858, inclusive."

This section is mandatory and specifically states that even though he owes a larger amount than is due him on his fees, it is compulsory for the treasurer to give him credit for the amount of his fees. This seems to be an exception to the general rule, which we held in the opinion herein enclosed.

Section 3855 R. S. Missouri, 1929, defines what should be considered as criminal costs. Section 3856 R. S. Missouri, 1929, describes the disposition of fees by the county treasurer at the end of each term of court. Section 3857 R. S. Missouri, 1929, reads as follows:

> "In order to make said sections 3853 to 3858 effective, it is hereby declared that all fees due by the state or county on account of any criminal case, or due witnesses before the grand jury, or as a juror or witness in an inquest, shall not be negotiable or assignable except subject to all the set-offs herein provided for, and that the state and county holds a prior lien on the same for the purpose of indemnification against loss by reason of the nonpayment of personal

back taxes, and for the payment of the fines, penalties, forfeitures and costs hereinbefore mentioned."

This section is one of the exceptions to the general rule that a county collector cannot collect part of the taxes and give receipts therefor.

Section 9911 R. S. Missouri, 1929, refers to the acceptance of warrants for the payment of taxes under certain conditions. Said section in full being as follows:

"Except as hereinafter provided, all state, county, township, city, town, village, school district, levee district and drainage district taxes shall be paid in gold or silver coin or legal tender notes of the United States, or in national bank notes. Warrants drawn by the state auditor shall be received in payment of state taxes. Jury certificates of the county shall be received in payment of county taxes. Past due bonds or coupons of any county, city, township, drainage district, levee district or school district shall be received in payment of any tax levied for the payment of bonds or coupons of the same issue, but not in payment of any tax levied for any other purpose. Any warrant, issued by any county or city, when presented by the legal holder thereof, shall be received in payment of any tax, license, assessment, fine, penalty or forfeiture existing against said holder and accruing to the county or city issuing the warrant; but no such warrant shall be received in payment of any tax unless it was issued during the year for which the tax was levied, or there is an excess of revenue

> for the year in which the warrant was issued over and above the expenses of the county or city for that year."

By this section the warrants must be presented by the legal holder and be issued and received in payment of a tax during the year for which the tax was levied. This section only applies where the holder of the warrant has been in possession of the same and which has not been withheld as provided under section 3857, supra.

Under section 12,171, R. S. Missouri, 1929, the county treasurer is prohibited from paying warrant unless presented by the person in whose favor it is drawn.

Section 12172, R. S. Missouri, 1929, authorizes the county treasurer to accept and pay a warrant from any one who has a proper assignment on the back thereof, as set out in that section.

Under section 3857, supra, the warrant is non-negotiable and non-assignable.

CONCLUSION.

In view of the above authorities it is the opinion of this department that the county treasurer may accept the warrants as set out under section 3857, supra, and it is his duty to retain the warrants and give credit upon the delinquent taxes of the amount due the witness or juror, as the case may be. He should retain the warrants even if the persons entitled to the warrants are indebted to the county for delinquent taxes in an amount greater than the amount of criminal costs due them. Under the facts as

stated in your request, it is the opinion of this department that this is one of the exceptions as set out under section 3857, supra, in which the county collector must retain and apply a partial payment of the taxes due the state, county and schools.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

SCHOOLS: County Superintendent of Schools not entitled to any unexpended balance in fund created by Section 9475, R. S. Mo. 1929.

May 16, 1939

5-18

FILED
59

Honorable John T. McKay, Jr.,
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion under date of May 3, 1939.

You inquire if the county superintendent of schools is required to turn over unexpended balance in the fund created by Section 9475, R. S. Mo. 1929.

This section requires a fee of all persons taking an examination for a teacher's certificate. The purpose of the fee is to defray expenses of teachers associations and teachers meetings and for expenses incident to grading of papers and issuing certificates of applications for licenses to teach. Section 9475, R. S. Mo. 1929, reads as follows:

> "Every applicant for a certificate shall pay to the county superintendent of public schools a fee of three dollars which shall entitle him to take any and all examinations given in any calendar year. Everyapplicant for a renewal of his certificate shall pay a fee of one dollar and fifty cents. The fees so collected shall be used for the payment of the expenses of teachers associations and teachers' meetings authorized by this chapter at least thirty per cent. being set apart and used for this purpose--and for the expenses incident to the grading of

papers and issuing of certificates of applicants for license to teach. The county superintendent of public schools shall remit to the state superintendent five cents for each subject written by each applicant, whose papers are sent to the state superintendent of schools. The fees, received in this manner by the state superintendent of public schools, shall be used to pay the compensation of such assistants as may be necessary to examine and grade all such papers, and to pay other expenses incident to the grading of the papers submitted and recording and certifying said grades. The state superintendent of public schools is hereby empowered to appoint and pay such assistants as he may need for the examining and grading of all such papers submitted and he shall also keep an accurate account of all moneys received and disbursed by him in carrying out the provisions of this article. Any balance remaining in said fund shall be turned into the general revenue fund of the state by said state superintendent of public schools on the first day of December of each calendar year. The county superintendent of public schools shall make report of all fees collected, all amounts expended for teachers associations and meetings and for all amounts remitted to the state superintendent to the county court at its regular meeting in February of each year."

By the words, "at least thirty per cent. being set apart and used for this purpose," the Legislature placed a minimum amount to be set aside for expenses of teachers associations and meetings. However, the Legislature did not restrict the expenditure to thirty per cent. of the fund for

this purpose. It may be increased, but under no circumstances shall the county superintendent of schools fail to set aside thirty per cent. for this purpose.

In Miller v. State, 94 So. 706, l. c. 709, 130 Miss. 564, the court held the words, "at least four months," in a constitutional amendment providing public schools shall be maintained in each school district at least four months during each scholastic year, did not preclude them from holding school for a longer period. In so holding the court said:

> "When they said'at least four months' we understand they meant that four months was to be the minimum term; or, to put it in another way, there must be not less than four months of schooling, and, inferentially, there may be a longer term, or at least a longer term was not intended to be prohibited, either expressly or by implication."

Also, in City of St. Charles v. Stookey, 154 Fed. 772, l. c. 782, the court, in holding an extension of at least 60 days means an indefinite time not less than 60 days, said:

> "An extension of at least 60 days is an extension for an indefinite time not less than 60 days, and after this extension was granted the contractor might have reasonably inferred, in the absence of subsequent notice to him by the city, that his time would be limited to some definite date, that a reasonable time not less than 60 days was allowed him to complete his undertaking. This was the natural meaning of the words and the true construction of the grant (Roberts v. Wilcock,8 Watts & S. 464, 470; Stewart v. Griswold, 134 Mass. 391), and there was no error in the rulings of the court here challenged."

Therefore, in view of the foregoing, it is the opinion of this Department that the county superintendent of schools is not restricted to paying thirty per cent. of this fund for expenses of teachers associations and meetings, but must set apart that much, and if the occasion requires it he may appropriate more for this purpose.

Now we come to your main request: Is the County Superintendent of public schools, under Section 9475, R. S. Mo. 1929, required to turn over any unexpended balance in said fund?

After careful examination of the provisions pertinent to your inquiry we come to the conclusion that it is the statutory duty of the county superintendent of public schools to hold said examinations, grade papers and issue certificates to teach, with the exception of certain papers forwarded to the State Superintendent of Public Schools for grading after said examination held by the county superintendent of public schools (Sections 9470, 9471, 9474 and 9475, R. S. Mo. 1929). The following provision requires certain papers to be forwarded to the State Superintendent of Public Schools for grading. Section 9471, supra, in part reads as follows:

> "* * * Within three days after the close of each regular examination, the county superintendent of public schools shall forward to the state superintendent, by express or registered mail, all the papers of all applicants for first grade certificates and of all other applicants who shall request their papers to be sent to the state superintendent. Said state superintendent of public schools shall carefully grade all papers, keep a record of said grades, certify them to the county superintendent of the county in which said papers were written, and also return said papers to said county superintendent of public schools who shall preserve them among the records of his office for at least one year after the date of the examination at which they were written."

The county superintendent of schools receives an annual salary, the amount to be determined by the population of the county. Section 9463, Laws of Missouri, 1933, page 384, reads in part as follows:

> "* * * * * in counties having a population of more than twenty-five thousand and less than thirty six thousand he shall receive Two Thousand Dollars; * * * * * * * * * of which the State of Missouri shall appropriate annually out of the general revenue fund of the State of Missouri four hundred dollars to each and every county. The county superintendent shall receive his salary monthly from the county revenue fund in the form of a warrant drawn upon the county treasurer."

Under the above provision the County Superintendent of Schools in Dunklin County shall receive $2000.00 per annum.

It is well established in this State that an official can receive no compensation unless he can place his finger on the particular statutory provision providing for same, allowing him such compensation. This is true whether he receives an annual salary or his compensation is regulated by fees.

In State v. Wofford, 116 Mo., l. c. 223, the court said:

> "It is well settled law that no officer is entitled to fees of any kind unless provided for by statute, and that the law conferring such right must be strictly construed because of statutory origin and right. Shed v. Railroad, 67 Mo. 687; Gammon v. Lafayette Co., 76 Mo. 675; Ford v. Railroad, 29 Mo. App. 616."

See also Ward v. Christian County, 111 S. W. (2d) 182.

The only specific provision for compensation for county superintendent of schools, that we are able to find, is that allowed under Section 9463, supra. Therefore, in view of the above and foregoing, the county superintendent of schools is entitled to no more compensation than allowed in 9463, supra.

Under Section 9475, R. S. Mo. 1929, fees are paid to the county superintendent of schools for certain designated purposes, to defray expenses of teachers associations and meetings and for expenses indidental to the grading of papers and issuing certificates of applicants to teach. We need not go into expenses pertaining to teachers associations and meetings, but only as to what expenses are incidental to grading papers and issuing certificates to teach.

"Incident" is defined in Funk & Wagnalls New Standard Dictionary as follows:

> "Falling upon or into something; impinging from without; as, incident rays. Likely to befall; naturally or usually appertaining or attending; as, danger incident to travel.
>
> "Anything that takes place as part of an action or in connection with an event; a subordinate or concomitant event or act; as, the incidents of a journey; an incident of a plot. Hence, a happening in general, especially one of little importance; any event; an occurrence; as, a daily incident. Something characteristically, naturally, or legally depending upon, connected with, or contained in another thing as its principal."

In Baltimore v. Baltimore & Ohio Railroad Company, 77 U. S. (10 Wall), 543, l. c. 551; 19 L. Ed. 1043, the court defined the words "and shall pay all and any expenses incident to the issuance of any bonds," as follows:

> "The position taken by the City is, that the Company was bound to pay the full amount of the interest without deduction, because of the following words in the defeasance clause of the mortgage: 'And shall pay all and any expense incidental to the issue of any of the bonds.' It is, therefore, necessary to construe these words, and there is no difficulty about it, when we consider the subject-matter about which they were employed. The word 'expense' may mean one thing in one case and quite a different thing in another. Its meaning in this case cannot be mistaken.
>
> "To carry out the arrangement between the parties required a considerable expenditure of money for printing, clerk hire, stationery, advertising and similar matters. These expenses were incidental to the issue of the bonds, and it was right and proper that the Railroad Company--the party to be benefited by the transaction--should pay them. And it agreed to do so; but this agreement cannot be extended to cover the tax in question, for in no sense is it an expense incidental to the issue of the bonds."

In Stokes v. Paschall, 243 S. W. 611, l. c. 614, the court in construing the expenses incident to issuing of the bonds, said:

> "We agree, therefore, with appellees that, in cases where a commissioners' court in the exercise of a sound discretion finds it reasonably necessary to employ bond brokers to aid in the sale of bonds of the character under consideration, they may do so, and, under the operation of the amended article 632, may lawfully pay a reasonable commission out of the proceeds

> of the bonds so sold. In other words, we think in such case such commission is an expense 'incident to the issuance' of the bonds, within the meaning of the amended article."

In The Robin Goodfellow, 20 Fed. (2d) 924, l. c. 925, the court defined "incidental" as follows:

> "What relation did the act of the lumber company in employing the libelant have to the objects stated in its memorandum of association? Was the employment incidental to the main object of the corporation?
>
> "'Traffic," 3 Bouv. Law Dict. p. 3307, says, is 'the passing of goods or commodities from one person to another for an equivalent in goods or money; and a trafficker is one who traffics or a trader, a merchant. Senior v. Ratterman, 44 Ohio St. 673, 11 N. E. 321.' Traffic may be 'either state or interstate * * * according to its origin or destination'; if shipped by the consignor from one state or country to another, 'it is interstate traffic. Fort Worth & D. C. Ry. Co. v. Whitehead, 6 Tex. Civ. App. 595, 26 S. W. 172, 173.' 8 Words and Phrases, First Series, p. 7055.
>
> "'Incidental,' obviously, means depending upon or appertaining to something else as primary. 'Burrill's Law Dictionary defines 'incident' as 'belonging or appertaining to; following; depending upon another thing as more worthy. * * * A thing may be necessarily or inseparably incident to another, or usually so.' Webster defines it thus: 'Something necessarily appertaining to or depending on another, which is termed the principal.' Thomas v. Harmon, 46 Hun (N. Y.) 75, 77. 4 Words & Phrases, First Series, p. 3494.

> "Lord Dunevin, in Trustee of Harbor of Dundee v. Nicol, (1915) H. L. A. C. 550 said: 'Incidental, in my view, means incident to the main purpose of the main business.'
>
> "Delivery of lumber is incidental to sale or traffic, the main object; and delivery may be made in any customary manner. If traffic is interstate, it must be shipped in the usual and customary way. Loading lumber on a truck, a car, or a ship, for delivery in the usual way, is no doubt incidental to the business of trafficking in lumber; and the loading may be by the regular employees of the lumber company or by a special employee."

In view of the foregoing authority in defining the word "incidental," unquestionably it was the intention of the General Assembly, in enacting Section 9475, supra, to permit such expense as supplies, printing questions, purchase of certificates to teach, and other similar expenses, but not such expense as actually grading papers. Such is not an expense incidental to the grading of said papers, but is actually grading same, and therefore the lawmakers never contemplated that the county superintendent of schools should employ assistants for the purpose of grading examination papers. If the General Assembly in enacting this provision had intended the county Superintendent should appoint assistants and pay for their services out of this particular fund, they should have specifically provided for same as they did for the state superintendent of schools in said provision. We think this falls under that well-known canon of statutory construction - "that the expression of one thing is the exclusion of another"- as stated by the court in State v. Sweaney, 195 S. W. 714, l. c. 716:

> "Section 10881, in its present form, was enacted in 1909. Laws 1909, p. 819. Prior to that time it had been expressly held by this court that the law providing for division of common school districts did not apply to village school districts. State ex rel. v. Fry, 186 Mo. 198, 85 S. W. 328. Such

> being the case, the Legislature, when it enacted section 10881, knew that the provisions of section 10837, relating to the division of one common school district into two new districts, would not apply to town or consolidated districts, unless it so provided in the act; and knowing this to be true, and failing to so provide, it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well-known canon of statutory construction, viz., that the expression of one thing is the exclusion of another."

Under Section 9467, R. S. Mo. 1929, the county Superintendent of schools is entitled to certain expenses for clerical hire out of the county treasury.

The fact that there may be unexpended money in this fund is no reason that the county superintendent of schools is entitled to same when from all indications and by all inferences he can be considered no more than a custodian or trustee of this fund to disburse same as provided by statute. Had the Legislature in enacting said provision intended that he should retain any balance in said fund after all expenses for which the fund was created had been made, the Legislature could have, without any difficulty, in clear and unambiguous language so provided the county superintendent of schools should benefit personally by retaining any such unexpended balance. As previously stated, for an official to receive any compensation, there must be a specific provision allowing same. Because there is a balance in this fund, after accounting for all expenses, is no reason why the county superintendent of schools, by reason of the fact these fees were paid to him, should dissipate same in any manner.

The fact there is no specific provision requiring this balance in said fund to be turned over to the county or state treasurer, as is required of all state officials, commissions, bureaus and boards (p. 415, Laws of Mo. 1933), does

not imply that the county superintendent of schools shall confiscate same. The General Assembly did not see fit to grant the State Superintendent of Schools, under Section 9475, supra, any unexpended balance in the fund he held, but specifically required that he return same to the General Revenue. We think the reason for not requiring same of the county superintendent of schools was to create a permanent fund. There is no valid reason that we can find why this unexpended balance should not be considered as an accumulated fund and if same should become so large that it is quite evident it will never be needed for the purposes set out in Section 9475, supra, then the General Assembly can appropriate same for some other purpose or they may enlarge on the purpose of the fund.

Therefore, it is the opinion of this Department that under Section 9475, Revised Statutes of Missouri, 1929, thirty per cent. of said fund shall be set aside for expenses of teachers associations and teachers' meetings, but that more than this amount may be spent for this purpose if necessary; that the county superintendent of schools under this provision is not entitled to any part of this fund for the purpose of grading papers, but only for such expenses that are incident to the grading of papers and issuing certificates to teach, which might include supplies, printing questions, purchase of and printing certificates. Furthermore, the county superintendent of schools should make a complete record to the county court in February of each year, showing all fees collected, all disbursements and all money remitted to the State Superintendent of Schools. The county superintendent of schools is not entitled to any unexpended balance remaining in said fund after all expenses have been met; said balance shall remain in said fund. The county superintendent of schools is merely acting in the capacity of trustee of an accumulative fund which shall be used only for the purposes set out in section 9475, supra.

Yours very truly,

AUBREY R. HAMMETT, Jr.,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

ARH:EG

TAXES: Cost of making resurvey of city property.

August 2, 1939

Mr. Robert A. McIlrath
Prosecuting Attorney
St. Francois County
Farmington, Missouri

FILED
59

Dear Sir:

We have your request of July 26th for an opinion with reference to the authority of the City of Farmington, or the County Court of St. Francois County, to have certain property in the City of Farmington resurveyed and replatted for the purpose of obtaining correct descriptions to be used in the assessment of taxes against such property.

It would appear under Section 9797, R. S. Mo. 1929, that such work within the corporate limits may be done by either the city surveyor, county surveyor, or other competent surveyor selected by the city. The cost of making that survey is specifically by said section taxed against the tracts of land thus surveyed. This is the only authority we find for the payment of such services.

The performance of such services would be by a public official such as the city surveyor or county surveyor, or a competent surveyor specifically appointed for that service. This would bring into operation the rule of law in this state that an officer can recover compensation only when the same is authorized by statute. Williams v. Chariton County, 85 Mo. 645; State ex rel. v. Adams, 172 Mo. 1; Hill v. Butler County, 195 Mo. 511; State ex rel. v. Wofford, 22 S. W. 486, 116 Mo. 220; State ex rel. v. Brown, 146 Mo. 401; Holman v. City of Macon, 175 Mo. App. 398; Sanderson v. Pike County, 195 Mo. 598; Bank v. Refrigerating Co., 236 Mo. 407.

In addition to the above authority, there is the rule, long adhered to in this state, that a public officer is presumed to render his services gratuitously unless

some specific statutory authorization is found for the payment of such services. King v. Riverland Levee Dist., 279 S. W. 195, 196.

It is, therefore, the opinion of this office that the cost of making such surveys or plats within the City of Farmington must be charged against the land surveyed, and neither the county court nor city council has authority to divert other funds for the payment of such compensation.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:HR

BOARD OF OPTOMETRY: Secretary of board must be selected by the board and cannot be appointed by the Governor.

November 7, 1939

11-9

FILED

59

Dr. T.J. McWay, Member
State Board of Optometry
818 Olive Street
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated November 4, 1939, which reads as follows:

> "I mailed circular under separate cover and appreciate an opinion from you. According to the newspapers our secretary, Dr. J.F. Brawley, has resigned and left the State; also our President, Dr. N.R. Hatfield, has been appointed to succeed him by the Governor. We also understand that Dr. Hatfield also has left the state for a few weeks.
>
> "In his absence can we call a meeting in the absence of our Ex-President and new Secretary? Does the Governor have power to appoint the Secretary under the circumstances? The board names the Secretary according to the law but in case of resignation is it the Governor who replaces him and if so how long should he retain his office?"

Your second and third questions may be answered together, and we shall take them up first.

Section 13498, R.S. Missouri, 1929, is that creating the State Board of Optometry and reads as follows:

> "The governor, with the advice and consent of the senate, shall appoint five persons from among such practicing optometrists of the state as have had not less than five years' practical experience in optometry as defined in section 13501 of this chapter, who shall constitute the state board of optometry. No member of any optical school or college, or instructor in optometry, or person connected in any way therewith, 'nor any person who as owner, stockholder or employe is connected with any manufacturing, wholesale, dispensing or jobbing house dealing in spectacles or optical supplies or instruments used by optometrists' shall be eligible to appointment upon the state board of optometry. On or before the first day of July, 1921, the governor shall appoint members of said board, and the terms of office of the members of said board first appointed shall be as follows: Beginning July 1, 1921, one member shall be appointed for a term of one year, one for two years, one for three years, one for four years, and one for five years. The term of the members of said board successively, shall expire, on the 30th day of June of each year and the term of all members after the first board is appointed shall be for a period of five years and until their successors shall be appointed and qualified. If any person so appointed shall discontinue the active practice of optometry during the period of his appointment his term shall thereupon cease and he

shall be at once removed by the governor. All vacancies, however occurring, shall be filled by appointment by the governor, with the advice and consent of the senate, and appointments made when the senate is not in session shall be confirmed at its next ensuing session. The members of the state board of optometry, before entering upon the discharge of their duties, shall make and file with the secretary of state, the constitutional oath of office. The members of said board shall within thirty (30) days after appointment, and annually thereafter in the month of July, meet and organize by electing a president from among the members thereof, and a secretary who shall also be the treasurer of said board, who shall not be a member of said board, but who shall 'be a reputable practicing optometrist.' The said secretary and treasurer, before entering upon his duties, shall file a bond with the secretary of state in the penal sum of $5,000.00 payable to the state of Missouri to insure the faithful discharge of his duties in said office. 'The premium for such bond shall be paid from the funds paid into the state treasury by the secretary of the board of optometry.' The said board shall prescribe the duties of its officers and adopt rules and regulations, not inconsistent with this chapter, to govern its proceedings; and also shall adopt a seal; and the secretary shall have the care and custody thereof, and he shall keep the record of all the proceedings of said board, which shall be open at all times

to public scrutiny. All certificates issued by the state board of optometry shall be signed by the president and attested by the secretary with the seal of said board attached to or impressed thereon. Every such certificate shall be prima facie evidence of the right of the holder to practice optometry. The president and secretary shall have the power to administer oaths and the board to take testimony in all matters relating to its powers and duties, and for that purpose shall be able to compel the attendance of witnesses and the production of all necessary books, papers, or documents, upon the proper service of a subpoena in proper form, duly attested. If any person is subpoenaed to appear before the said board and fails to obey the command of said subpoena without reasonable cause, or if any person in attendance upon any hearing or proceeding before such board shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, he shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $50.00, nor more than $500.00, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment, and may be prosecuted therefor in any court of competent jurisdiction, and in case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense."

The particular sentence of the foregoing section which bears upon our question is: "The members of said board shall within thirty (30) days after appointment, and annually thereafter in the month of July, meet and organize by electing a president from among the members thereof, and a secretary who shall also be the treasurer of said board, who shall not be a member of said board, but who shall 'be a reputable practicing optometrist.'"

An examination of the statutes creating other boards reveals that in nearly all other cases, all of the officers of such boards are chosen from the members thereof. This is true in the cases of Board of Osteopathic Examination (Section 13515), Board of Dental Examiners (Section 13559), Board of Nurse Examiners (Section 13480), Board of Pharmacy(Section 13147) and Board of Embalming (Section 13539).

It is, therefore, apparent that the Legislature laid stress on the discretionary powers of the State Board of Optometry in that they had the right to elect one not of their number to become secretary. According to the plain wording of the statute, the sole power to designate the secretary lies in the Board and, therefore, he must submit his resignation to those who select him. We fail to find any statute or constitutional authority granting the right to the Governor to appoint such an elective official and believe that the sole power to designate such officer lies in the Board of Optometry. In this connection, we also call your attention to the fact that Dr. N.R. Hatfield who has been appointed secretary, according to your letter, was a member of the board and is, therefore, disqualified as secretary unless his resignation as a member of the board shall first have been submitted and accepted by the Governor.

In regard to your second question, that of the right of the other members to call a meeting, we refer you to the following sentence in the section above

cited: "The said board shall prescribe the duties of its officers and adopt rules and regulations, not inconsistent with this chapter, to govern its proceedings; * * * ".

In case you fail to find that the board has ever set up regulations to govern a situation such as that at hand, we refer you to Section 13500, R.S. Missouri, 1929, which requires the board to hold meetings at least once in three months. Section 13499 provides that three members shall constitute a quorum, and invests the president with power to call special meetings. In the absence of the president, we do not believe that the other members may call a special meeting unless the rules of the board so prescribe, but that any three members, in the absence of the president, may designate a place and time of meeting in order to comply with the mandatory requirement that a meeting be held at least once in three months.

CONCLUSION.

It is our conclusion, therefore, in view of the foregoing, that only the Board of Optometry has the power to select a secretary for such organization and that in the absence of a provision in the rules made by the board for calling a meeting by some member other than the president, any three members may call a meeting at the expiration of three months from the last preceding meeting.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

RLH:VAC

TAXATION: City collector of city of second class cannot assess a penalty of more than 1% upon delinquent real estate taxes but can assess and is entitled to 3% of the total penalty of not more than 5% on personal delinquent taxes.

December 14, 1939

12-15

FILED
59

Hon. F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 6, 1939, which reads in part as follows:

> "We now have in progress in Greene County a Grand Jury, and in their instructions of a general nature was to look into officials handling public money. We have a situation here in regard to the City Collector for a city of the second class in which there is some confusion. Several different lawyers have written different opinions in regard to this matter, and the statutes are somewhat confusing. As this involves a criminal matter, it is much more serious than any civil rights might be. In brief, the City Collector now collects and has been collecting a 3% penalty on all delinquent real estate taxes when they are paid at his office, whether or not suit has been brought. This is in addition to the 1% per month interest charge which the statutes allow a city of the second class to charge and the Collector keeps this additional 3% as a part of the emoluments of the office. We are unable to find in the statutes any authorization for the city by ordinance or under the state laws to charge anything in addition to the 1% per month on delinquent real estate taxes."

You also state:

> "Please pardon the long explanation of this tax matter as outlined above, but that is a fair statement of the questions we are trying to decide and would appreciate very much an opinion from your office on the legality of the penalty over and above the interest charge in a city of the second class where they have attempted to regulate this by ordinance. Also if Section 6589 means 3% of the 5% commission as the statute says or whether or not it can be construed that the Collector would get 3/5 of the commission and the city 2/5."

We are first quoting sections of the statute which apply to real estate and land tax only.

Section 6600 R. S. Missouri, 1929, reads as follows:

> "No demand for the payment of taxes shall be necessary, but it shall be the duty of every person subject to taxation to attend at the office of the commissioner of revenue, unless otherwise provided by ordinance, at some time between the first day of September and the thirty-first day of December in each year and pay his taxes; and if any tax be not paid before the first day of January following the levy of the tax, the same shall be delinquent and bear interest thereafter at the rate of one per centum a month, or a fractional part thereof. The commissioner of revenue shall continue to receive taxes after they become due until collected by distress or sale."

It will be noticed in the above section that the only penalty set out for the non-payment of real estate or land taxes is a penalty of 1% a month or a fractional part thereof when the land tax is not paid when due.

Section 6605 R. S. Missouri, 1929, which applies only to delinquent land taxes, does not set out any specific penalty and does provide that when the back tax book is delivered to the commissioner of revenue he shall direct the city attorney to bring suit in the name of such city to enforce the collection of such taxes, general or special, with interest, cost and penalties in any court of competent jurisdiction. It does not set out any penalty. Section 6606 R. S. Missouri, 1929, specifically states that the procedure would be the same as ordinary practice and procedure in civil cases, including the sale under executions and making deed to purchaser. All of the sections mentioned and set out apply to land or real estate delinquent taxes only and do not apply to the collection of delinquent personal taxes.

Section 6612 R. S. Missouri, 1929, specifically applies to delinquent personal and ad valorem tax due. This section partially reads as follows:

> "It shall be the duty of the said commissioner of revenue in the month of January in each year to make out a full and complete list of all taxes on personal property and ad valorem taxes remaining unpaid for the previous year, which list shall state the name of each person delinquent in the payment of his personal tax, which list shall be made out alphabetically. * * * "

This section does not apply to real estate, but does apply to personal property and ad valorem tax.

Section 6597 R. S. Missouri, 1929, partially reads as follows:

> " * * The term 'personal property' shall include every tangible thing which is the subject of ownership not forming a part or parcel of real property, and where used in this article in a general sense shall include all taxable property other than real

property. * * * "

Section 6614 R. S. Missouri, 1929, reads as follows:

> "It is hereby made the duty of the commissioner of revenue as soon as taxes on personal property or ad valorem taxes shall be delinquent to proceed to collect the same by distress and sale, in the manner herein prescribed, and for this purpose it shall be his duty to appoint one or more deputies to aid and assist him in the speedy collection of such delinquent personal and ad valorem taxes. The said commissioner of revenue shall receive as additional compensation for his services and expenses such sum as may be fixed, by ordinance, on the amount of all delinquent personal taxes collected, not exceeding five per cent. which percentage he shall collect from the delinquent, together with the whole amount of delinquent taxes, interests and costs, and in making such collections should it become necessary to make the delinquent personal and ad valorem taxes by distress and sale, he shall be entitled to receive the same compensation, in addition, as may be provided by ordinance, not to exceed the five per cent. provided for in this section, as constables are entitled to receive for the sale of property on execution and such other and further compensation as may be provided by ordinance of such city, which shall also be taxed as costs."

It will be noticed under the above section that the word "ordinance" appears and that said section specifically states "on all delinquent personal taxes." This section applies only to personal taxes, and no ordinance is required for the 1% set out as a penalty for the non-payment of real estate taxes under section 6600, supra.

We can find no place in the statute, under the col-

lection of delinquent taxes applying to land or real estate, where the city collector or commissioner of revenue in a city of the second class is entitled to any penalty or can collect any penalty other than the 1% as set out in section 6600, supra.

You also state in your request that it is the theory of some lawyers that under section 6605, supra, where the statute uses the word "with interest, cost and penalties" that this would be sufficient to authorize the city to pass an ordinance collecting a penalty on delinquent real estate. This is not the law, and all tax statutes are to be construed against the taxing authority and in favor of the person paying the tax. It was so held in the case of State v. Hallenberg-Wagner Motor Co., 108 (2d) 398, par. 2, where the court said:

> "Like general rules govern the construction of revenue laws, which, when 'ambiguous or doubtful, will be construed strictly in favor of the taxpayer and against the taxing power,' 59 C. J. p. 1131, sec. 670, nn. 84-86; State ex rel. v. Gehner (Banc) 325 Mo. 24, 29, 27 S. W. (2d) 1,3 (3), citing authority; but, of course, the rule of strict construction may not serve to defeat the intention of the lawmaker. In re Clark's Estate, 270 Mo. 351, 362, 194 S. W. 54, 57 (2); State ex rel. v. Baker (Banc) 316 Mo. 853, 858, 859, 293 S. W. 399, 401 (2,4,5)."

Also, in the case of State v. Markway, 110 S. W. (2d) 1118, par. 1, where the court said:

> "'The power to levy and collect taxes is purely statutory, and has been confided to the Legislature and not the courts.' State ex rel. Parish v. Young, 327 Mo. 909, loc. cit. 915, 38 S. W. 2d 1021, 1023. 'It is well established that the right of the taxing authority to levy a particular tax must be clearly authorized by the statute, and that all such laws are

> to be construed strictly against such taxing authority.' State ex rel. Ford Motor Co. v. Gehner, 325 Mo. 24, loc. cit. 29, 27 S. W. 2d 1,3."

Section 6589 R. S. Missouri, 1929, partially reads as follows:

> "* * Provided, that the commissioner of revenue shall in addition to said sum of three thousand dollars be entitled to retain three per cent of the five per cent penalty provided by section 6614, article 3, chapter 38, R. S. 1929, upon delinquent taxes collected, and that the remainder of such penalty shall be paid into the city treasury; * * * "

You ask in your request if that section should be construed 3% of the 5% commission, or whether it should be construed that the collector would get 3/5 of the commission and the city 2/5 of the commission. If the collector was only to receive 3% of the 5% commission on a ten dollar delinquent tax payment, he would only receive one and one-half mill for his services, but, if he received 3% of the ten dollar payment on back personal tax, he would receive thirty cents. Surely it was not the intention of the legislature to only allow one mill for the collection of a delinquent personal tax of ten dollars. In construing statutes of this nature, one must take into consideration the reason and the purpose of its enactment. The legislature in stating that the commissioner in addition should receive three per cent of the 5% penalty, surely must have intended that the collector should receive three per cent of the penalty and the city receive the balance of 2% of the penalty.

In the case of O'Malley v. Continental Life Ins. Co. 75 S. W. 2d 837, pars. 7,8, the court said:

> "The conclusion just reached may find additional support in the proviso itself when it is considered apart from the con-

> text. In the consideration of this clause we apply the rule that 'where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words and the meaning of a term may be enlarged or restrained by reference to the whole clause in which it is used.' 25 R. C. L., sec. 239, p. 995."

Under the above holding, in view of the fact that the legislature intended to pay an additional commission to the collector for the collection of delinquent personal taxes it could not be said that the legislature only intended that the collector should receive three per cent of the penalty.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the city collector of a city of the second class cannot be authorized by an ordinance of the city allowing him to collect a penalty of not more than five per cent upon delinquent real estate taxes, as set out in Section 6614 R. S. Mo., 1929, which section only applies to delinquent personal tax and ad valorem tax.

It is further the opinion of this department that the city collector of a city of the second class is entitled by ordinance to levy and collect not more than five per cent of the amount of the taxes which are delinquent as a penalty and the city collector may

retain by ordinance three per cent of the penalty if permitted by ordinance and the balance of two per cent of the penalty should be paid into the city treasurer's office. This only applies to the case of personal taxes and ad valorem taxes.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TAXATION AND REVENUE :

1. Trustee appointed under the provisions of 9953b, Laws of Missouri 1939, at page 851, is to receive his fees as a part of the costs.
2. That by order of County Court the trustee may sell for a less or greater sum than the taxes.

December 30, 1939.

1-7

FILED
59

Honorable F. Hiram McLaughlin
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. McLaughlin:

We desire to acknowledge your request for an opinion on December 28, 1939, which is as follows:

"This office is in need of an opinion interpreting the law permitting the County Court to appoint a trustee to purchase land at delinquent tax sales. The pertinent provision of this statute is found at page 852, Laws of 1939.

"The law permits the trustee to bid where no other bids are received sufficient to pay in full all delinquent taxes, penalties, etc. The law also provides that the proceeds of such sales should be applied first to payment of costs, and the balance distributed pro rata to the funds entitled to receive the taxes.

"It also provides the compensation of trustees is payable solely from the proceeds derived from the sale of lands purchased by them as trustees.

"Does this statute mean that a commission can not be paid to trustee until all costs, delinquent taxes, interest and penalties, have been paid in full, or can the trustee be paid a commission

from the proceeds of the sale price, even though the sale price be insufficient to take care of the costs and taxes?

"Also does the trustee have authority, with the approval of the County Court, to accept a bid in a less sum than the costs and taxes and penalties or does he have to have a bid equal to the amount of these things? Hoping we have made ourselves clear, and thanking you for your views on this matter, we are"

I.

DOES THIS STATUTE MEAN THAT A COMMISSION CAN NOT BE PAID TO TRUSTEE UNTIL ALL COSTS, DELINQUENT TAXES, INTEREST AND PENALTIES HAVE BEEN PAID IN FULL, OR CAN THE TRUSTEE BE PAID A COMMISSION FROM THE PROCEEDS OF THE SALE PRICE, EVEN THOUGH THE SALE PRICE BE INSUFFICIENT TO TAKE CARE OF THE COSTS AND TAXES?

Section 9953b, Laws of Missouri 1939, at page 851, is, in part, as follows:

" * * * and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, * * * "

Under the provisions of the above statute, it seems clear that the trustees fees, become a part of the costs and as such are to be paid prior to the pro rata distribution.

In the case of Township Board of Education v. Boyd, 58 Mo. 276, the county court was trustee for the care and management of the school fund of the township. It instituted certain injunction proceedings for the protection of the fund and gave an injunction bond signed by J. K. Boyd and J. B. Johnson, two of the justices of the county court. Upon dissolution of the injunction a judgment was issued against said obligors, one of whom, paid the same, and by a court order he was reimbursed out of the township school fund. In this case the court said:

> "The county court was a trustee for the 'care and management' of the school fund of the township. In this capacity, and in the exercise--for aught that appears to the contrary--of its soundest judgment and discretion, it instituted certain injunction proceedings for the protection of the fund. The law required personal security for the purpose, which was given. A judgment against the surety following, which judgment he was bound to pay, and did pay, it would be strange if the law should refuse to indemnify him from the interest which his suretyship had so served at a sacrifice."

Certainly upon the basis of equitable principles, a trustee would be entitled to the payment of his costs out of the funds which he held as trustee for reasonable services rendered and for a definite fee fixed by statute. In laying down a rule that the burden of protecting a trust fund shall fall upon the fund itself, the Supreme Court, in the case of Morrow vs. Pike County, 180 Mo. 622, held:

> " * * * But it is fundamental that, conceding the right to make the contract in question, the burden of protecting the trust fund shall fall upon the fund itself on well-recognized equitable principles."

CONCLUSION

Therefore, it is the conclusion of this department that, a trustee selling land under the provisions of Section 9953b, supra, is entitled to have his fees listed as costs to be paid before a pro rata distribution to the funds entitled to receive the taxes and that on the basis of well recognized equitable principles, such trustee shall be entitled to his fees for executing and protecting the trust and that such fees should be a burden upon the fund itself.

II.

ALSO DOES THE TRUSTEE HAVE AUTHORITY, WITH THE APPROVAL OF THE COUNTY COURT, TO ACCEPT A BID IN A LESS SUM THAN THE COSTS AND TAXES AND PENALTIES OR DOES HE HAVE TO HAVE A BID EQUAL TO THE AMOUNT OF THESE THINGS? HOPING WE HAVE MADE OURSELVES CLEAR, AND THANKING YOU FOR YOUR VIEWS ON THIS MATTER, WE ARE

This inquiry is answered in the conclusion of an opinion rendered by this department to Honorable George B. Bridges, Prosecuting Attorney of Mississippi County on December 19, 1939, a copy of which is enclosed herein.

Very truly yours,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General
SVM:LB
Encl.

BONDS:
SURETY BONDS:
COLLECTORS' BONDS:
OFFICERS:

1. Payment of premium of surety bond not mandatory on public body.
2. Premium to be paid out of Class 4.
3. Entire premium to be paid for by county and not apportioned among the funds protected.

April 4, 1939

4-5

FILED
60

Honorable W. J. Melton
Presiding Judge of the
County Court
Charleston, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "E. G. Gilmore, County Collector, Mississippi County, put an item of $450.00 in his yearly budget for the year of 1938, this amount being the amount due as premium on his Surety Bond.
>
> "The County Court cut this amount off his budget because we felt he should pay the premium himself and later we found that section #1, page 190 of the 1937 Session Act states that if he gives a Surety Bond it is the duty of the county court, as the protected body to pay this premium. Will we have to pay for this 1938 bond? If so what class should it be paid from and as road and bridge, school, and county court drainage districts are all protected under this bond. Will the entire premium be paid out of county revenue, or should we take some from school districts and drainage districts?"

The questions presented by your request are as follows:

1. If the collector "elects" to enter into a surety bond, is the "consent and approval" of the county court mandatory and the county thereby becomes liable for the premium?

2. From what class of the county budget should the premium on the surety bond be paid?

3. In a collector's bond, is the cost to be paid by the county, or should it be apportioned among the various political subdivisions for whom the collector collects taxes?

Laws of Missouri, 1937, page 190, section 1, provides as follows:

> "Whenever any officer of this state or of any department, board, bureau or commission of this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any county of this state, or any deputy, appointee, agent or employee of any such officer, or any officer of any incorporated city, town, or village in this state, or any deputy, appointee, agent or employee of any such officer; or any officer of any department, bureau or commission of any county, city, town or village, or any deputy, appointee, agent or employee of any such officer; or any officer of any district, or other subdivision of any county, or any incorporated city, town or village, of this state, or any deputy, appointee, agent or employee of any such officer, shall be required by law of this State, or by charter, ordinance or resolution, or by any order of any court in this State, to enter into any official bond, or other bond, he may elect, with the consent and approval of the governing body of such state, department, board, bureau, commission, official, county, city, town,

village, or other political subdivision, to enter into a surety bond, or bonds, with a surety company or surety companies, authorized to do business in the State of Missouri and the cost of every such surety bond shall be paid by the public body protected thereby."

Laws of Missouri, 1935, page 409, section 9885, provides as follows: 1056-1939

"Every collector of the revenue in the various counties in this state, and the collector of the revenue in the city of St. Louis, before entering upon the duties of his office, shall give bond and security to the state, to the satisfaction of the county courts, and, in the city of St. Louis, to the satisfaction of the mayor of said city, in a sum equal to the largest total collections made during any one month of the year preceding his election or appointment, plus ten per cent, of said amount: Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. The official bond required by this section shall be signed by at least five solvent sureties. Provided, that in all counties which now have or which may hereafter have a population of less than 75,000 inhabitants, according to the last preceding federal decennial census, the county court in such counties may require the county collector thereof to deposit daily all

collections of money in such depository or depositories as may have been selected by such County Court in accordance with the provisions of Sections 12184, 12185, 12186 and 12187 of the Revised Statutes of the State of Missouri 1929, to the credit of a fund to be known as 'County Collector's Fund,' and such depository or depositories shall be bound to account for the moneys in such 'County collector's Fund' in the same manner as the public funds of every kind and description going into the hands of the county treasurer and under the same depository bond as required to be given under section 12187 Revised Statutes of Missouri 1929; provided further, that when such deposits are so required to be made, such county courts may also require that the bond of the county collector in such counties shall be in a sum equal to the largest collections made during any calendar week of the year immediately preceding his election or appointment, plus ten per cent of said amount; provided further, that no such county collector shall be required to make daily deposits for such days when his collections do not total at least the sum of One Hundred Dollars ($100.00); and provided further the collector shall not check on such 'County Collector's Fund' except for the purpose of making the monthly distribution of taxes and licenses collected for distribution as provided by law or for balancing accounts among different depositories."

I.

In 1937 the 59th General Assembly enacted a law which allows an officer "with the consent and approval of the governing body" to enter into a surety bond and the

cost of such bond to be paid by the public body protected thereby. It is a matter of common knowledge that prior to the enactment of this statute many county officials gave personal bonds, the cost of surety bonds being almost prohibitive in view of the compensation received by such officers. However, the Legislature wishing to protect and safeguard public moneys in a safer and more secure fashion, provided that with the consent and approval of the governing body that surety bonds paid for by the public body protected could be given.

Prior to 1937, surety companies were authorized by Section 2851, R. S. Mo. 1929, to "become and be accepted as surety on the bond recognizance or other writing obligatory of any person or corporation in or concerning any matter in which the giving of a bond or other obligation is authorized, required or permitted by the laws of the state, * * ". The purpose of this section was as stated in the act itself "* * to enable corporations created for that purpose to become surety on any bond, recognizance or other writing in the nature of a bond, in the same manner that natural persons may, subject to all the rights and liabilities of such persons." Therefore, it will be seen that prior to the 1937 enactment quoted above that an officer could give either a personal bond or a surety bond but if a surety bond were given the cost must be paid by the officer. Therefore, the 1937 Act was not to allow an officer to elect to give a surety bond but was to permit the public body protected by an official bond to pay for such bond which right they did not have prior to 1937.

Under Section 2851, supra, an officer who seeks to qualify by giving a bond would have the right to offer a personal bond or a surety bond, but by that section no obligation is placed upon the body accepting the bond to pay the premium. Since the Act of 1937, found at page 190, supra, provides that an officer may elect "* * with the consent and approval of the governing body * * * * to enter into a surety bond * * * and the cost of every such surety bond shall be paid by the public body protected thereby," it evidently did not mean that the public body had to consent before a surety bond could be given since by Section 2851, supra, surety companies were already qualified to become surety on bonds. This indicates that the consent and approval of the governing body means consent to pay for the bond from the public treasury.

To hold that all the officers of this state or of any department, board, bureau or commission of this state, or any deputies, appointees, agents or employes of any such official, and all officials of any county, of this state, and their deputies, agents, appointees or employes, and all officials of any incorporated city, town or village, and their deputies, appointees, agents or employes, and all officials of any department, bureau or commission or any county, city, town or village, and their deputies, appointees, agents, or employes, and any official of any district or other sub-division of any county, or any incorporated city, or town or village, and their deputies, appointees, agents or employes, who are required by law to furnish bond can obligate the respective public treasuries to pay the premiums on the bonds by merely deciding themselves that they prefer to get a surety bond would cast a tremendous obligation upon the public without the public having anything to say in the matter other than what they have said by the Act of 1937. It is difficult to believe that the Legislature intended to shift the responsibility for furnishing a bond from the official required to furnish the bond, to the governmental agency for whose protection the bond is required.

It is a fundamental rule of statutory construction that the repeal of a statute by implication is not favored. State ex rel. St. Louis Police Relief Association v. Igoe, 107 S. W. (2d) 929, 340 Mo. 1166, and if by any fair interpretation all sections of the Statutes can stand together there is no repeal by implication. State ex rel. Karbe et al. v. Bader, 78 S. W. (2d) 835, 36 Mo. 259. For a later statute to operate as repeal by implication of an earlier one, there must be such manifest and total repugnance that two cannot stand, and if they are not irreconcilably inconsistent, both must stand. State ex rel. and to Use of Peck and Company v. Brown, 105 S. W. (2d) 909, 340 Mo. 1189.

To construe the 1937 Act as providing that the payment by the public body is mandatory would in effect repeal Section 2851, supra, insofar as it relates to bonds given by public officials and employees because they are WOULD BE inconsistent with each other.

The conflict is that the 1937 Act provides that if a surety bond is given by a public official or employee the premium is to be paid by the public body while Section 2851, supra, provides that it is to be paid for by the

person who is required to post the bond. As a practical matter the mandatory construction would do away with those provisions for personal bonds because it is obvious that no person required to give a bond would enter into a personal bond if he could enter into a surety bond, the premium on which had to be paid for from public funds.

Therefore, it will be seen that the "consent and approval" of Laws of Mo. 1937, page 190, supra, does not mean the same as the "satisfaction" that must be obtained under Section 9885, supra. When an officer must give a bond to the satisfaction of a certain body or person, it refers to the amount and security of the bond. The consent and approval as provided for in the statute means that the county court consents to the public body paying the cost of the bond, that is, the consent and approval is as to the payment and not as to the amount and security. This consent and approval is not a prerequisite to the giving of a surety bond which the officer himself will pay for but only must be obtained in order to hold the public body protected liable for the payment of the premium. (It is not mandatory upon the governing body to give such consent and approval to every officer who elects to give a surety bond. The governing body in its discretion may or may not agree to permit such bond to be paid for the public body protected, but if consent and approval is given, then the public body becomes liable for the payment of the premium.

Applying the above principles to the facts as presented in your request, if the county court which is the governing body gave its consent and approval to the collector to enter into a surety bond the premium for which was to be paid by the public body protected thereby, then the county, by such action, became bound and the striking of such amount from the estimate of the county collector given to the county court under the provisions of the County Budget Act was unlawful and of no effect and the public body protected thereby remains liable.)

II.

Your next question is out of what class of the County Budget should the premium be paid. We believe that such payment should be made out of Class 4 of the County Budget which

is for the following purpose (Laws of Mo. 1933, page 344, section 5):

> "Class 4: Pay or salaries of officers and office expense. List each office separately and the deputy hire separately (County Clerk shall prepare estimate for the county court but his failure does not excuse the court)"

It is the opinion of this department that moneys paid for premiums on bonds fall within this class and should be paid therefrom.

III.

Your last question is whether the county court should pay the entire amount of the premium from county funds or should the expense be apportioned by payment by the various political sub-divisions protected by such bond.

We will state it in another way. Since the collector, besides collecting county revenue also collects state taxes, school taxes and various other taxes, should not such funds bear their proportionate part of the premiums since they are protected under the bond of the collector?

The statute is ambiguous and uncertain in its provision for payment. It provides that the giving of such a bond is dependent upon the consent and approval of the governing body "of such state department, board, bureau, commission, official, county, city, town village or other political sub-division," but it provides that the cost shall be paid by "the public body protected thereby." It is a cardinal rule of statutory construction that where the language of a statute is of doubtful meaning, the duty devolves upon the court to ascertain the true meaning by discovering the intention of the Legislature. State v. Toombs, 25 S. W. (2d) 101; Darlington v. Missouri Pacific R. R. Co., 216 Mo. 658, 59 C. J. 957.

We believe that it was the intent of the Legislature that the bond of county collector should be paid by the county and not be apportioned among the various political

sub-divisions whose taxes the collector collects. The reasons for this position are as follows:

First, there is a well founded maxim of the law that "It is proper in law to argue because of inconvenience (Argumentum ab inconvenienti est validum in lege.) As was said by Judge Lamm in Paving Co. v. Hayward, 248 Mo. 280, 287:

> "The inconvenience arising from such construction of the statute precludes adopting it, provided any other course be open in reason."

Johnston v. Ragan, 265 Mo. 420, lays down the same rule.

It is a matter of common knowledge that collectors in some counties of this state not only collect the taxes for the county and for the state but also for the school districts which in some counties run one hundred or more and also collects taxes for road districts which some counties have to the number of twenty or thirty. It would be inconvenient, if not impractical, for the county collector to apportion the amount of the premium among these various political sub-divisions, and the state auditor, in auditing such accounts, would have such a Herculean task that to place such construction upon the statute would be to infer that the Legislature intended an absurd thing.

Second. There has been no appropriation by the State Legislature to pay for the bonds of such officials. The county collector collects state moneys and if the state were to be included within the scope of the phrase "public body protected thereby," then there would have to be an appropriation by the Legislature to pay for such bonds. The Legislature, in not providing any money for such payment, must have intended that such bonds should be paid entirely by the county and that the state should not be liable for a proportionate part of such premium. This view was taken in the case of State ex rel. Portland Cement Co.

v. Smith, 90 S. W. (2d) 405, in which our Supreme Court concluded that the Legislature did not intend that the State Highway Department should pay sales tax because it had made no appropriation for such purpose.

Third. The statute in question provides that the premium of the cost of the bond should be "paid by the public body protected thereby."

The above phrase is in the singular and provides for only one body to pay the cost of the bond. While we are aware of the rule of statutory construction that "words importing the singular number may extend and be applied to serve persons or things," however, this rule is not to be applied except where it is necessary to carry out the evident intent of the statute. First National Bank in St. Louis v. State ex inf. Barrett, 68 L. Ed. 486.

Fourth. The Legislature has by other statutory enactments imposed upon the county the burden of paying for work done by county officials for other political subdivisions.

Under Section 9877, Laws of Mo. 1933, page 422, the State and the County pay one half each for the words and figures used in the extension of taxes. Such road districts, school districts, etc., whose taxes are extended do not reimburse the county for their part of this labor but the county bears the entire expense except that for which the state pays.

Under Section 10007, R. S. Mo. 1929, the State and County pay for the extension of taxes in proportion to the columns used by each which would be one column for the state and the other column, including all the subdivisions of the county, paid for by the county.

CONCLUSION.

It is, therefore, the opinion of this department that:

First: That the County Court under Laws of Mis-

souri, 1937, page 190, may consent to a Surety Bond of a collector being paid for by the "public body protected thereby", and that the amount of the premium on such bond should be included in the estimate of the collector given under the County Budget Act. This consent is discretionary with the County Court and if it is not given, then the expense of the bond either personal or surety must be borne by the collector.

Second: If consent is given by the County Court for the public body protected to pay the premium on the surety bond of a county collector, then such payment should be made out of Class 4 of the County Budget.

Third: The county is the "public body protected thereby" under the bond of a county collector and, therefore, the county should pay the entire amount of the premium upon such bond.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA



OFFICERS: Deputy County Tax Collector may not be appointed Trustee for purchases of lands and lots under Senate Bill No. 311, 60th General Assembly.

August 1, 1939.

8-1

FILED
60

Honorable Emory C. Medlin
Prosecuting Attorney
Barry County
Monett, Missouri

Dear Mr. Medlin:

I desire to acknowledge your letter of July 28, 1939, which is as follows:

> "Mr. Elbert Terry is deputy County Collector of this county. He asked me this morning if he would be allowed to act as agent or trustee for the County Court in purchasing properties offered for sale the third time for taxes while holding the position as deputy collector.
>
> "As you know under Senate Bill No. 311 which passed during the last session of the Legislature the County Court has the power to purchase properties offered for sale the third time.
>
> "What is your opinion as to Mr. Terry acting as their agent while filling the position as deputy collector."

Section 9883 R. S. Mo. 1929 is as follows:

> "The offices of sheriff and collector shall be distinct and separate offices

in all the counties of this state, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this state, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector."

Section 9896 R. S. Mo. 1929 is as follows:

"Collectors may appoint deputies, by an instrument in writing, duly signed, and may also revoke any such appointment at their pleasure, and may require bonds or other securities from such deputies to secure themselves; and each such deputy shall have like authority, in every respect, to collect the taxes levied or assessed within the portion of the county, town, district or city assigned to him, which, by this chapter, is vested in the collector himself; but each collector shall, in every respect, be responsible to the state, county, towns, cities, districts and individuals, companies, corporations, as the case may be, for all moneys collected, and for every act done by any of his deputies whilst acting as such, and for any omission of duty of such deputy. Any bond or security taken from a deputy by a collector, pursuant to this chapter, shall be available to such collector, his representatives and sureties, to indemnify them for any loss or damage accruing from any act of such deputy."

Section 9953b of Senate Bill No. 311, passed by the 60th General Assembly, is, in part, as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a

is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. * * * Upon appointment of any such person or persons to act as trustee as herein designated a certified copy of the order making such appointment shall be delivered to the Collector, and if such authority be revoked a certified copy of the revoking order shall also be delivered to the Collector. Compensation to trustees as herein designated shall be payable solely from proceeds derived from the sale of lands purchased by them as such trustees and shall be fixed by the authorities hereinbefore designated, but not in excess of ten percent (10%) of the price for which any such lands and lots are sold by the trustees. Provided further, that if at any such sale any person bid a sufficient amount to pay in full all delinquent taxes, penalties, interest and costs, then the trustees herein designated shall be without authority to further bid on any such land or lots."

In State ex rel. against Ausk, 48 Mo. 242, the Supreme Court held that one person could at the same time occupy the office of the clerk of the Circuit Court and also clerk of the County Court, saying that the incompatibility of the two offices was not recognized in a legal sense:

> "Inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible."

In State ex rel. against Bus, 135 Mo. 325, (en banc), the court held that a person may hold the office of school director and constable at the same time in the City of St. Louis, and said at page 338:

> "The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

At page 339, the court, quoting from another case, said:

> "The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."
>
> *
>
> "We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices,

> or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant."

A person cannot hold two offices if such be incompatible. In 46 Corpus Juris, p. 941, Sec. 46, the following is said:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of the two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The purpose of Section 9953b, supra, is to protect the parties interested in the proceeds of general taxes from loss by the discretionary bidding of a trustee, up to the total amount of taxes, penalty, interest and costs. The Bill provides that the trustee is to be appointed by the County Court and a fee fixed by such court which shall not exceed 10% of the price for which such lands are sold by the trustee.

The collector may appoint a deputy and revoke such appointment at his pleasure and such deputy shall have like authority, in every respect to collect the taxes. The Collector and his deputy are statutory officers.

The deputy collector is the alter ego of the collector whose duty it is to sell lands and lots for taxes. Therefore the appointment of such deputy as trustee might, in some instances, make him seller and buyer of such property with discretionary right to make the purchase price not to exceed the total taxes, penalty, interest and costs or make no bid. He could, at a third sale, as such trustee, bid no more than costs and thereby cause loss to the tax creditors.

The right of selling and buying being vested in the same authority would undoubtedly create a condition where "they must, per se, have the right to interfere, one with the other" and they are therefore incompatible. Also there is always the probability of the interest of seller and buyer coming into conflict or antagonism - which is one of the tests of incompatibility.

Under the provisions of said statute the trustee, after purchasing the land sold for taxes, thereupon again becomes seller, and upon a percentage basis. All of the above powers and rights being vested in one person would surely place him sooner or later, where he must represent different interests which would be adverse and antagonistic.

CONCLUSION

Therefore, it is the opinion of this department that a deputy county tax collector may not be appointed trustee for the purpose of purchasing land and lots and selling the same as such trustee under the provisions of Senate Bill No. 311, 60th General Assembly of Missouri.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

TAXATION AND REVENUE: Legal representative of minor may redeem from the Collector after sale and delivery of deed, if no controversy of fact; otherwise right of party to redeem must be established in court of competent jurisdiction.

February 28, 1939.

FILED 62

Mr. Dewey Minich
Collector of the Revenue
Alton, Missouri

Dear Mr. Minich:

We are in receipt of a letter of February 22, 1939 from Forrest Smith, State Auditor, enclosing your letter to him dated February 13, 1939 requesting an opinion, from this department, your letter being as follows:

"We will appreciate it if you will procure an opinion, either from your department or from the Attorney General, relative to the redemption of property sold for non-payment of taxes.

"On November 2nd, 1936 a particular tract of land in this County was offered and sold for non-payment of taxes due thereon, being purchased at a price less than the total amount of taxes and cost due thereon. Due to fact that the two years had elapse, the purchaser was given a collector's deed for this land. Since issuing and recording the deed, we have been notified that two minor heirs own this land and wish to redeem it. Since the laws of Missouri provides that the minors may redeem either through their Guardian or next friend, we are at a lose in determining just what proceedure they shall take in redeeming this land.

"We have taken it up with Mr. J. E. Sanders, County examiner, and finally came to the conclusion that inasmuch as the collector issued a deed for this land and as it is specified therein that 'TO HAVE AND TO HOLD the said mentioned tracts or parcels of land, with the appurtenances thereto respectively belonging, to the said party of the second, his heirs and assigns forever, in as full and ample a manner as the collector of said count is empowered by law to sell the same', it would indicate that the collector would have no further claim on this land and any redemption would come outside the collector's office and jurisdiction.

"We also understand that the Guardian of the children at the present time was also the Guardian at the time that the land sold for taxes.

"In Section 9956a of the Missouri laws of 1933 it fails to indicate the proceedure in making the redemption after a deed has been issued to the purchaser for the land involved.

"Any information you may be able to give concerning this matter will be greatly appreciated and thanking you very kindly in advance, I remain"

Section 9956a is as follows:

"The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: By paying to the county collector, for the use of the purchaser, his heirs or assigns, the full sum of the purchase money named in his certificate of purchase and all the costs of the sale together with interest at the rate specified in such certificate, not to exceed ten percentum annually, with all subsequent taxes which have been paid thereon by the purchaser, his heirs or assigns, with interest at the rate of eight per centum per annum on such taxes subsequently paid, and in addition thereto the person redeeming any land shall pay the costs incident to entry of recital of such redemption. Upon deposit with the county collector of the amount necessary to redeem as herein provided, it shall be the duty of the county collector to mail to the purchaser, his heirs or assigns,

at the last postoffice address if known, and if not known, then to the address of the purchaser as shown in the record of the certificate of purchase, notice of such deposit for redemption. Such notice, given as herein provided, shall stop payment to the purchaser, his heirs or assigns, of any further interest or penalty. In case the party purchasing said land, his heirs or assigns, fails to take a tax deed for the land so purchased within six months after the expiration of the two years next following the date of sale, no interest shall be charged or collected from the redemptioner after that time."

Section 9956b is as follows:

"Infants, idiots, insane persons and persons in confinement may redeem any lands belonging to them sold for taxes, within two years after the expiration of such disability, in the same manner as provided in the preceding section for redemption by other persons."

Section 9956c is as follows:

"In case any lasting and valuable improvements shall have been made by the purchaser at a sale for taxes, or by any person claiming under him, and the land on which the same shall have been made shall be redeemed as aforesaid, the premises shall not be restored to the person redeeming, until he shall have paid or tendered to the adverse party the value of such improvements; and, if the parties can not agree on the value there-

of the same proceedings shall be had in relation thereto as shall be prescribed in the law existing at the time of such proceedings for the relief of occupying claimants of lands in actions of ejectment. No compensation shall be allowed for improvements made before the expiration of two years from the date of sale for taxes."

Section 9957a is, in part, as follows:

"Such conveyance shall be executed by the county collector, under his hand and seal, witnessed by the county clerk and acknowledged before the county recorder or any other officer authorized to take acknowledgments and the same shall be recorded in the recorder's office before delivery; a fee for recording shall be paid by the purchaser and shall be included in the costs of sale. Such deed shall be prima facie evidence that the property conveyed was subject to taxation at the time assessed, that the taxes were delinquent and unpaid at the time of sale, of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, that said land or lot had not been redeemed and that the period therefor had elapsed, and prima facie evidence of a good and valid title in fee simple in the grantee of said deed, * * * "

Section 9962c, in part, is as follows:

"The remedies granted by this section and section 9962d shall not be held exclusive but in addition to any applicable remedies now or hereafter existing."

Section 9962d is as follows:

"If any conveyance made by the county collector, pursuant to a sale made for the non-payment of taxes, under this or any former tax law, shall prove to be invalid and ineffectual to convey title for any other cause than such as are enumerated in section 9960b the lien which the state had on such land for state, county, township, school and all lawful purposes, together with all lawful charges, shall remain in full force, and shall be transferred by such deed to the grantee and vested in him, his heirs and assigns, who shall be entitled to a lien upon such lands, and the same shall be bound for the final payment thereof; and in case judgment be rendered against the person holding the title from the collector, as aforesaid, for the recovery of such land, in an action of ejectment or other action, either at law or in equity, brought by the owners of such lands, heirs or assigns, the court shall ascertain the amount due to the party holding such tax deed and from whom due for principal and interest and for all improvements made by him on such lands including subsequent taxes paid with interest, and shall decree the payment thereof within such reasonable time by the owner of such land; if there be an owner of any life estate or any other person first liable for the payment of such taxes, such ownership and liability shall be ascertained by the court and entered of record in such cause, and in default of such payment the court shall decree that such life estate, the interest of such debtor in such lands and the fee simple thereof, shall be sold therefor or sufficient thereof to pay the amount of such improvements, principal and interest as above set forth, due to the party having the collector's deed, his heirs and

> assigns. Such property shall be offered and such sales shall be made in the order, and in the manner and form as provided in section 9962c: Provided, That there shall be no right of redemption of such property or of any such interest therein, after the date of sale, and the sheriff shall, upon receipt of the purchase money, execute to the purchaser a deed in fee simple or a lease for the unexpired term of the part or interest so sold, as the case may be, and the purchaser shall have the right of immediate possession of such land or lot and the improvements thereon. At such sale if such land or any part or parcel thereof or any interest therein be sold for a sum in excess of the lien and cost, then such surplus shall be paid over to the person or persons lawfully entitled thereto as such rights are determined by the court in its decree in said cause."

The sale, referred to in your inquiry, having been made for less than the total amount of the taxes, penalty, interest and costs was invalid unless made under and by virtue of Section 9953a Senate Bill No. 94, Laws of Missouri for 1933 at page 432. Therefore, we are presuming that such sale, was executed under said Section 9953a.

After two years from the date of the sale the certificate holder may obtain title as provided in Section 9957a, supra.

In case there should be no controversy that the owner was an infant, idiot or person in confinement and he was a proper party in interest at the time of the sale of the land, the Collector could permit him, through his legal representative, to redeem under and by virtue of Section 9956a, supra. If the purchaser, after two years from the date of the sale, could not agree with the owner as to the value of improvements such controversy would necessarily be submitted under the provisions of Sections 9956c, supra.

Let us presume that a party sought to redeem on account of infancy and that at the time of the sale, the father, being the record owner, was alive, or that he had not been heard from for over seven years at the time of such sale and was presumed to be dead. These and many other controversial questions might arise that could not be determined by the Collector and should be submitted to a court of competent jurisdiction.

Under the provisions of Section 9956b, supra, many years may pass after the sale before an owner appears to redeem. A new collector would probably be in office and the collector's record would not reveal the claimant nor evince his rights. Neither would such record show the trend of title nor the improvements made nor subsequent taxes paid by the purchaser on the property sold under the Jones-Munger Bill. Section 9954a of said bill provides that the rent collected by the purchaser shall be endorsed on the certificate as a credit. A suit for accounting might arise over a charge that such credits were not accurate.

Section 9962d, supra, provides for such contingency. Under that section, when the conveyance is ineffectual, the grantee is subrogated to the rights of the state and has a lien upon the lands sold - for the taxes and all lawful charges. It recognizes that the former owner may bring a legal or equitable action for the recovery of the land but provides that the lien must first be paid. Therefore an owner whose land sells for taxes may choose his forum in which to seek his rights. It could not have been the purpose of the bill to clothe the collector with power of a court to pass upon controverted facts, the establishment of which was a condition precedent to the right to redeem.

CONCLUSION

Therefore, it is the opinion of this department that after land is sold and a deed is delivered therefor as provided in Section 9957a, supra, a minor, through his or her legal representative, may redeem land, from the collector, which such minor owned at the time of sale, under the provisions of Section 9956a, supra; Provided, that there is no question of contest as to the facts necessary to establish

the rights of such minor to redeem and in that event the right of the minor to redeem must be determined by some court of competent jurisdiction.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

SVM:LB

SCHOOLS: It is not legal to have challengers and watchers in the polls at school elections.

March 22, 1939

3-27 FILED 62

Hon. Forrest Mittendorf
House of Representatives
Jefferson City, Missouri

Dear Sir:

Some time ago you submitted the following to us for an opinion:

"Please give me your opinion as to the legality of outsiders having watchers in the polls at school elections."

You do not state in your letter whether you refer to school elections held in the rural sections or in the city of St. Louis. However, we do not think this omission will effect our ultimate conclusion.

Section 9284 R. S. Missouri, 1929, sets forth the powers of qualified voters of a school district in reference to school matters. Under said section the patrons of the district may vote a paper ballot or viva voce. There is no provision for printed ballots nor watchers or challengers; same is applicable to the election of county superintendent, which takes place at the same time of the annual school election, under section 9454 R. S. Missouri, 1929.

Section 9341 R. S. Missouri, 1929, amended in 1933, Laws of 1933, page 381, provides for the manner in which school elections shall be conducted in city, town and consolidated schools. It appears to be special in its nature and provides a different method from that of the state, county, primary and general election.

Section 10461 R. S. Missouri, 1929, relates to primary elections in cities of over 400,000, and provides for challengers and watchers.

We are unable to locate any statute which in anywise can be construed to permit challengers or watchers in the polls at school elections. All the statutes are referable, in so far as challengers and watchers are concerned, to general and primary elections.

Respectfully submitted,

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

OWN:RW

PROSECUTING ATTORNEY FEES: When dismissal is at cost of defendant such fee is not taxable as a part of the cost.

March 31, 1939.

4-3

FILED
62

Honorable Stephen J. Millet
Prosecuting Attorney
Caldwell County
Kingston, Missouri

Dear Mr. Millet:

We desire to acknowledge your request for an opinion on March 27, 1939, which is as follows:

> "Would you be kind enough to give me an opinion of your office as to whether or not the office of Prosecuting Attorney is entitled to charge and collect the sum of $5.00 in criminal cases where his office has filed charges or a complaint and later wishes to dismiss the same at the cost of the defendant?
>
> "The section 11783 of the R. S. of Missouri 1929, says in part, ---
> "for his services in all actions which it is or shall be made his duty by law to prosecute or defend, five dollars".
>
> "We had lots of cases where information is filed for uttering and passing a worthless check where the payee of the check would rather have the check paid and the costs paid by the drawer of the check with the suit dismissed than have the case stand for trial. I want to charge and collect the sum of $5.00 in such cases as fees due

> this office from the defendant. Is that right? I Understand that the state can only becharged for convictions.
>
> "Your opinion of this matter will be appreciated and I suggest that a copy be sent to the State Auditor's office for their reference when checking our offices."

Section 11783 R. S. Mo. 1929 is, in part, as follows:

> "Prosecuting Attorneys shall be allowed fees as follows, * * * for the conviction of every defendant in the circuirt court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; * * * "

The question of a fee of a circuit attorney to be taxed as cost, in a case where it was dismissed at the cost of the defendant, is construed in State vs. Foss, 52 Mo. 416, 417, as follows:

> " * * * The judgment was founded upon an agreement, by which a conviction, fine and imprisonment were waived if the defendant would simply pay the costs. It is true, costs naturally follow and are incident to a judgment of conviction, but here we see there was no conviction within the meaning of the law. The criminal statutes fully designate what is intended by a conviction. It is clearly where, by a trial or confession the defendant

> is assessed to pay a fine or be imprisoned, or is punished by both these modes. But there is no conviction for costs only, to entitle the Circuit Attorney to his fee. A case similar to this was recently passed upon at the February Term, and decided in accordance with these views. (See State, ex rel., Wood vs. Ray County Court, ante p. 27.)
>
> "The reasoning in the case of the State ex rel., Hopkins vs. Buchanan County Court, (41 Mo., 254) is not very satisfactory as regards a judgment of dismissal with costs by agreement, being equivalent to a conviction.
>
> "For the purposes of that case it may be conceded to be correct, as the agreement of the defendant fixed his liability for the costs, but for the costs only that were taxed and authorized by law. But in the present case, the fee of five dollars to the Circuit Attorney was not authorized, as that officer had not prosecuted the indictment to a conviction, which was essentially necessary before an allowance could be made to him.
>
> "The case of the State vs. Beard, (31 Mo., 34) decides the very point here presented for review, and holds that where the prosecution of an indictment is dismissed at defendant's costs, a fee for the Circuit Attorney cannot be properly taxed against the defendant."

The same question was passed on by the Supreme Court in State vs. Clifford, 124 Mo. 492, 497, in the

following language:

> "This court in at least four cases has ruled that where a prosecution of an indictment is dismissed at the defendant's costs a fee for the circuit attorney can not be properly taxed either against a defendant, the state or the county. State v. Beard, 31 Mo. 34; State ex rel. v. Thompson, 39 Mo. 427; State v. Foss, 52 Mo. 416; State ex rel. v. Ray County Court, 52 Mo. 27. And the principle is equally applicable here. In the one case the fee is allowed only for a conviction. * * * "

CONCLUSION

Therefore, it is the conclusion of this department that when a prosecution of an indictment or information is dismissed at the defendant's cost, a fee for the circuit attorney can not be properly taxed against either the defendant, state or county.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

SCHOOLS:
TRANSPORTATION:
CONSOLIDATED DISTRICTS: The board of directors of consolidated districts, unless authorized by vote of the electors of the district, may not provide for transportation of pupils in elementary schools except where the average daily attendance falls below ten.

April 12, 1939

4-14

FILED
62

Mr. George H. Miller
Prosecuting Attorney
Hickory County
Hermitage, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion on the following question:

> "Will you please send me an opinion upon the following question: Does the Board of School Directors in a consolidated district have the authority to close a rural school and transport the students to a central location, regardless of the average daily attendance, without a vote by the residents of the district?"

The sections of the school law applicable to transportation of children are as follows: Section 9354, R. S. Mo. 1929:

> "The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If transportation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the

home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have all the seventh and eighth grade work done at the central high school building, provided fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

Section 9197, R. S. Mo. 1929, provides:

"Whenever the board of directors of any school district or board of education of a consolidated district shall deem it advisable, or when they shall be requested by a petition of ten

> taxpayers of such district, to provide for the free transportation to and from school, at the expense of the district, of pupils living more than one-half mile from the schoolhouse, for the whole or for part of the school year, said board of directors or board of education shall submit to the qualified voters of such school district, who are taxpayers in such district, at an annual meeting or a special meeting, called and held for that purpose, the question of providing such transportation for the pupils of such school district: Provided, that when a special meeting is called for this purpose, a due notice of such meeting shall be given as provided for in section 9228. If two-thirds of the voters, who are taxpayers, voting at such election, shall vote in favor of such transportation of pupils of said school district, the board of directors or board of education shall arrange for and provide such transportation. The board of directors or board of education shall have authority and are empowered to make all needful rules and regulations for the free transportation of pupils herein provided for, and are authorized to and shall require from every person, employed for that purpose, a reasonable bond for the faithful discharge of his duties, as prescribed by the board. Said board of directors or board of education shall pay by warrant the expenses of such transportation out of the incidental fund of the district."

By these sections it will be seen that the transportation of school children is authorized in the following cases:

1. When authorized by vote of the tax-paying resi-

dents of the district;

2. When the average daily attendance in an elementary school falls below ten the school board has authority to close such elementary school and transport the pupils to some other school;

3. In case transportation is not voted and authorized as provided by Section 9197, supra, then by a majority vote the seventh and eighth grade pupils may be transported to the central high school building of a consolidated district.

Under Section 9354, supra, which refers to consolidated school districts, if transportation is not authorized by the proper vote of the resident taxpayers, then it is mandatory on the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child in the district except those children who are not placed farther from the elementary school by reason of the consolidation of the district. In State ex rel. Miller et al. v. Board of Education of Consolidated School District No. 1, 21 S. W. (2d) 645, 648, in speaking of the duties of the school board towards maintaining schools, the court said:

> "* * * * * And it is equally well settled that a board of education cannot be required to conduct school in certain locations within the district unless it is first shown, among other things, that suitable buildings in which to conduct said schools are at said locations or that sufficient funds have been provided with which the board can construct suitable buildings at such locations. * * * * * * "

In other words, before the board can be required to do any of the things necessitating the expenditure of the district funds, such funds must be provided by taxation or otherwise.

On the question of the authority of a school board to use the public funds for transporting children, we find the rule stated in Volume 56 C. J. page 832 at Section 1038,

in the following language:

> "In the absence of express statutory authorization to transport pupils to and from district schools, no such authority can be implied from the duty imposed on the school trustees to secure to the children of the district the right and opportunity of equal education or from a statute authorizing trustees of a consolidated school district, or of a discontinued school, to use school funds for transportation, or from a statute authorizing classification of school districts into elementary and high school districts but providing that the classification shall not be so made as to deprive any child of opportunity to attend a school properly classified within the stipulated distance of his home unless free transportation for such child shall be provided, * * * * * * * * * * * * * "

And in Volume 63 A. L. R., page 414, the rule on this question is also stated in the following language:

> "In the absence of express statutory power, a school board is not authorized to expend money for the carrying of children to school. * * * * * * * "

It will be seen that before the board is authorized to expend any public funds for transportation of pupils that they must have their authority from the statutes.

CONCLUSION.

The only authority that we are able to find authorizing the school board to close an elementary school is when the average daily attendance of such school for a period of a month falls below ten. When the board closes the school under such circumstances, then the school will

remain closed for the remainder of the term and the board is then authorized to transport the children to some other elementary school or schools in the district.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

FERTILIZER LAWS: Agriculture Experiment Station must label or tag each separate parcel of
AGRICULTURE: "Vigoro" before it may be exposed for sale.

June 16th, 1939.

6-26

FILED
62

Professor M. F. Miller,
Dean and Director,
College of Agriculture,
Experiment Station-Extention Service,
University of Missouri,
Columbia, Missouri.

Dear Sir:

We acknowledge receipt of your inquiry which reads as follows:

> "I feel that it is necessary for us to have a ruling from the Attorney General with reference to a certain interpretation regarding the Fertilizer Law, a copy of which I am enclosing. The law requires that each bag or package shall bear a tag or sticker indicating that it has been registered.
>
> "The case in question has to do with packages such as the one I am sending you under separate cover including various small packets of Vigoro fertilizer tablets put out by Swift & Company. The law might be interpreted to mean that each one of these small packets should bear a tag or sticker or that the larger package only should be tagged. You will observe

that the Company has placed the sticker on the larger package.

"Since this package is really a sales device to be kept on the counter of the merchant with the registration sticker showing, the question arises as to whether or not this one sticker is sufficient. I might say that this has some relation to the plan followed by some dealers in selling small amounts of fertilizer for yard and garden purposes, as is sometimes done.

"In this case the bag bears the label and the small packages which they measure out are of course not labeled. It would be almost impossible to administer a provision which would require labeling of these smaller bags as the material is measured out. However, these packets of Vigoro could each be labeled if it is your opinion that the law would require it."

Section 12588, Revised Statutes of Missouri, 1929, provides:

"Any commercial fertilizer or material to be used as a fertilizer, the selling price of which exceeds five dollars per ton, shall have stamped or affixed to each package of such fertilizer in a conspicuous place on the outside thereof, by the manufacturer, importer, corporation, company or person who sells or causes the same to be sold, offered or exposed for

sale, a plainly printed statement which shall certify as follows:

(1) The name, brand or trademark under which the fertilizer is sold.
(2) The name or address of the manufacturer of the fertilizer.
(3) The guaranteed chemical composition of the fertilizer in the following terms: (a) Per centum of nitrogen: (b) per centum of available phosphoric acid, and in the case of an undissolved animal bone, the per centum of insoluble phosphoric acid; (c) per centum of potash soluble in distilled water. In case the composition is expressed in equivalent to ammonia, etc., in addition to the above it shall be clearly and unequivocally shown that such terms are used merely as equivalents and not used to represent additional plant food."

Section 12589, Revised Statutes of Missouri, 1929, provides that before such commercial fertilizer is sold or offered for sale in Missouri, the person who sells or causes the same to be sold, offered or exposed, shall annually register with your department a statement setting forth the chemical, or trademark under which it is sold and the name and address of the manufacturer.

Section 12591, Revised Statutes of Missouri, 1929, provides, among other things, the following:

"Every person, corporation or company who shall sell, offer or expose for sale in this state any commercial fertilizer, the selling price of which exceeds five dollars per ton, shall stamp or affix to each package of such fertilizer in a conspicuous place on the outside thereof, a plainly printed statement which shall recite and certify in effect and form the matters and things required to be set forth in the registered statement described in section 12589. If any such fertilizer is sold, offered, or exposed for sale in bulk, such printed statement shall accompany every lot and parcel sold, offered or exposed for sale. Every person, corporation or company selling or exposing for sale such fertilizer shall, in addition to said printed statement, attach to every package or quantity of such fertilizer sold or exposed for sale in a conspicuous place on the outside of said package a label or tag furnished by said experiment station showing such brand of commercial fertilizer has been registered at said experiment station for that year."

You forwarded to this office along with your request an exhibit in the form of a paper carton approximately fourteen (14) inches long, six (6) inches wide and four (4) inches high. Said carton having the picture of a girl looking at a flower and having the name in large red letters "VIGORO", the name "COMPLETE PLANT FOOD", and immediately under that, in large red letters, the word "TABLETS". In the right hand corner of the top part of

said carton the price of ten (10¢) cents per package of twenty-four. In said carton is enclosed thirty smaller cartons which completely fill the larger carton, said smaller cartons each being approximately four inches long, two inches wide and something like an inch thick. Each of said smaller cartons contain a quantity of tablets and reading matter.

On the outside of said smaller package are the words "VIGORO" "TABLETS" and other advertisements, and directions how to use the same, and under the latter is the name of "SWIFT & COMPANY FERTILIZER WORKS, a Division of Swift & Company." On one end of each of said small packages is the name "VIGORO" and the following:

> "These special tablets are products of Swift & Company, makers of Vigoro, America's largest selling plant food for lawns and gardens. For outside use, Vigoro is available in sizes ranging from 1 to 100 pounds. Use it on lawns, flowers, trees, shrubs and vegetables."

On the other side of each of said small packages is printed the word "VIGORO, complete plant food", and the following:

> "Vigoro - 24 25-grain tablets. Guaranteed Analysis: Nitrogen 4.00%, Available Phosphoric Acid 12.00%, Potash K_2O (soluble in water) 4.00%. Manufactured by Swift & Company Fertilizer Works, Div. of Swift & Company, Calumet City, Ill.; Cleveland, Ohio; National Stock Yards, Ill.; Baltimore, Md."

On one end of each of said small packages is printed the words "Vigoro, Complete Plant Food, A product of Swift & Company, contains 24 25-grain tablets." On the other end of each of said smaller packages is the following:

> "This package was taken from an original package, which met all requirements of fertilizer laws, including the manufacturer's name, guarantee and payment of privilege tax."

Each of said smaller cartons has stamped or affixed on it the printed statment reciting the name, brand or trade mark of the fertilizer, the name and address of the manufacturer thereof and the chemical composition of the fertilizer, and it is apparently in conformity with Section 12588, supra.

It is evident that this fertilizer has a selling price which exceeds five dollars per ton and, therefore, comes within the requirements of the fertilizer law. Your inquiry seems to be directed more particularly to the latter part of said Section 12591, supra. That section provides that if the fertilizer is offered for sale in bulk, such printed statement shall accompany each lot and parcel offered for sale. But this last mentioned provision apparently does not affect your inquiry because the fertilizer you inquire about does not appear to be offered for sale in bulk, but is offered for sale in each of these small cartons.

Said Section 12591, supra, next provides that every person, etc., selling or exposing for sale

> "* * * * such fertilizer shall, in addition to said printed statement, attach to every package or quantity of such fertilizer sold or exposed for sale in a conspicuous place on the outside of said package a label or tag furnished by said experiment station showing such brand of commercial fertilizerhas been registered at said experiment station for that year."

It is noted the last quoted part of said section contemplates that the printed statement hereinabove set forth on each of the individual small packages shall be shown thereon and in addition to the same, there shall be placed "in a conspicuous place on the outside of said packages a label or tag furnished by said experiment station showing such brand of commercial fertilizer has been registered at said experiment station for that year."

If the last quoted provision of Section 12591, supra, applies to the small cartons, then the fact that each small carton has printed thereon the following:

> "This package was taken from an original package, which met all requirements of fertilizer laws, including the manufacturer's name, guarantee, and payment of privilege tax,"

is not a compliance with said statute.

Each of said small cartons must have "a label or tag furnished by said experiment station." The last above referred to matter does not appear to be furnished by the experiment station but is merely printed on each of said small cartons and apparently done by the person preparing the small carton and the contents thereof.

Section 12591, supra, contemplates that more than that shall be done, and that a label or tag furnished by the experiment station showing that such brand of commercial fertilizer has been registered at the experiment station for that year, shall be attached to each of the smaller cartons above mentioned.

Very truly yours,

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DRAKE WATSON
Assistant Attorney General.

DW/RV

COLLECTORS AND SHERIFFS: Authorized to appoint salaried attorneys under House Bill No. 480.

October 20, 1939

10-24

FILED
62

Mr. Forrest Mittendorf
2671 Carson Road
Overland, Missouri

Dear Sir:

We are in receipt of your request for an opinion as to the effect of Section 8a of S.C.S.H.B. 480, found at page 682 of the Laws of Missouri, 1939, and which reads as follows:

"The collector of revenue shall employ an attorney to represent him in his official capacity and he shall represent the collector in all legal proceedings instituted by the collector for the collection of delinquent taxes. Said attorney shall receive an annual salary, payable monthly, of not to exceed $3600.00 per year, as may be fixed by the County Court. The salary paid to said attorney shall be in full of all services rendered the said collector and in lieu of any fees, commissions and charges fixed by law in enforcing the payment and collection of delinquent back taxes on real estate. The sheriff shall be entitled to employ an attorney to

> represent him in his official capacity, which said employment shall be approved by the county court. Said attorney shall receive an annual salary of not to exceed $2000.00 per year, as may be fixed by the county court, which salary shall be in full for all services rendered the sheriff and in lieu of any fees, commissions and charges fixed by law."

In your conversation you mentioned that there was a contract in existence between the collector of your county and certain attorneys for the purpose of collecting delinquent taxes and which contract fixed the compensation of the attorneys. You suggest that such a contract might be abrogated or impaired by the enactment of the section above quoted.

In State ex rel. McKittrick v. Bair, 63 S. W. (2d) 64, the status of a contract existing between the collector and an attorney selected by him for prosecuting delinquent tax suits was fully discussed in the following language, l. c. 65:

> "The attorney's fees are provided for by section 9952 of the Revised Statutes of 1929 (Mo. St. Ann. Sec. 9952), which, after providing that the collector shall proceed to enforce the payment of delinquent taxes charged on any lot or tract, by suit to enforce the lien thereon, further provides in substance that for such purpose the collector shall have power, with the approval of the county court, to employ such attorneys as he may deem necessary, who shall receive as fees such sum, not to exceed 10 per cent. of the taxes actually collected and paid into the treasury and an additional sum, not

to exceed $3 for each suit instituted for the collection of such taxes; which said sum shall be taxed as costs in the suit and collected as other costs, and no attorney shall receive any fee or compensation for such services except as in this section provided. From the statute itself it is obvious that the attorney's right to fees does not accrue pari passu with the rendering of each act of service in a given case, but accrues as a whole after collection made or judgment rendered. 12 C. J. 973; Coles v. Madison County, Breese (1 Ill.) loc. cit. 157, 12 Am. Dec.161. And, contrary to an argument pressed, the Legislature having fixed one definite and certain mode of payment, no other is permissible, and there can be no application of the doctrine of quantum meruit. Greene County v. Lydy, 263 Mo. 77, 172 S. W. 376, Ann. Cas. 1917C, 274.

"The contract entered into between the collector and his attorney, and approved by the county court, imposes no liability upon either the state, county, or the collector. It only fixes the status of the attorney as to his right to compensation and the amount thereof when in the tax suit the liability therefor becomes fixed upon the taxpayer's property by the final judgment in the case. Butler v. Sullivan County, 108 Mo. loc. cit.638, 18 S. W. 1142. And, as stated in State ex rel. Kemper v. Smith, 13 Mo. App. 421, 423, 'It is clear, then, that unless the proceeding result in collecting a sum of money belonging to the public revenue, neither the collector nor

> his attorneys can claim any costs in the cause.' The same rule necessarily applies to the other interveners, who as public officers have no contractual right as to their terms of office or their compensation or any vested right in either, the same being subject to legislative control. State ex rel. Attorney-General v. Davis, 44 Mo. 129; Givens v. Daviess County, 107 Mo. loc. cit. 608, 17 S. W. 998; State ex inf. Crow, Attorney-General, v. Evans, 166 Mo. 347, 66 S. W. 355; Gregory v. Kansas City, 244 Mo. 523, 149 S. W. 466. The fees of the collector and his attorney and of the interveners are subordinate to the general legislative power to impose, increase, diminish, or remit penalties for tax delinquencies; that no vested right of any of them is impaired by the remission."

The foregoing discussion concerns Section 9952, R. S. Missouri, 1929, which was amended by Laws of Missouri, 1933, at page 465. However, the amendment was held to be invalid in the case of State ex rel. Karbe v. Bader, 78 S. W. (2d) 835, so that any contract now in existence is under the authority of the statutes of Missouri, 1929.

House Bill No. 480, of which Section 8a above quoted is a part, provides in general for salary of the various county officials in counties of 200,000 to 400,000 inhabitants. So far as these salaries are concerned, they do not become effective until the beginning of the succeeding terms of the various officials or their successors. In Section 8a it is apparent that so far as the attorneys to be appointed by the collector and sheriff are concerned, the salaries set out therein become effective when the act becomes a law. It is set out

therein that the salary is to be in full of all services rendered and in lieu of any fees, commissions and charges fixed by law enforcing the collection of taxes.

In Section 9a of House Bill No. 480, found at page 683, Laws of Missouri, 1939, all acts, or parts of acts inconsistent with any provision of the bill are repealed. Furthermore, at page 878, Laws of Missouri, 1939, under House Bill No. 677, Section 9952 is expressly repealed so that there is no other provision than that found in Section 8a for the employment of attorneys to collect delinquent taxes. It is not to be assumed that the Legislature intended that collectors be left without a method to collect taxes.

An opinion as to the effective dates of all bills passed by the 1939 Legislature is being prepared by this department, and upon completion a copy will be sent you.

CONCLUSION.

It is our opinion, therefore, that Section 8a, found in Laws of Missouri, 1939, at page 682, in regard to the appointment of attorneys by the collector and sheriff in counties of 200,000 to 400,000 population, which provides the salary for such attorneys, is effective immediately upon the act becoming a law.

Respectfully submitted,

APPROVED

ROBERT L. HYDER
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

RLH:RV

SHERIFF'S FEES: Amount entitled for services under Sections 11789 and 11791, R. S. Mo. 1929.

December 29, 1939

1-2

FILED
62

Mr. John W. Mitchell
Assistant Prosecuting Attorney
St. Joseph, Missouri

Dear Mr. Mitchell:

We wish to acknowledge your recent letters wherein you state as follows:

> "Section 11846 fixes the salary of the Sheriff of this County at $3600. a year. Sections 11847 and 11848 provide for the salaries of deputies and assistants. The latter section contains this language:
>
> > "'No compensation shall be allowed or paid to said sheriff, his deputies or assistants except that and to those herein expressly provided for, and no amount shall be charged to the county or drawn out of the county treasury for services of any deputy or assistant of said sheriff that shall not be the exact amount due said deputy or assistant.'
>
> "Section 11850 repeals all statutory provisions outside of Article 4 allowing any fee or compensation to the Sheriff to be paid out of the County Treasury, and further provides that all fees to said Sheriff 'by the terms of any contract or any such statutory provisions

outside of this article, due or receivable from any source, are, upon the taking effect of this article, hereby transferred to the County, and shall be paid into the County Treasury.'

"Section 11851 makes it the duty of the Sheriff to charge on behalf of this County every fee that accrues in his office and to receive the same, together with the fees taxed in his office.

"Section 11852 requires the Sheriff at the end of each month to pay over to the County Treasurer all moneys collected by him for fees, and to make a verified report of the same to the County Auditor.

"Section 11789 covers the fees to be charged by the Sheriff in civil cases, and 11791 covers the fees to be charged by the Sheriff in criminal cases.

"In Section 11791 provision is also made for payment for the services of the Sheriff in taking convicts to the penitentiary, and in that section there is specified the amount to be paid to the Sheriff and to such guards as he may take along with him, together with mileage and the expenses of each convict while being taken to the penitentiary.

"I should like to have your opinion as to whether or not the Sheriff of this County is entitled to retain for himself any part of the fees which are specified by the foregoing sections in either criminal or civil cases.

"I should also like to have your opinion as to whether the Sheriff may retain for himself all or any part of the money payable to the Sheriff under the provisions of Section 11791 for services in taking convicts from this County to the penitentiary.

"In connection with the foregoing questions will say that I have been unable to find any specific statutory provision for the payment of the necessary expenses of the Sheriff in discharging the duties of his office in both civil and criminal matters. In the absence of such provision it would seem to follow that the County Court by necessary implication would have the power to pay out of the general revenue of the County the actual expenses of the Sheriff in the performance of his various official duties in both civil and criminal matters."

"Supplementing my letter to you which was mailed just a few hours ago and dated November 28th, will say that the last two paragraphs of that letter were not intended to refer to the boarding of prisoners or to the maintenance and operation of the jail. There are statutory provisions covering those matters of course."

I

Article 4, Section 11846, Revised Statutes of Missouri, 1929, provides that sheriffs of all counties containing a city of 75,000 inhabitants and less than 200,000

inhabitants, shall receive a salary of thirty-six hundred dollars per year:

> "From and after the passage of this article and until the first day of January, 1921, the sheriff of all counties in this state which now contain or may hereafter contain a city of 75,000 inhabitants and less than 200,000 inhabitants, shall receive five thousand dollars per annum as his salary, to be paid in monthly installments on the first day of each month, and after the first day of January, 1921, the sheriff of all such counties shall receive a salary of only thirty-six hundred dollars per annum, said salary to be paid in monthly installments on the first day of each month."

Section 11850, R. S. Mo. 1929, provides that all statutory provisions, outside of Article 4, allowing any fee or compensation to the sheriff to be paid out of the county treasury, are repealed:

> "All statutory provisions, outside of this article, allowing any fee or compensation to the before mentioned officer to be paid out of the county treasury of any such county, are, upon the taking effect of this article, hereby repealed, and all fees to said officer by terms of any contract or any such statutory provisions outside of this article, due or receivable from any source, are, upon the taking effect of this article, hereby transferred to the county, and shall be paid into the county treasury."

The question is asked - Whether the sheriff is entitled to retain for himself any part of the fees which are specified by Sections 11789 and 11791, R. S. Mo. 1929.

There is a well-known rule of statutory construction that a statute is not open to construction where the language is plain and unambiguous. Reay v. Elmira Coal Company, 34 S. W. (2d) 1015, 225 Mo. App. 212.

It is apparent from reading Section 11850, supra, that it was intended that the compensation of the sheriff be fixed on a definite yearly basis and that all fees "due or receivable from any source, are, * * * hereby transferred to the county, and shall be paid into the county treasury."

From the foregoing we are of the opinion that fees allowed sheriffs for services in civil cases by Section 11789 R. S. Mo. 1929, and fees allowed sheriffs for services in criminal cases by Section 11791, R. S. Mo. 1929, cannot be retained by the sheriff of Buchanan County but must be paid into the county treasury.

II

We now take up your third question - Whether the sheriff is entitled to expenses payable out of the general revenue of the county in the performance of his official duties in both civil and criminal matters.

We must first determine whether the term "expenses" is included within the meaning of the terms "fees" and "compensation" as used in Section 11850, supra.

In the case of Harlan County v. Blair, 49 S. W. (2d) (Ky.) 1028, l. c. 1029, the court distinguished between the meaning of "fees" and "expenses" thus:

> "Expenses incurred in performing services is distinct and separate from fees allowed for rendering such services. Fees to an officer are a recompense for his services,

> while expenses allowed him are designed to indemnify or reimburse him for funds expended in performing his duties."

And in the case of State v. Thomason, 221 S. W. 491, l. c. 494, "expenses" are distinguished from "compensation" thus:

> "That the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, is well established upon reason and authority * * * * *."

It is thus evident that the term "expenses" does not fall within the meaning of the terms "fees" and "compensation."

However, before a sheriff may be entitled to reimbursement for expenses necessarily made in the performance of his official duties, there must be a statute providing for reimbursement of expenses.

57 Corpus Juris, Section 1185, page 1124, states that,

> "A sheriff or constable is entitled to reimbursement for disbursements necessarily made or expenses necessarily incurred by him in the performance of his official duties, when, and only when, there is a statute providing for reimbursement and the expenses of disbursements in question are within it."

We are, therefore, of the opinion that, absent statutory authority, the sheriff of Buchanan County is not entitled to expenses in the performance of his duties in civil or criminal matters.

III

Your second question is whether the sheriff may retain for himself any part of the money payable to him under the provisions of Section 11791, R. S. Mo. 1929, for services in taking convicts from the county to the penitentiary.

Section 11791, supra, provides in part as follows:

> "* * * For the services of taking convicts to the penitentiary, the sheriff * * * shall receive the sum of three dollars per day for the time actually and necessarily employed in traveling to and from the penitentiary, * * * and the sheriff * * * shall receive five cents per mile for the distance necessarily traveled in going to and returning from the penitentiary, the time and distance to be estimated by the most usually traveled route from the place of the departure to the penitentiary; the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each convict while being taken to the penitentiary; * * * * * * * * * ."

From the foregoing we are of the opinion that the sheriff would not be entitled to the sum of three dollars per day for taking convicts to the penitentiary.

We are enclosing a copy of an opinion rendered by this Department to the Honorable Forrest Smith under date of December 14, 1936, wherein we held that the five cents per mile received by the sheriff for services for taking

convicts to the penitentiary and returning therefrom is an accountable fee, but that the five cents per mile allowed the sheriff to cover all expenses of each convict, while being taken to the penitentiary, is not an accountable fee.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

MW:EG
Enc.

GAMBLING: Prosecution for punch boards brought under Section 4290 R. S. Mo. 1929.

February 24, 1939

FILED 2-27
63

Mr. Vincent S. Moody
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Mr. Moody:

We acknowledge your request for an opinion, as follows:

> "Would you be so kind as to render your opinion on the following question:
>
> Are punch boards covered by Section 4287, Revised Statutes Mo. 1929, or by any other Section, and if so, what type of punch board; that is, are punch boards that give 'something every time' prohibited by the laws of Missouri?
>
> An early opinion of this will be greatly appreciated by me."

In the case of State vs. Turlington 204 S. W. 821, 200 Mo. App. 192, the defendant was charged by information of the prosecuting attorney with violating Section 4753, R. S. 1909 (now Section 4290 R. S. Mo. 1929) by permitting a punch board, alleged to be a gambling device, to be used or operated in his store building.

Section 4290, supra, provides:

> "Every person who shall permit any

> gaming table, bank or device to be set up or used for the purpose of gaming in any house, building, shed, booth, shelter, lot or other premises to him belonging or by him occupied, or by which he hath at the time the possession or control, shall, on conviction, be adjudged guilty of a misdemeanor and punished by imprisonment in the county jail or workhouse for not more than one year nor less than thirty days, or by fine not exceeding five hundred dollars or less than fifty dollars."

The point was made by the appellant in the above case that the manner in which he conducted the punch board was no offense under the law. The court said that the evidence showed:

> "The evidence shows that the punch board was a board in which there were a great many holes. In each of these holes was a small strip of paper containing a number. These holes were covered, but the cover was so designed as to indicate exactly the location of each hole. The prizes were knives and post cards. The knives ranged in value from 50 cents to $1.50, and the post cards were worth 3 cents each. A small wooden pin was used to punch the covering of the hole. Five cents a punch was charged, and the number on the slip of paper in the hole punched indicated whether a post card or a knife was the reward, and, if a knife, it indicated what knife. There were no blanks. The purchaser of a punch got a post card or a knife. When the board was first set up a 'punch' was sold for 5 cents; but, being advised that there might be less taint of a gamble or game of chance if the post card was

> sold in advance, this method was adopted. The post card was sold for 5 cents, and the purchaser was then entitled to a punch. If he got a knife, he was a post card ahead, as compared with original system. The defendant would buy back for three cents the post card if the purchaser desired to sell it. The defendant testified that the post card cost 3 cents, and that he bought back a number of them. So in any event the defendant was 2 cents ahead if the purchaser who got a post card did or did not sell it back. The slips of paper in the holes calling for post cards were far in excess of those calling for knives so that when the entire board was punched there was a margin of gain in favor of the defendant."

And in holding that such was a gambling device, said:

> "Clearly we think such board falls within the class of gambling devices. The incentive prompting any one to take a punch was the chance of getting something of more value than the cost of the chance. The amount of the winner's gain or loser's loss would make no difference, if the chance to win more than was invested was present. <u>It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one.</u> Had the post card which was always drawn, except when a prize of more value was drawn, been in fact of the value of five cents, so that there would have been no chance for the customer or patron to lose, this would not purge the enterprise of its chance characteristics, because the chance to win more than invested yet remained. This is clearly the law as written in Moberly v. Deskin, 169 Mo. App. 672, 155 S. W. 842, from which

we quote:

> 'The chief element of gambling is the chance or uncertainty of the hazard. It is not essential that one of the party to the wager stands to lose. The chance taken by the player may be in winning at all on the throw, or in the amount to be won or lost, and the transaction should be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered the uncertain chance of getting something for nothing, the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win. Such offer, therefore, is a direct appeal to the gambling instinct, which, it is said, possesses every man in some degree, and it is the temptation to gratify the instinct that all penal laws aimed at gambling are designed to suppress.'"

The court in passing on the sufficiency of the information under Section 4753, supra, said:

> "The sufficiency of the information is challenged. Omitting formal parts, the information is as follows:
>
> > 'That J. A. Turlington * * * did unlawfully permit a certain gambling device called a punch board, designed and used for the purpose of playing games of chance for money and property, to be used for the purpose of gambling in a certain building there situate, and under the control of him, the said J. A. Turlington,' etc. * * * * * * *

> "The information charges the offense in the language of the statute, and follows approved forms and precedents, and, we think, is sufficient. State v. Wade, supra; State v. Leaver et al., 171 Mo. App. 371, 157 S. W. 821; State v. Howell, 83 Mo. App. 198; Kelly's Crim. Law & Pr. (3d Ed.) Sec. 953."

From the foregoing, we are of the opinion that punch boards are covered by Section (4753 R. S. 1909) 4290 R. S. Mo. 1929.

You inquire whether punch boards are covered by Section 4287 R. S. Mo. 1929, as follows:

> "Every person who shall set up or keep any table or gaming device commonly called A B C, faro bank, E O, roulette, equality, keno, slot machine, stand or device of whatever pattern, kind or make, or however worked, operated or manipulated, or any kind of gambling table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played or by means of such table or gambling device or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a felony, and shall be punished by imprisonment in the penitentiary for a term of not less than two nor more than five years, or by imprisonment in the county jail for a term not less than six nor more than twelve months."

In the Turlington case, supra, it was contended by appellant that the information drawn under Section 4753, supra,

did not sufficiently advise the defendant of the offense in that it did not describe the gaming characteristics of the alleged gambling device, citing State vs. Wade, 267 Mo. 249, 183 S. W. 598 to support his contention. The information challenged in the Wade case was under Section 4750 R. S. Mo. 1909, now Section 4287 R. S. Mo. 1929, supra. The court said:

> "The information there challenged was under section 4750, where a number of specific gaming devices are named, followed by a general denouncement of any gaming device of whatever kind or pattern. The information there was for an offense falling within the general provisions of the statute, and was charged in language similar to that in the information in the case at bar. The information there was held insufficient because there was no allegation bringing it within the class of the enumerated devices. Following the well-known rule of ejusdem generis, it was held in the Wade case that an information charging an offense embraced within the general provisions of section 4750 must contain sufficient averments to show that the offense charged is within the class of offenses specifically named. Furthermore, it is pointed out in the Wade case that an information containing the averments there challenged would be sufficient under section 4753, known, with reference to gaming devices, as the misdemeanor section."

It being doubtful whether punch boards would fall within the class of offenses specifically named in Section 4287, supra, we are of the opinion that prosecution for permitting punch boards to be operated should be brought under Section 4290 R. S. Mo. 1929.

You ask what type of punch boards are prohibited, and if they include punch boards that give "something every time"?

In the Turlington case, supra, the court said:

> "It is this chance to get something of more value than the amount invested that characterizes the device as a gambling one."

The test is not whether a person gets "something every time", but whether there is a chance of getting something of more value than the amount invested. If the latter, we are of the opinion that the punch board is a gambling device and is prohibited under Section 4290 R. S. Mo. 1929, supra.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General
MW:RT

STATE HIGHWAY PATROL: Meaning of "resident tax paying citizen."

March 23, 1939

4-5 FILED 63

Captain R. E. Moore
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We have your request for an opinion as to the meaning of Section 6 (Laws 1931, page 232) of the State Highway Patrol Act prohibiting the appointment of any person to be a member of the State Highway Patrol, who has not been "a resident taxpaying citizen of the State for a period of three years previous to his appointment." A person is said to be a "resident" when he lives, maintains a home, or has a domicile in the State. In substance, it means an inhabitant. State ex rel vs. Bunce, 173 S. W. 101, 187 Mo. App. 607.

The word "taxpayer" is defined as "a person owning property in the state subject to taxation, and on which he regularly pays taxes." State vs. Clements 264 S. W. 984, 986, 305 Mo. 297; State ex inf. vs. Menengali 270 S. W. 101, 103, 307 Mo. 447.

"Resident taxpayer" is synonymous with the term "qualified property tax paying voter", which means a taxpayer who is a resident of the state for a fixed period of time. Baugh vs. Little 282 Pac. 459, 461, 140 Okla. 206.

It is, therefore, the opinion of this office that the term "resident tax paying citizen of the state for a period of three years" means that the person shall have had a domicile in the state, and shall have had property which was subject to taxation, and which was duly assessed, and on which such person shall have actually paid taxes for a period of three years. A person who does not meet

these requirements is ineligible to be appointed to any position in the Missouri State Highway Patrol.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:RT

LOTTERIES: Use of photographs to select winner.

June 2, 1939

63

FILED
63

Mr. Vincent S. Moody
Prosecuting Attorney
Macon, Missouri

Dear Sir:

We have your request of May 31st for an opinion, which request is as follows:

> "A local theatre has installed a camera, which takes each patron's picture as he or she enters the theatre. The roll of film is extracted each night and sent to the State of Illinois to be developed. After the film is developed in Illinois, one picture is chosen by the photographer in Illinois and this one picture is sent back to Missouri. Each Tuesday night, this picture that has been chosen in Illinois is shown on the screen here in Macon and if the person is there to identify himself, he receives Twenty-five Dollars. If the person is not there, no one receives the money and the next week it is Thirty-five Dollars."

A lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. State v. Emerson, 318 Mo. 633, 1 S. W. (2d) 109, 111; State v. Becker, 248 Mo. 55, 154 S. W. 769.

It is therefore apparent that the payment of an admission price for attending the theatre constitutes a consideration. The prize in this case is conceded to be a Twenty-five ($25.00) Dollar cash award.

The only remaining question is: Does this scheme possess the elements of chance? The development of the pictures in Illinois, a state different from that in which

they were taken, does not materially one way or the other affect the element of chance. What is material and is decisive in this case is that someone in Illinois arbitrarily selects a picture of the person who is to receive the prize. In People v. Rehm, 57 Pac. (2d) 238, contestants in California were asked to select the best and most appropriate title for cartoons in California. The judges who passed upon the best and most appropriate titles were in New York. The distance between the judges and the contestants is immaterial. The California Court held that case to be a lottery. In the recent "Famous Names" contest, put on by the St. Louis Globe Democrat, State ex inf. Attorney General v. Globe Democrat Publishing Company, 341 Mo. 862, 110 S. W. (2d) 705, 113 A.L.R. 1104, the Court had before it a contest in which the contestants in St. Louis and the greater St. Louis area were required to select the best or most appropriate title to cartoons. A committee in New York were to determine the best or most appropriate names for each of the cartoons, and the contestants were to be bound by the answers selected in New York. The Court held the contest to be a lottery because it involved the elements of prize, consideration and chance.

The word "lottery" must be construed in its popular sense with the view of remedying the mischief intended to be prevented and to suppress all evasions for the continuance of the mischief. People v. McPhee, 139 Mich. 687, 103 N. W. 174; 69 L. R. A. 505. State v. Mumford, 73 Mo. 647, 650. State vs. Wersebe, 181 Atl. 299, 301.

The word is generic; no sooner is it defined by a court than ingenuity evolves some scheme within the mischief discussed but not quite within the letter of the definition given. People v. McPhee, 139 Mich. 687; 103 N. W. 174; 69 L. R. A. 505. State v. Clark, 33 N. H. 329. This is made apparent from an examination of a large number of cases in which various methods of distributing money or goods by chance are examined and discussed.

No one in Missouri has any way in which to find out whose picture is to be selected in Illinois.

The Supreme Court of the United States in Dillingham v. McLaughlin, 68 L. Ed. 742, l. c. 747, said:

> "What a man does not know and cannot find out is chance as to him, and is recognized as chance by the law."

The selection of the photograph in Illinois was left in the uncontrolled discretion of a judge or judges in Illinois.

Commenting upon this phase of lotteries, we find the following statement in 45 Harvard Law Review, page 1212:

> "It is somewhat surprising to find a fairly large number of decisions involving the award of prizes in the uncontrolled discretion of a judge. All of them agree that the contest is a lottery." (Italics ours.)

CONCLUSION

It is therefore the opinion of this office that the award of prizes by the use of photographs, as herein set out, constitutes a lottery in violation of Section 3314, R. S. Mo. 1929. State v. McEwan, 120 S. W. (2d) 1098.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:VC

TAXATION AND REVENUE: Taxes unlawfully collected should be
COUNTY BUDGET LAW: refunded out of Class 5 under the
REFUNDING OF TAXES: County Budget Act.

December 19, 1939

12-20

FILED
63

Honorable Vincent S. Moody
Prosecuting Attorney
Macon County
Macon, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following statement of facts and questions:

> "In 1937, a certain farm was advertised and sold for delinquent taxes. Prior to this, notice had been given to the county collector by the owner of said farm that the farm was in bankruptcy under the Frazier-Lempke Act; and therefore, the collector had no right to sell this farm. The purchaser of said farm paid the money and it was distributed to the various taxing bodies according to law. In 1939, the purchaser of said land applied to our present county collector for a deed to said premises. The collector refused to give the purchaser a deed basing his right to do so upon Section 9958 A. Laws of Missouri, 1933, at page 441. The purchaser of the land who had paid his money into the county then applied to the County Court for a refund of the purchase price plus interest. The county court is willing to refund the purchase price.
>
> "Under the above state of facts,

> will you please render me an opinion upon the following two questions:
>
> "1-Under the budget law, upon which fund should a warrant refunding the purchase price be drawn?
>
> "2-If they are authorized to pay, should they pay interest on the amount refunded?"

I think an answer to your question will depend entirely upon what the statutes provide in connection with taxation and county budget law.

It seems that your collector has refused to deliver a deed to a party who purchased lands which he had offered for sale for taxes because the sale was invalid. Section 9958a, Laws of Missouri, 1933, at page 441, provides as follows:

> "Whenever the county collector shall discover, prior to the conveyance of any lands sold for taxes, that the sale was for any cause whatever, invalid, he shall not convey such lands; but the purchase money and the interest thereon shall be refunded out of the county treasury to the purchaser, his representatives or assigns, on the order of the county court. Such invalid sale shall suspend for the period intervening between the date of the sale and the discovery of its invalidity the running of the statute of limitations. In such cases the county collector shall make an entry opposite to such tracts or lots in the record of certificates of purchase issued or redemption record that the same was erroneously sold, and the cause of invalidity, and such entry shall be prima facie evidence

> of fact therein stated. He shall notify the county clerk of such action, whose duty it shall be to make a like entry upon his sale record."

It will be noted by this section that the lawmakers intended that in cases where a party had purchased lands at sales under the Jones-Munger Act and the collector could not execute and deliver a deed on account of the sale being invalid, that the purchase money, together with interest thereon, should be refunded out of the county treasury to such purchaser.

Then the next question which confronts us is, granting that the money is to be refunded out of the county treasury, from what class would this refund be taken. In 1933 our lawmakers enacted a bill known as the County Budget Act. Under this law an attempt was made to classify all claims against the county and require that they be paid in the order of their classifcation. The act to which we refer is Laws of Missouri, 1933 at page 340. This act has been before the courts on a number of occasions and without an exception the courts have held that the counties are bound by the act and must follow its provisions.

On the question of the classification of expenditures, we find that by Section 2 of the Act, page 341, it is provided as follows:

> "The court shall classify proposed expenditures in the following order.
>
> "Class 1: The county court shall set aside and apportion a sufficient sum to care for insane pauper patients in state hospitals. Class 1 shall be the first obligation against the county and shall have priority of payment over all other classes.

"Class 2: Next the county court shall set aside a sum sufficient to pay the cost of elections and the cost of holding circuit court in the county where such expense is made chargeable by law against the county except where such expense is provided for in some other classification by this act. This shall constitute the second obligation of the county and all proper claims coming under this class shall have priority of payment over all except class 1.

"In estimating the amount required in class 2 the county court shall set aside and apportion in the budget a sum not less for even years than the sum actually expended in the last even numbered year and for odd years an amount not less than the amount that was actually expended during the last preceding odd numbered year.

"Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county.

"Class 4: The county court shall next set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be

included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six.

"Class 5: The county court shall next set aside a fund for the contingent and emergency expense of the county, which shall in no case be more than one-fifth of the anticipated revenue. From this class the county court may pay contingent and incidental expenses and expense of paupers not otherwise classified. No payment shall be allowed from the funds in this class for any personal service, (whether salary, fees, wages or any other emoluments of any kind whatever) estimated for in preceding classes.

"Class 6: After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose. Provided however, that the county court shall not incur any expense under class six unless there is actually on hand in cash funds sufficient to pay all claims provided for in preceding classes together with any expense incurred under class six. Provided, that if there be outstanding warrants constituting legal obligations such warrants shall first be paid before any expenditure is authorized under class 6."

By a reference to the foregoing section on expenditures, we think that the refund authorized by said Section 9958a, Laws of Missouri, 1933, page 441, could only be paid out of Class 5. This claim would be in the nature of contingent or an emergency claim.

CONCLUSION.

From the foregoing it is the opinion of this department that where a party purchases lands which the county collector has offered for sale for delinquent taxes and has paid money therefor to the collector, that where the collector is unable to deliver a valid deed, then it is the duty of the county court to order a warrant drawn on the county treasury repaying to such purchaser the amount that he has paid the collector for the lands together with interest thereon at the legal rate.

We are further of the opinion that this claim for refund and interest should be classed as a fifth class demand against the county and paid out of that class.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

CRIMINAL COSTS: Payment of an insufficient check after five days is not a defense to the action.

April 3, 1939

4-6 FILED 64

Hon. L. I. Morris
Prosecuting Attorney
LaFayette County
Lexington, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of March 28th, 1939, which reads as follows:

> "It is respectfully requested that your office supply me with an opinion upon this set of facts:
>
> "On December 1st, 1937 an information was filed under Section 4305 Revised Statutes of Missouri, 1929, on a worthless check given by 'A. C.'.
>
> "Before a hearing on this case 'A.C.' files a petition in bankruptcy in the U. S. Federal Court. 'M', complaining witness in the criminal action stated that he had filed the claim with the district court for the full amount of the check and the cause was continued until the subsequent date. August 1, 1938, 'A. C.' declared a bankruptcy. Matters in his petition were disposed of and his assets failed to pay in full upon this check.
>
> " 'M,' because of this failure to receive full payment insists upon criminal prosecution upon the original action.

"It is requested that your office supply me with an opinion stating whether the original criminal action can be prosecuted under Section 4035 Missouri Revised Statutes 1929, in the view of decisions rendered in State vs. Taylor, 73 S W 378."

Section 4305, R. S. Missouri, 1929, reads as follows:

"Any person who, to procure any article or thing of value, or for the payment of any past due debt or other obligation of whatsoever form or nature, or who, for any other purpose shall make or draw or utter or deliver, with intent to defraud any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker, or drawer, has not sufficient funds in, or credit with, such bank or other depository, for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of misdemeanor, and punishable by imprisonment for not more than one year, or a fine of not more than one thousand dollars, or by both fine and imprisonment."

This section is the lessor charge of section 4304, R. S. Missouri, 1929, as amended by the laws of 1931, page 200.

Section 4304, R. S. Missouri, 1929, is a felony, and applies to the drawing of checks on a bank where t he drawer has no account, while section 4305, R. S. Missouri, 1929, is a misdemeanor and ap-

plies to the drawing of a check in which the drawer has an account but insufficient to cover the full amount of the check.

The gist of the crime under section 4305, supra, is the drawing of the check and the crime is committed at the time that the check is written and delivered. The fact that the check, after a five days notice had been given, was paid would not be a defense on the prosecution. It was so held in the case of State v. Loesch, 180 S. W. 875, l. c. 879, par. 10, where the court said:

> "One of the prosecuting witnesses was asked on cross-examination if the defendant had not attempted to settle with him after the deal had been consummated through which the defendant obtained the property. This character of examination and kindred questions following same were not permitted to be answered by the trial court, on the ground that, if the testimony were admitted, it would be proof simply to show self-serving acts or declarations, and hence no defense. The crime of obtaining property with the intent to cheat and defraud, which is the gist of this action, having been proved, testimony to show that the defendant had made restitution would not have been admissible. State v. Cooper, 85 Mo. 256. Much less, then, is testimony to be admitted which only tends to show that defendant would have reimbursed the parties if it had been possible. This testimony, if admitted, instead of being a circumstance in defendant's favor, would tend to show that he knew he had gotten the property of the prosecuting witnesses for nothing, and, cognizant

of this fact, evinced a willingness, when confronted with the charge, to reimburse them. The trial court therefore did not err in the exclusion of this character of testimony."

As mentioned in your request the case of State v. Taylor, 73 S. W. (2d) 378, only holds that a check post dated comes under section 4305, 4306, R. S. Missouri, 1929.

CONCLUSION.

In view of the above authorities it is the opinion of this department that if the information which was filed on December 1st, 1937, and was not dismissed, a trial could be had upon the information, even though part of payment had been made upon the check under the bankruptcy proceeding, as described in your request. The statute of limitations would be one year upon this action, for the reason that it is a misdemeanor and a new information could not be filed upon the charge.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General.

WJB:RW

TAXATION:

COUNTY CLERK AND EXTENTION OF TAXES:

County Clerk should extend taxes separate for each bond issue.

4-6

April 3rd, 1939

FILED
64

Hon. L. I. Morris,
Prosecuting Attorney,
Lafayette County,
Lexington, Missouri.

Dear Sir:

This is in reply to yours of recent date requesting an opinion on the following statements of facts and request which are as follows:

"STATEMENTS OF FACTS"

"On August 30, 1938, an election was held in Lafayette County, Mo. for the purpose of authorizing the incurring of indebtedness by Lafayette County, Mo. in the sum of $20,000.00 and the issuance of bonds for the purpose of building a court house (in reality this was an addition to the already existing court house building).

A proposition to authorize incurring indebtedness for Lafayette County, Mo. in the sum of $33,000.00 and the issuance of bonds for the purpose of building a jail in Lafayette County, Mo. was duly held and both propositions carried and the county authorized to levy and collect tax in addition to the other taxes provided by law.

These funds were matched by the U. S. Federal Government under a grant duly authorized by law and originally two project numbers were assigned, however, at a subsequent date only one project was used by the government for the purpose of the administration, payment and supervision of these buildings.

A contract was let under the proper bids and bids were submitted under a single project number.

OPINION REQUESTED: Question as to whether under this set of circumstances two columns or separate columns should be shown upon the tax books of Lafayette County or should one column suffice for carrying this item of bonds.

Should this record (sample page of the county record accompanies this letter) show the two separate bond items or should one single column suffice."

From your statement of facts and inclosure, it appears that your County Court has been authorized to issue bonds in the amount of $20,000.00 for the court house and $33,000.00 for the jail. It also appears that the Federal Government has matched these funds on this work which was started as two projects, but were later consolidated into one for the purpose of the administration payment and supervision of the work.

We do not think your question would be affected by the fact that these projects were consolidated. It would depend on whether the monies which you have expended for this work have been derived from two different bond issues.

From your inclosure we also find that the election authorized the issuance of two sets of bonds, one for the courthouse and one for the jail. The issuance of these bonds is authorized by Section 2905, R. S. Mo., 1929, by which it appears that bonds issued for both might have been consolidated, but since in your case they are separate, they will have to be treated separately.

For the purpose of paying the interests, costs and premiums on these bonds, Section 2917, R. S. Mo., 1929, requires the State Auditor to perform certain duties which are set forth which are as follows:

> "The State Auditor shall, annually, on or about the first day of July, certify to the several county courts, city councils, boards of aldermen, boards of trustees, school boards, boards of supervisors or boards of commissioners, the amount required during the next fiscal year to pay maturing interest coupons, together with ordinary costs to the state of collection and disbursement of the same, which amount shall thereupon be levied as a special tax upon all property in such county, city, village, township, school district, special or common road district, drainage district or levee district, and shall be collected with the state revenue and paid over to the treasurer of the county, city, vil-

> lage, township, school district, drainage district or levee district, special or common road district, having issued such outstanding registered bonds, which shall be deposited by such treasurerto the credit of his respective county, city, village, township, school district, drainage district, special or common road district, or levee district, in the bank or banks at which the same are made payable; provided, that this special tax may be paid in coupons, registered under this article, overdue or maturing during the current fiscal year."

By this section the Auditor is required to certify the amount which will be required to meet the demands of each bond issue, and it is on this section that the County Court fixes the rate of levy necessary to pay the same.

Section 9876, Laws of Missouri, 1933, page 421, provides in part as follows:

> "As soon as the Assessor's book shall be corrected and adjusted, the Clerk of the County Court, except in St. Louis City, shall, within ninety days thereafter, extend the taxes therein in proper columns prepared for such extentions, which book, with the taxes so extended therein, shall be authenticated by the seal of the Court as the Tax book for the use of the Collector;* * * "

From the foregoing it will be seen that it was the intention of the Lawmakers that the tax levy for each bond issue should be made and carried separately on the tax books.

CONCLUSION

From the foregoing if the monies from both bond issues were spent for the courthouse and jail, then the levy should be made for each issue and carried in separate columns on the tax books, regardless of the fact that the projects were carried on as one project.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

TWB/RV

PROSECUTING ATTORNEY: Prosecuting Attorneys in certain counties are entitled to additional pay for acting in juvenile cases, under 1939 Session Laws: COUNTY TREASURER: Treasurer in counties under township organization in certain counties is entitled to additional amount allowed under 1939 Session Law: COUNTY COURT: County Judges are entitled to mileage in certain counties under the 1939 Session Law: COUNTY CLERK: County Clerk in certain counties is allowed $500.00 additional pay as budget officer, under the 1939 Session Law.

December 22, 1939

FILED
64

Mr. Henry N. Moore
Presiding Judge
Nodaway County
Maryville, Missouri

Dear Judge Moore:

We are in receipt of your request for an opinion, dated December 16, 1939, which reads as follows:

> "I would like an opinion on the following officers as effected by the 1939 Session Acts, as it would seem to me that unless additional duties have been added that Article 14, Section 8 of the Constitution would preclude any increase in salary.
>
> "The Prosecuting Attorney has no additional duties from the fact that Juvenile cases were handled by that office before his election. The Treasurer also has no additional duties. Is the mileage of the County Court considered additional to the salary and are we entitled to this mileage during our elected term? Also your opinion of the County Clerk's $500.00 as Budget Officer, as this has been handled by former County Clerks and is not an additional duty."

In the above request you have asked the opinion of this Department as to additional compensation allowed the prosecuting attorney, county treasurer, county judges and the county clerk, under the 1939 Session Laws. We will attempt to answer this request separately as to each officer. Under the 1930 census the population of Nodaway County was 26371 and this opinion is based upon that bracket.

I

First, as to the prosecuting attorney, we find that Section 14164 R. S. Missouri, 1929 reads as follows:

> "Any reputable person, being a resident of the county, having knowledge or information of a child, who appears to be a neglected or delinquent child, may file with the clerk of the circuit court a petition, in writing, setting forth the facts, verified by affidavit. It shall be sufficient that the affidavit be on information and belief."

It will be noticed under this section that any reputable person, a resident of the county, may file an information against a child with the clerk of the circuit court.

Section 14164, supra, was repealed, and a new section enacted, which appears at page 273, Laws of Missouri, 1939, and reads as follows:

> "When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately

> thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. The prosecuting attorney shall receive as compensation for the additional services and duties required under this act, in addition to the salary and fees now allowed prosecuting attorneys by law, an amount equal to 25% of the annual salary of such prosecuting attorney, per annum, to be paid in equal monthly installments upon the warrant of the county court issued in favor of the prosecuting attorney on the county treasurer for that purpose; Provided, however, that this section shall be applicable only to counties of less than 50,000 population."

It will be noticed under the above section that the word "shall" appears, it also included "shall file a complaint with the prosecuting attorney", and went on further to say that the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition which covers a different procedure than that set out in Section 14164, supra. It will also be noticed in the title of the act of 1939 that it specifically states "imposing upon the prosecuting attorney in the various counties the duty of filing petitions in the juvenile court * * * *." Under the old Section 14164, it was not the duty of the prosecuting attorney to file the complaint with the clerk of the circuit court. There is no question but that additional duties has been added to the prosecuting attorney and he should be allowed the additional fees allowed by the act of 1939. This section by imposing additional duties upon the prosecuting attorney and allowing additional compensation is not a violation of article 14, section 8, of the Missouri Constitution.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the prosecuting attorney of Nodaway County should be allowed the additional salary and fees as set out in Section 14164, Session Laws of Missouri, 1939, from the time that the act went into effect.

II

As to the second inquiry in your request, concerning the county treasurer, I am enclosing an opinion rendered by this office, on December 13, 1939, and addressed to your county treasurer which held that section 12316, Laws of Missouri, 1939, page 386, was not a violation of Article 14, Section 8, of the Missouri Constitution. The reason why this additional limitation upon the pay of the county treasurer is not a violation of the Constitution is the fact that previous to the enactment of 1939 the salary of the county treasurer was not specifically set at any statutory amount, but remained in the discretion of the county judges of the county.

III

You also inquire as to the mileage of the county court, as set out in the 1939 act, for additional salary and whether or not it is a violation of Article 14, Section 8, of the Missouri Constitution if allowed.

Section 2092, Laws of Missouri, 1933, page 204, partially reads as follows:

> "* * * In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day

> for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court, provided that such mileage shall be charged only once for each regular term, and no mileage shall be paid for any special or adjourned term."

The above section set out was amended by the Laws of 1939, page 332, is numbered the same and partially reads as follows:

> "* * * In all counties of this state now or hereafter having less than seventy-five thousand inhabitants, the judges of the county court shall receive for their services the sum of five dollars per day for each day necessarily engaged in holding court. In addition to the salaries herein authorized to be paid to judges of the county court in counties having seventy-five thousand inhabitants or more, and in addition to the per diem herein authorized to be paid to the judges of the county court in counties having less than seventy-five thousand inhabitants, said judges shall receive five cents per mile for each mile necessarily traveled in going to and returning from the place of holding county court; * * * * * * * * * * * * "

It will be noticed in comparing the 1933 act, supra, and the 1939 act, supra, that there was no increase upon the amount per mile received by the county judge for mileage necessarily traveled in going to and returning from the place of holding county court.

The 1933 act, supra, restricted the trips made to one trip each regular term, while under the 1939 act this restriction was omitted, so that the county judge may collect the mileage for each trip to the place of holding court from his residence and return. Our first reason for holding that this act of 1939 is not a violation of article 14, section 8 of the Missouri Constitution, is, that the amount allowed per mile has not been increased, and further for the reason that the amount allowed each judge of the county court for mileage has not been specifically set by statute for the reason that one judge may live a greater distance from the courthouse than either of the other two judges, and for the further reason that a judge may move his place of domicile to a shorter or greater distance from the place of holding court and therefore the mileage fees are not specifically set out by statute. Our further reason that the act of 1939 in reference to mileage of the county judges is not a violation of article 14, section 8, of the Missouri Constitution, is that mileage is considered as expenses and not a part of the compensation, or fee. In support of that holding, we set out the following out-state decisions.

In the case of Taxpayers' League of Carbon County, Wyoming, v. John McPherson et al., 106 A.L.R. Ann. 767, Wyoming Supreme Court, February 11, 1936, 54 Pac. (2d) 897, the court said:

> "The question whether an item of travel fees, with other items for per diem fees and extra service, should be included in the fee and emolument account of a federal district attorney, as belonging to the 'fees, charges and emoluments' to which that officer was entitled by reason of the discharge of his official duties, was involved in the case of United States v. Smith, 158 U. S. 346, 15 S. Ct. 846, 847,

39 L. Ed. 1011. The federal statute provided that certain fees should be allowed district attorneys in addition to a stated salary. In that part of the act providing for fees was a provision that these attorneys should receive $5 per day while attending court and 10 cents per mile for traveling from the place of their abode to the place of holding court, and a like sum per mile for returning. In 1882 (22 Stat. 344) the law was changed so that as it affected New Mexico and Arizona it read, 'For the like services, double the fees hereinbefore provided' (Rev. St. U. S. sec. 837); but this amendment also limited the amounts receivable as fees and salaries by such district attorneys to $3,500 annually. The plaintiff, a district attorney of the United States for the Territory of New Mexico, claimed the increase per diem and mileage, although if this mileage was regarded as a fee, his salary and fees would exceed the statutory limited amount. The government insisted that the mileage was a fee or emolument and should be considered in computing the annual salary. In holding that the allowance was not a 'fee, charge or emolument,' but was intended simply to reimburse the officer for expenses, the Supreme Court of the United States said: 'While an allowance for travel fees or mileage is, by section 823, included in the fee bill, we think it was not intended as a compensation to a district attorney for services performed but rather as a reimbursement for expenses incurred, or presumed to be incurred, in traveling from his residence to the place of holding court, or to the office of the judge or commissioner. The allowance of mileage to officers of the United States, particularly in the military and naval service, when traveling in the service of the government, is fixed at an arbitrary sum, not only on account of the difficulty of auditing the petty items which constitute the bulk of traveling expenses, but for the reason that officers travel in different styles; and ex-

penses, which in one case might seem entirely reasonable, might in another be deemed to be unreasonable, There are different standards of traveling, as of living; and, while the mileage in one case may more than cover the actual expenses, in another it may fall short of them. It would be obviously unjust to allow one officer a certain sum for traveling from New York to Chicago, and another double that sum, and yet their actual expenses may differ as widely as that. The object of the statute is to fix a certain allowance, out of which the officer may make a saving or not, as he chooses or is able. And while, in some cases, it may operate as a compensation, it is not so intended, and is not a fee, charge, or emolument of his office, within the meaning of section 834. It is much like the arbitrary allowance for the attendance of witnesses and jurors, which may or may not be sufficient to pay their actual expenses, depending altogether upon the style in which they choose to live.'

"We think it plain, from the authorities cited above, that generally speaking, statutory compensation for expenses necessarily incurred in performing the duties of an office is neither salary nor an emolument of the office within the meaning of section 32 of article 3 of our State Constitution. Such compensation is merely to assure the officer that for the performance of his official duties alone, and not for the performance of such duties and the payment of expenses incident thereto, he will receive the salary provided by law therefor. Consequently the amount allowed by law for such expenses may be changed during the officer's term, without doing violence to the aforesaid constitutional provision. * * "

Also, it is stated in State ex rel. Weldon v. Thomason (1919) 142 Tenn. 527, 221 S. W. 491:

> "* * that it is well established upon reason and authority that the expenses of public officers incurred in the performance of their official duties are distinct from and not included in the compensation allowed them, unless authoritatively so declared, and the apparently uniform consensus of opinion in those cases wherein the question has been considered is to the effect that constitutional prohibitions against change in the compensation fixed for public officers are not intended to be construed as limitations upon legislative authority to provide for the expenses of such officials. *"

Also, in Kirkwood v. Soto (1891) 87 Cal. 394, 25 P. 488, it was held:

> "* * * that it was the compensation for services to be rendered, and not the incidental expenses of the office, that the legislature was forbidden to increase by the provision of the Constitution that the compensation of any county, city, town, or municipal officer should not be increased after his election, or during his term of office. The County Government Act provided, in respect to the class of county officers to which the officer in question belonged, that they should receive as compensation for the services required of them by law, or by virtue of their office, a specified salary, and the court said that the words 'compensation' and 'salary' were evidently used synonymously in the Constitution and in such act. In this case a statute passed during the term of office of a county super-

> intendent of schools, which provided that each county superintendent should receive his actual and necessary traveling expenses, to be paid out of the general fund, was held not to violate the constitutional restriction. The court further said that since the adoption of the Constitution containing the restriction, many acts had been passed by the legislature, after the commencement of terms of office, providing for the payment of necessary expenses incident to the offices, and their constitutionality had never been questioned."

Also, it was held in Scroggie v. Scarborough (1931) 162 S. C. 218, 160 S. C. 596:

> "* * that an allowance of expenses, including mileage, to members of the legislature, did not violate a constitutional prohibition against an increase in the compensation of public officers during their term of office."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county judges of Nodaway County are entitled to the mileage as set out in Section 2092, Laws of Missouri, 1939, page 332, and it is not a violation of Article 14, section 8, of the Missouri Constitution.

IV

In regard to your inquiry as to whether or not the county clerk of Nodaway County is entitled to $500.00 as budget officer, and as set out in Section 21a, Laws of

Missouri, 1939, page 658, we are calling your attention to the following: Section 21, Laws of Missouri, 1933, page 351, which reads as follows:

> "Wherever in this act the term 'budget officer' shall appear, it shall be deemed to mean the presiding judge of the county court, unless the county court shall have by order designated the county clerk as budget officer. Wherever the term 'accounting officer' shall appear, it shall be deemed to mean the county clerk, auditor, accountant, or other officer or employe keeping the principal financial records of the county."

It will be noticed under the above section that the term "budget officer" is deemed the presiding judge, unless the county court shall have by order designated the county clerk as "budget officer." In view of that statement, the legislature has not seen fit to specifically say that the county clerk at all times shall be the budget officer. In some counties the county clerk is not the budget officer, but it remains with the presiding judge of the county court.

Laws of Missouri, 1939, Section 21a, page 658, reads as follows:

> "In all counties of the state now or hereafter having a population of eighty thousand inhabitants or less, the clerks of the county court of such counties shall for services as budget officers receive and be paid an annual compensation, payable out of the County Treasury at the end of each month in equal monthly installments in the same manner as the compensation of such county clerks are now paid, which compensation shall be in addition to the compensation now allowed them by law for their services as clerks of the county court of their respective counties, and shall be in full compensation for all additional services now or hereafter required of, or rendered by them under this act. Such additional annual compensation

> shall be in all counties, now or hereafter having, according to the last federal decennial census, a population of less than ten thousand inhabitants the annual sum of $200.00, a population of ten thousand inhabitants and less than fifteen thousand inhabitants the annual sum of $300.00, a population of fifteen thousand inhabitants and less than twenty-five thousand inhabitants the annual sum of $400.00, a population of twenty-five thousand inhabitants and less than fifty thousand inhabitants the annual sum of $500.00, a population of fifty thousand inhabitants and not more than eighty thousand inhabitants the annual sum of $600.00."

It will be noticed under Section 21a, supra, that in counties having a population of 25,000 inhabitants and less than 50,000 inhabitants, the county clerk shall receive $500.00 for his services as budget officer. Under this section there is no alternative but that the county clerk is the budget officer, and it becomes his duty to act as a budget officer and for that reason additional duties have been placed on the county clerk by statute, while, under Section 21 of the 1933 Session Laws, page 351, it was in the discretion of the county court whether or not the county clerk should act as budget officer. In view of this comparison, additional statutory duties have been placed upon the county clerk for which he should receive additional compensation.

CONCLUSION

In view of the above sections and comparisons, it is the opinion of this department that the county clerk of Nodaway County, is entitled to $500.00 additional pay per annum as budget officer, in compliance with Section 21a, Laws of Missouri, 1939, page 658, and it is not a violation of Article 14, Section 8, of the Missouri Constitution.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

WJB:DW

STATE ATHLETIC COMMISSION: Rule of commission is superior to rule of city commission

February 23, 1939

FILED 65

Honorable Russell Murphy
Chairman of State Athletic Commission
Mississippi Valley Trust Company Building
St. Louis, Missouri

Dear Sir:

This will acknowledge receipt of a letter under date of February 20, 1939 from H. T. Dawson, Commission Secretary requesting in your behalf our opinion on the following:

> "Do the rulings of a State Commission created by State law take presidence over the rulings of a city commission, created by a city ordinance or city office, where the State and City Commissions here to referred to might be different on the same question."

Chapter 92 R. S. Mo. 1929 and the amendments thereto is the law of this state regulating boxing, sparring and wrestling exhibitions. Such legislation has been held to be a valid exercise of a state's police powers. Fitzsimmons vs. New York State Athletic Commission 146 N. Y. S. 117.

Section 12999 of Chapter 92 R. S. Mo. 1929 provides in part:

> "That the athletic commission of the State of Missouri shall have general charge and supervision of all boxing, sparring and wrestling exhibitions held in the State of Missouri, and it shall have the power, and it shall be its duty: First, to make and publish rules and regulations governing in every particular the conduct of boxing, sparring and wrestling exhibitions, the time and place thereof, and the prices charged for admission thereto. * * *"

We assume, that the city has, under the police powers delegated to it by the state, enacted an ordinance similar to the above statute, that both the rule of the state and the city commissions are reasonable but are irreconcilably in conflict. These assumptions leave the bare question: Which is superior?

In order to determine the answer to this question we must look to the authority behind the rules of the state and city commission. In one it is the state and its statutes and in the other it is the city and its ordinance. Thus the question really is : "Is a statute of a state superior to an ordinance of a city?" Ascertaining this makes the question simple and one which has been decided numerous times. In St. Louis vs. Ameln 235 Mo. l.c. 684 and 685 it is stated:

> "As the voice of the State lawmaker is paramount to that of the municipal lawmaker, and as the duty of the latter is to conform to the former, in a field where the right to legislate is concurrent, in case of conflict between a State law and a municipal ordinance, the latter must give way."

All cities of the state are subject to the rule laid down in the above case including those cities with special charters adopted under Sections 16 and 20 of Article 9 of the Mo. Constitution. State ex rel vs. Jost 265 Mo. 51; Section 23 Article 9 Mo. Constitution; State ex rel vs. St. Louis City 2 S. W. (2d) 713.

CONCLUSION

Therefore, it is the opinion of this department that administrative rulings of the state athletic commission are superior to and take precedence over an inconsistent administrative ruling of the Athletic Commission of an incorporated city of this state.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

(Acting) Attorney General

LLB:WW

ROADS AND BRIDGES:
SPECIAL ROAD DISTRICTS:
PROPERTY SUBJECT TO TAX:
DISTRICT FUNDS EXPENDED;
WHERE:

Special road districts organized under Art. IX, chap. 42, R.S. Mo. 1929, are not authorized to make levies for road and bridge purposes. Cities located in a special road district are not exempt from the general levies for road and bridge purposes. Special road district funds to the amount of 25% of the amount collected in a city may be expended by the commissioners on the streets in such city.

March 27, 1939

3-27

FILED
65

Mr. Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department pertaining to special road districts and the taxes and how such taxes shall be expended. You have set out a number of questions in your request, but we will give you the general principles of the law on this subject and then answer your questions in the order that they have been submitted.

You state in your request that the special road district to which you refer has been created by the authority of Article IX, chapter 42, R. S. Missouri, 1929. These districts are com only termed eight-mile special road districts.

Since such districts are created by the statute their officers must look to that statute for their powers and duties. I note in your request that you state that the commissioners have levied a certain tax by virtue of the provisions of Section 8067, R. S. Missouri, 1929. You will note that that Section is included in Article X, chapter 42, R. S. Missouri, 1929, under which special road districts, with benefit assessments, are created. This Section does not apply to your special road districts which were created under Article IX of that chapter, therefore, your commissioners are not authorized to make a levy under authority of that Section.

The lawmakers have provided by Sections 7890 and 7891, R. S. Missouri, 1929, for the raising of the revenue for road districts. Section 7890, supra, authorizes a levy on all real and personal property in the county. Such levy shall not exceed twenty cents on the one hundred dollars valuation. This is for the fund known as the county road and bridge fund. Section 7891, supra, authorizes a levy not exceeding twenty-five cents on the one hundred dollars valuation on all real and personal property in the county. This fund is known as "the special road and bridge fund."

In State ex rel. Road District v. Burton, 283 Mo. 41, it has been held that the road taxes received by virtue of the two foregoing levies shall be turned over to the commissioners of such road district provided timely application therefor has been made by such district.

Coming to your questions in the order that you have submitted them. In answer to Question 1 which is as follows:

> "Is the order of the State Auditor correct, in other words is the special road district a special tax unit or must the tax be uniform over the entire county. May the special road district legally levy a tax at a less or greater rate, at least a different rate from that paid by the remaining part of the County."

will say that since we have held above that the special road district is not authorized to make a levy, then the only levy which can be made for road and bridge purposes is that authorized to be made by the county court by virtue of the provisions of said Sections 7890 and 7891 which require the levy to be made on all real and personal property in the county.

Answering Question 2 of your request which is as follows:

> "Is the property within the corporate

> limits of the City of Kirksville, subject to a general county road tax."

will say that since said Sections 7890 and 7891 require the levy to be made on all taxes, real and personal, in the county, then the property within the corporate limits of the City of Kirksville could not be excluded from this levy. This would be in violation of the provisions of Section 3, Article X of the Constitution of Missouri, which is as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

The only property in the county which is exempt from the levy authorized by said Section 7890 and 7891 is that listed under Section 6, Article X of the Constitution of Missouri, which is as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

Answering Question 3 of your request which is as follows:

> "Is the property within the incorporated limits of the City of Kirksville, subject to a special road district tax levied if the one attempted to be levied has been by the Commissioners of the Special Road District or the County Court."

will say that by virtue of the foregoing statements the property within the incorporated limits of the City of Kirksville is subject to the "special road and bridge tax" and the "general road and bridge tax" levied by virtue of the provisions of said Sections 7890 and 7891, but since the commissioners of the special road districts are not authorized to levy a special road district tax, then the property within the limits of the City of Kirksville or within the special road district would not be liable for the payment of the tax for it is levied without authority and is void.

In answer to your Question number 4 which is as follows:

> "Are the Commissioners of the Special Road District, if privileged to levy it, privileged to assess against that part of the property in the district lying outside the city and not extending the same against the property within the city."

will say that since we have heretofore ruled that the commissioners of special road districts are not authorized to make a levy of this tax, then there would be no authority to assess the tax against any property in the district whether it is within the corporate limits of a city or not.

In answer to Question 5 which is as follows:

> "Property lying within the incorporated limits of the city subject to the gener-

> al levy of the County assessed for bush and weed tax, bridge and road tax, and if so must said funds be delivered to the Special Road District or may they be spent outside of the Special Road District."

we find that Section 8042, R. S. Missouri, 1929, provides as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commis-

> sioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

As heretofore stated if the county court makes the levy under said Sections 7890 and 7891, then all the property in the county is subject to the payment of these taxes and if the commissioners of the special road district make timely application for that portion of said taxes which is raised from property in their special road district, then it is the duty of the county court to turn that money over to the commissioners of the district.

Answering Question 6 of your request which is as follows:

> "Under Section 8034, R.S. Mo. 1929, may the Special Road District deliver funds not to exceed 25% to the City Council and allow them to spend these funds on the streets of said incorporated city or must said funds be actually expended by the district. Is it mandatory for the Special Road District to spend funds in the sum of 25% within the incorporated city."

Section 8034, R. S. Missouri, 1929, authorizes the commissioners of the special road district to expend for the purpose of grading and repairing streets in corporate limits of the city of the district.

You ask the question whether or not it is mandatory on the commissioners of the district to expend this one fourth of its revenue within the corporate limits of a city. In answer to that we will say that it is not mandatory, and this is a matter which is entirely within the discretion

of the commissioners of the district how much of the road fund they will expend on the streets in a city.

In answer to Question 7 which is as follows:

> "If the Commissioners of the Special Road District do vote a levy on all of the property within the district and deliver it to the County Court with the request that the same be ordered extended as a tax, does the County Court have any discretion in the matter or is it obligatory upon the Court to make the extension."

will say that since the commissioners of the special road district are not authorized to make a levy for road and bridge purposes, then the county court is not required to nor authorized to extend a tax on such levy.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION:
ROAD AND BRIDGE LEVY AND BUDGET ACT:

All road and bridge taxes collected on properties in special road district should be paid to the special road district on demand even though such taxes are apportioned as provided by the County Budget Act.

April 18, 1939

4-26

FILED
65

Mr. Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following questions:

"1. Is the revenue received by the county under the provisions of the laws of Missouri, pertaining to class 3 to be delivered to the Commissioners of the road district in accordance with the proportional part of the levy received from the special road district?

"2. Is the revenue received by the county and set aside for use in accordance with the provisions of class 3, Section 2, of the County Budget Statutes Session Acts 1933, to be used by the county for the repair and replacement of bridges in the county outside of the special road district from which part of the money has been received?

The court order pertaining to your question which you submitted is as follows:

"Order No. 2

"In Re: County Levy for 1938.

"It is ordered by the County Court of Adair County, Missouri, on this 2nd

> day of May, 1938, it being the first day of the Regular May Term, 1938, that a levy of fifty cents (.50¢) per one hundred dollars ($100.00) valuation be extended against all real estate and personal property within the boundaries of Adair County, Missouri, according to Section 9871 and 9873, Revised Statutes of Missouri, 1939, and apportioned to the classifications as follows:
>
> "Class No. 1, four cents (.04¢) per one hundred dollar valuation.
> Class No. 2, seven cents (.07¢) per one hundred dollar valuation.
> Class No. 3, ten cents (.10¢) per one hundred dollar valuation.
> Class No. 4, fifteen cents (.15¢) per one hundred dollar valuation.
> Class No. 5, eleven cents (.11¢) per one hundred dollar valuation.
> Class No. 6, three cents (.03¢) per one hundred dollar valuation.
>
> "It is so Ordered."

The copy of this court order, fixing the levy for county revenue, shows that the county court fixed the levy for such purposes at the maximum amount as is authorized by the provisions of Section 9873, R. S. Missouri, 1929, which section provides in part as follows:

> "For county purposes the annual tax on property not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof shall not in any county in this state exceed the rates herein specified: * * * * * * * * * * * * * in counties having ten million dollars and not exceeding thirty million dollars said rate shall not exceed fifty cents on the one hundred dollars valuation, * * * * * "

The official records show that your county comes within the brackets of ten million to thirty million dollars in valuation, therefore, a levy of as much as fifty cents on the one hundred dollars assessed valuation may be made for county revenue purposes. Section 7890, R.S. Missouri, 1929, which pertains to the levy that the county court is required to make for road and bridge purposes, is as follows:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

This section, prior to its amendment in 1921, fixed a minimum of ten cents on the one hundred dollars valuation which the court was required to levy, but since the amendment, the minimum is removed and only the maximum remains, but it is mandatory upon the court to make some levy under this section.

Section 8042, R. S. Missouri, 1929, which relates to the road and bridge taxes collected on properties in special road districts, provides in part as follows:

> "In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of

> any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district ; * * * * "

The two foregoing sections have been before our appellate courts on many occasions and every time it has been held that all taxes for road and bridge purposes collected on properties in a special road district belonged to the district and must be turned over to such district upon timely application being made therefor.

The levy authorized by Section 7890, supra, is a part of the levy for county revenue purposes, and the amount of this levy plus whatever other levy the court may make for county revenue purposes must not exceed the levy authorized by Section 7893, supra, which in your case is fifty cents on the one hundred dollars assessed valuation.

This question was before our Supreme Court in State to Use of Covington v. Wabash Ry. Co., 319 Mo., 302, l.c. 305, wherein the court said:

> "* * * * We are, therefore, of the opinion that the levy for road purposes under amended Section 10682 (which is now Section 7890, R. S.

> Mo. 1929) in the instant case was a levy for county purposes within the meaning of the reenacted Section 12865, (which is now Section 9873, R. S. Mo. 1929) and that as a matter of construction the ten-per-cent restriction applies."

Section 9871, R. S. Mo. 1929, provides as follows:

> "As soon as may be after the assessor's book of each county shall be corrected and adjusted according to law, the county court shall ascertain the sum necessary to be raised for county purposes, and fix the rate of taxes on the several subjects of taxation so as to raise the required sum, and the same to be entered in proper columns in the tax book."

Since it has been held in the Wabash R. R. case, supra, that the levy required by Section 7890, is a levy for county purposes, and since Section 9871, supra, requires the court to ascertain the sum necessary to be raised for county purposes, and since we must presume that the court, in fixing this levy, performed its duties as required by law, it naturally follows that when your court was making this levy for county purposes it intended to include in that levy the amount of tax required to be raised for road and bridge purposes as required by said Section 7890. It was mandatory on the court to make the levy for road and bridge purposes as required by said Section 7890, and since it made the maximum levy for county purposes as authorized by Section 9873, supra, then assuming that the court was performing its duty as required by law, it has included in the fifty cent levy for county purposes the levy required by Section 7890, supra.

The making of the levy and the apportionment of taxes is provided for by different sections.

It will be noted that the court made the fifty cent levy for county revenue purposes and the only way we have

to determine what part of the levy was intended for road and bridge purposes is to look to that part of the court order directing that ten cents on the one hundred dollars valuation of the tax for county revenue be apportioned to class 3 of the Budget Act.

Section 2 of the Budget Act, page 341, Laws of Missouri, 1933, provides as follows:

> "The court shall classify proposed expenditures in the following order.
>
> * * * * * * *
>
> "Class 3: The county court shall next set aside and apportion the amount required, if any, for the upkeep, repair or replacement of bridges on other than state highways (and not in any special road district) which shall constitute the third obligation of the county."

While the County Budget Act requires the court to set aside and apportion the amount required for Class 3, the court, under Section 8042, supra, must also set aside the amount of the county revenue required to be levied for road and bridge purposes by said Section 7890, and on demand turn it over to the special road districts which contain the property upon which said tax has been collected.

If all the taxes collected under the ten cent levy were set aside to Class 3 of the Budget Act, the provisions of Sections 7890 and 8042 would be meaningless because the county court could ignore the provisions of said sections and place all of these taxes in Class 3 of the Budget Act. This would have the effect of repealing Section 7890 by implication and defeating its purpose and as a result thereof the special road districts would be abolished and we do not think the lawmakers had any such intention when they passed the Budget Act.

It is a general rule of statutory construction that where two statutes can be given a construction which will

uphold both of them it must be done. This rule is stated in State ex rel. Halsey v. Clayton, 226 Mo. 292.

Considering Sections 7890, 8042, 9871, 9873 and Class 3 of Section 2 of the Budget Law, we think that the lawmakers intended that the county court apportion from county revenue to Class 3 only that part of the levy for road and bridge purposes which it is authorized by law to set aside or apportion for that purpose.

As stated above the court must turn over to the special road districts on timely application therefor all of the road and bridge taxes collected on properties in such districts, and since Section 7890, supra, makes it mandatory on the county court to make some levy for road and bridge purposes which is a part of the county revenue levy, the county court would, therefore, be prohibited from placing in Class 3 under the Budget Act any of the county revenue tax collected for road and bridge purposes on properties in a special road district.

Finally this leads to the question: "Did the county court include in the fifty cent levy for county revenue purposes the tax required by Section 7890?" If it did do that, then that part of the tax paid on properties in a special road district on timely application therefor must be turned over to the district.

In this connection we again quote the following law and facts:

1. Section 7890 makes it mandatory on the court to levy some tax not exceeding twenty cents for road and bridge purposes.

2. The tax required by Section 7890 is a part of the county revenue tax.

3. The county court has levied the maximum amount for county revenue purposes.

4. With the presumption that the county officers perform their duties as required by statute, we must assume that the county court, when making this levy, included the

levy for road and bridge purposes.

5. The court has indicated that ten cents on the one hundred dollars valuation of the levy shall go to Class 3 of the Budget Act.

With the foregoing statements of fact and law in mind, we think that the court order apportioning to Class 3 of the Budget Act ten cents on the one hundred dollars valuation of the county revenue levy can only include that part of the levy which the county court is authorized to apportion. It would not include that part of the ten cent on the one hundred dollars valuation of the levy which was required to be raised for road and bridge purposes and collected on properties in special road districts.

CONCLUSION.

From the foregoing and in answer to your first question, will say it is the opinion of this department that that part of the taxes which you have collected under your levy and apportioned to Class 3 which have been collected on properties in a special road district, should be turned over to the commissioners of such special road district.

Answering your second question, we think that when the lawmakers wrote into Class 3 of the Budget Act the clause prohibiting the county court from expending any of the moneys of this class in special road districts, that such districts were entitled to all of the revenue raised for road and bridge purposes and included in the county revenue levy on properties in their districts and for that reason the lawmakers prohibited such districts from claiming or getting any more of the levy. For that reason no part of the taxes which are legally apportioned to Class 3 of the county revenue may be paid to special road districts.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

LOAN & INVESTMENT) Additional powers conferred
COMPANIES:) on Loan and Investment
Companies do not apply to
individuals.

May 5, 1939

5-8

FILED
65

Mr. Maurice L. Mushlin
Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of April 19th, 1939, which reads as follows:

> "I would desire to have your office render an opinion as to whether or not individuals could engage in the loan business under the loan and investment act, without incorporation under such loan and investment act.
>
> "In other words, can individuals obtain the privileges granted to the Corporations under the loan and investment act, such as charging eight percent interest, two per cent for investigation, and lastly Twenty Dollars per automobile for extra hazard.
>
> "It is my opinion that only Corporations can be chartered and operate under the loan and investment act.
>
> "I desire to thank you for your early opinion on this matter."

Section 4979 R. S. Missouri, 1929, reads as follows:

> "The term 'loan and investment company' as used in this article means any corporation formed under the provisions of this article."

It will be noticed that this section, which is included in Article 8, Chapter 32, of the Revised Statutes of Missouri, 1929, specifically states the term law investment company as used means "corporation".

Section 4980 R. S. Missouri, 1929, reads as follows:

> "Corporations may be organized under and by virtue of this article in the same manner as manufacturing and business corporations, under and by virtue of article 7 of chapter 32, R. S. 1929, except as otherwise herein provided."

Section 4981 R. S. Missouri, 1929, reads as follows:

> "The aggregate amount of the capital stock of any loan and investment company organized under the provisions of this article shall not be more nor less than is now provided for in the case of manufacturing and business corporations."

In reading the above three sections together, it must be construed that anything contained in Chapter 32, Article 8, refers only to corporations and not individuals. Section 4982 R. S. Missouri, 1929, which is contained in Chapter 32, Article 8, was amended by Section 4982 Laws of Missouri, 1933, page 199.

The third paragraph of Section 4982, Laws of Missouri, 1933, reads as follows: (P. 200).

> "To charge for a loan made pursuant to this section one dollar for each fifty dollars or fraction thereof loaned for any examination or investigation of the character and circumstances of the borrower, co-maker or surety and the drawing and taking acknowledgment of necessary papers in making the loan; no charge shall be collected unless a loan shall have been made as a result of such examination or investigation."

The fourth paragraph of the same section reads as follows:

> "To charge for a loan made pursuant to this Section, when secured by chattel mortgage or lien upon a motor vehicle, a sum not greater than Twenty Dollars ($20.00) on account of extra hazards involved in such loans, provided, however, that in the event the Company retains all or any part of such charge for its own use, the note evidencing the indebtedness shall bear on its face a statement that the maker thereof has the option of delivering and conveying the motor vehicle securing such note, regardless of condition, in full satisfaction of the balance due thereon."

In view of the third and fourth paragraphs being in Section 4982, supra, and contained in Chapter 32, Article 8, which only applies to corporations, it cannot be said that an individual could take advantage of this additional power as conferred by the laws of 1929, and the laws of 1933.

The sections above quoted are not ambiguous and do not need interpretation by the courts of this state. According to 59 C. J. page 952, it is said:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretations by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning." citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523."

Also, in the case of Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224, the Court said:

> "To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

It will be noticed in the fourth paragraph of Section 4982, supra, Laws of Missouri, 1933, page 201, that it specifically sets out "Company" which further bears out the opinion of this department

that this section which allows $1.50 for the examination or investigation of the character of the borrower or others, and also which allows under the fourth paragraph a sum not greater than Twenty ($20.00) Dollars, which should be construed as a commission on account of extra hazard involved in the loan upon automobiles, only applies to corporations incorporated under the loan investment company chapter, and does not apply to individuals.

Section 2840 R. S. Missouri, 1929, reads as follows:

> "The parties may agree, in writing, for the payment of interest not exceeding eight per cent, per annum, on money due or to become due upon any contract."

Under this section an individual by agreement may charge a rate of interest not exceeding eight per cent per annum. But sections 4980,4981,4982, supra, covers additional charges that may be lawfully demanded by loan and investment companies.

CONCLUSION.

In view of the above authorities it is the opinion of this department that Chapter 32, Article 8, Laws of Missouri, 1929, and as amended in the Laws of Missouri, 1933, page 199, only applies to corporations chartered and operating under the Loan and Investment Act and does not apply to individuals.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

SCHOOLS:
BOARD OF EDUCATION:
RETIREMENT OF TEACHERS:
USING PUBLIC REVENUE FOR PAYMENT INTO RETIREMENT FUND:

Board of Education in cities of 500,000 or over may not terminate the tenure of teachers on the basis of age without recommendation of the Superintendent of Instruction.
Revenues may be used to pay teachers retired from service.

July 18, 1939 7/26

FILED
65

Board of Education
of the City of St. Louis
St. Louis, Missouri

Attention: Mr. Richard Murphy

Gentlemen:

This is in reply to yours of recent date wherein you request an opinion from this department on the following questions:

> "1. May the Board of Education terminate the tenure of teachers on the basis of age?
>
> "2. Can the Board legally use part of its revenues as payment to teachers retired from service?"

In our research on your first question we find that Sections 9573 and 9575, R. S. Missouri 1929, are applicable. They are as follows:

> "The members of such board of education shall be elected on a general ticket and by the qualified voters of such city at large as hereinafter provided, and shall qualify by taking the oath prescribed by this article, and proceed to organize by electing one of their number president and another vice-president; and thereupon it shall be the duty of any

then existing corporation, or board of directors, or officers of the school district of such city, to surrender their offices and to deliver to said board of education, or to its officers, agents or employes, all the public school property, both real and personal, of every kind whatsoever, and the control and management of the public school affairs of such city: Provided, that until such board of education shall be organized, the administration of the public schools and the management of school property in such city shall remain in the control of any such existing corporation, board of directors, or officers of the school district, in the same manner and with the same powers as existed prior to the passage of this article, or the attaining by said city of the requisite number of inhabitants. It shall be the duty of the said board of education, as soon as practicable after its organization, to appoint a superintendent of public instruction, a commissioner of school buildings, a secretary and treasurer, an auditor, and such other officers, employes and agents as it may deem proper: Provided, that no such officer, employe or agent shall be a member of said board. And such board of education may continue the employment and service of any existing officers, teachers, agents or other employes, in their several capacities, in connection with the administration of school affairs until such time as they may effect the change of the administrative system applicable to the public schools as contemplated in this article; and said board of education may thereafter

retain or remove any agents, teachers, janitors, engineers or other employes then rendering service in connection with the public schools of such city. At its first regular meeting after the first day of October in each year following its original organization, said board of education shall re-organize by electing one of its members president and another vice-president. All vacancies in such board shall be filled by the mayor by appointment until the next election for members of said board, when the vacancy shall be filled for the remainder of the term. All rules and by-laws made by any existing corporation, board of directors, or officers of the school district, at such time vested in such city with the management of the public schools, for the government of the public schools and school property in such city, shall continue in force, so far as consistent with this article, until repealed or altered by such board of education."

"The superintendent of instruction shall be appointed by the board of education for a term of four years, during which term his compensation shall not be reduced. The board of education may, on the nomination of the superintendent of instruction, appoint as many assistant superintendents as it may deem necessary, whose compensation shall be fixed by the board, and who may be removed by the superintendent with the approval of the board. The superintendent of instruction shall have general supervision, subject to the control of the board, of the course of instruction, discipline and conduct of

> the schools, textbooks and studies; and all appointments, promotions and transfers of teachers, and introduction and changes of text-books and apparatus, shall be made only upon the recommendation of the superintendent, and the approval of the board. The superintendent shall have power to suspend any teacher for cause deemed by him sufficient, and the board of education shall take such action upon the restoration or removal of such teacher as it may deem proper. All appointments and promotions of teachers shall be made upon the basis of merit, to be ascertained, as far as practicable, in cases of appointments, by examination, and in cases of promotion, by length and character of service. Examination for appointment shall be conducted by the superintendent under regulations to be made by the board. The superintendent of instruction shall devote himself exclusively to the duties of his office and shall have power to appoint clerks, whose number and salary shall be fixed by the board, and shall have power to remove the same; shall exercise a general supervision over the schools of the city, examine their condition and progress, and shall keep himself informed of the progress of education in other cities. He shall advise himself of the need of extension of the school system of the city, shall make reports from time to time as may be fixed by the rules or directed by the board, and shall be responsible to the board for the condition of the instruction and discipline of the schools."

The power of the board to employ and terminate the services of teachers has been before the Supreme Court on

two different occasions. The first time in State ex rel. Brown et al. v. Board of Education of City of St. Louis et al., 294 Mo. 106, 242 S. W. 85, and State ex rel. Brown v. Board of Education, 299 Mo. 465, 253 S. W. 937. The first time the question of the power of the board came before the Supreme Court it seems that the board of education of the city of St. Louis made the following rule with respect to employment of teachers (242 S. W. 86):

> "'Section 1. The teachers appointed at the close of the scholastic year shall hold their positions for one year; and the board distinctly reserves the right of discontinuing the services of any and all of the teachers at any time, should it deem such an action expedient. Any teacher appointed to a position shall hold position for that scholastic year, subject, however, to the above-mentioned provisions governing teachers reappointed at the close of the scholastic year. Every teacher employed by the board shall be required to sign a contract accepting appointment subject to the conditions of this rule.'"

The authority of the board of education to make and enforce such a rule was covered in this case and the court, in construing what is now Section 9575, R. S. Missouri 1929, said at l. c. 88:

> "The statute under consideration was enacted in 1897. Section 11461 was obviously enacted to abrogate this rule and to remedy the evils arising from its enforcement. This purpose is as apparent as if it had been so declared in express terms. It ordains that the superintendent of instruction shall have general supervision, subject to the control of the board, of the course of instruction, discipline, and conduct of the schools,

> text-books, and studies; and all appointments, transfers, and promotions of teachers and introduction and changes of text-books and apparatus, shall be made only upon the recommendation of the superintendent and the approval of the board. The superintendent shall have power to suspend any teacher for cause deemed by him sufficient, and the board of education shall take such action upon the restoration or removal of such teacher as it may deem proper. All appointments and promotions of teachers shall be made upon the basis of merit, to be ascertained, as far as practicable, in cases of appointments, by examination, and in cases of promotion, by length and character of service. These and other provisions of this section are the dominant characteristics of the statute. They unmistakably indicate that the chief business of the board, under the direction and leadership of the superintendent of instruction, is the organization of a permanent corps of teachers on the basis of merit, whose tenures are not dependent on the pleasure of the board. The members of the board are shorn of all power of appointment or dismissal, except upon the recommendation of the superintendent. * * *"

The court in that case very definitely ruled that the board of education did not have authority to terminate the service of a teacher without the recommendation of the superintendent of instruction. The above decree again came before the Supreme Court in State ex rel. Brown v. Board of Education, 299 Mo. 465, and in discussing that decree the court, at l. c. 469, said:

> "It will be noticed by this final

decree that the Board of Education and the Superintendent of Instruction are enjoined (1) 'from appointing teachers for a year;' (2) 'from discontinuing the services of any teacher except after suspension by the "Superintendent of Instruction" in the manner provided by law;' (3) and from appointing and promoting teachers except upon the basis of merit, to be ascertained as far as practicable in case of appointment, by examination, and in case of promotion by length and character of service.

"As to the objection to the ruling '(2)' of the circuit court, relating to the discontinuance of the service of a teacher, the order is that it shall be done in the manner provided by law; that is, provided by Section 11461, set out above. The trial court certainly did not err in making that order. As to objection to order '(3)' relating to the appointments and promotions, etc., it is in almost the exact language of the statute regarding appointments and promotions and it cannot be contended that the trial court erred in making that order. Those injunctive orders are made because the observance of Section 1, Rule 47, was held by this court to be in violation of the statute.

"The only part of the judgment which the appellants objected to with any plausible reason is that '(1)' enjoining the board from 'appointing teachers for a year.' It is argued with great earnestness by the appellant that under that ruling, teachers employed by the Board of Education hold

> for life, subject only to a possible removal for cause 'after a trial.' The appellants conjure up an insidious peril in the form of teachers fastening themselves like leeches upon the Board of Education so that they cannot be shaken off."

Again at l. c. 471 the court said:

> "* * * There is nothing in the opinion of this court, nor in the judgment of the circuit court, which prohibits the Board of Education, on the recommendation of the Superintendent of Instruction, where circumstances require it, in an individual case, from making a contract with a teacher for a definite period. The judgment merely provides that all appointments and promotions shall be made upon the basis of merit to be ascertained in the manner provided by the statute. In the former opinion of this court it is said the law contemplates that the superintendent has the requisite capacity and information to determine the qualifications of teachers and may make recommendations accordingly. If the superintendent should recommend for sufficient reasons that an individual teacher should be appointed for a definite period and the board so chooses to appoint one, there is nothing in the judgment of the circuit court, nor in the opinion to prevent it."

So it seems from the opinions of the Supreme Court in these two cases that the board of education, with a recommendation of the superintendent of instruction, might terminate the services of the teachers on the account of age or make such contracts of employment as the parties saw fit to make.

In our research through the statutes we find, however, that Section 9006 is a special statute applicable to teachers in such cities who have elected to participate in the retirement pension fund. This section is as follows:

> "The public school boards or boards of directors having charge of public schools in such cities shall have power, by a majority vote of all members, to retire any female teacher or other administrative and clerical employe who shall have elected to come under and participate in the benefits of this article, as aforesaid, and who shall have taught in public schools or rendered service therein for a period aggregating twenty-five years; and any male teacher or administrative and clerical employe who shall have elected to come under and participate in the benefits of this article, as aforesaid, and who shall have taught or rendered such service for a period aggregating thirty years; and such teacher or administrative and clerical employe shall have the right, after such term of service, to retire and become a beneficiary under said article, provided he shall be, in the judgment of the board of trustees, physically or mentally incapacitated for such service: Provided, however, that four-fifths of the said term of service shall have been rendered by said beneficiary within the limits of the municipality where said boards have jurisdiction: Provided further, that said board of trustees shall have full power to pass on the applications of all teachers, administrative and clerical employes, who may elect to come under and participate in the benefits of this article, and prescribe

rules governing time of service."

It seems from this section that the board of education of such cities may retire teachers who have been in service for a certain period of time, and provided that they come within the provisions of said Section 9006.

CONCLUSION.

From the foregoing it is the opinion of this department that the board of education of the city of St. Louis may not terminate the tenure of a teacher on the basis of age without the recommendation of the superintendent of instruction unless such teacher comes within the provisions of Section 9006, supra. In such case, the board by majority vote may retire such teacher.

We are further of the opinion that if the superintendent of instruction recommends the termination of the tenure of a teacher that the board may terminate such services.

II.

On your second question we find that Section 9004 R. S. Missouri 1929, is applicable, and it provides as follows:

> "The public school board or boards of directors having charge of public schools in cities now or hereafter having a population of three hundred thousand inhabitants or more shall have power to create a public school teachers' and administrative and clerical employes' pension and retirement fund, and for that purpose they may set apart the following moneys, to-wit: (1) An amount not exceeding one per cent. per annum of the respective salaries paid to teachers and administrative

> and clerical employes in the employment of such boards, who shall elect to come under and participate in the benefits of the succeeding sections, which amount shall be deducted from said salaries annually, at such time and in such manner as the board of trustees shall prescribe. (2) All moneys received from donations, legacies, gifts, bequests or otherwise, on account of said fund. (3) All moneys which may be derived from other methods of increment as may be duly and legally devised for the increase of said fund."

From this section a retirement or teachers' fund is provided.

Your question especially refers to the authority of the board of education to use public funds for the payment of teachers who have retired. Section 47 of Article IV of the Constitution provides as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: Provided, That this shall not be so construed as to prohibit the General Assembly from providing by law for authorizing the creation, maintenance and management of a fund for the pensioning of crippled and disabled firemen, and for the relief of the widows and minor children of deceased firemen, by such cities, villages or incorporated towns as may have an

> organized fire department--said fund to be taken from the municipal revenue of such cities, villages or incorporated towns: Provided further, That nothing in this Constitution contained shall be construed as prohibiting the General Assembly from granting, or authorizing the granting of, pensions to the deserving blind, as may be provided and regulated by law: Provided further, That the General Assembly of the State of Missouri shall cause an annual tax of not less than one-half of one cent nor more than three cents on the one hundred dollars valuation of the taxable property of the State to be levied for the purpose of providing a fund to be devoted in the manner provided by law to the pensioning of the deserving blind. If any balance shall exist in such fund after the deserving blind have been pensioned, then the same, or so much thereof as may be necessary, may be used for the support of the commission for the blind. And if there shall be a balance in said fund after the blind have been pensioned and the commission for the blind has received adequate support, then the same shall be transferred to the public school fund. Said tax shall be levied and collected annually in the same manner as other State taxes are levied and collected, and such fund shall be subject to appropriation for above purposes by the General Assembly."

This article of the Constitution was amended in 1936 by adding another section thereto and it is as follows: (Laws of Missouri 1937, page 613, Amendment No. 3, Section 47a)

> "Nothing in this Constitution contained shall be construed as prohibiting payments, from any public funds, into

> a fund or funds, for paying benefits, upon retirement, disability, or death, to persons employed and paid out of any public fund, for educational services, their beneficiaries, or their estates."

It appears that this amendment was adopted especially for the purpose of taking care of the funds needed to carry out the provisions of Section 9004, supra.

CONCLUSION.

From the foregoing it is the opinion of this department that if funds are available the board of education of the city of St. Louis can legally use them in payment to teachers who are retired from service.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION: No exemption allowed on execution on judgment for personal taxes.

August 22, 1939

FILED
65

Hon. Charles E. Murrell, Jr.,
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of August 17th, 1939, which reads as follows:

"I would like to have the opinion of your office on the following question, What exemption can be claimed by a judgment-debtor when the judgment was on personal taxes?"

Section 1166, Article 19, Chapter 5, R. S. Missouri, 1929, reads as follows:

"Nothing contained in this article shall be construed so as to exempt any property from seizure and sale for the payment of taxes due this state, or any city, town or county thereof."

The above section was upheld in Lazonby v. Smithey, 151 Mo. App. 285, l. c. 291, where the court said:

"Exception to the general exemption law has always existed in favor of an execution for taxes (section 3165, R. S. 1899.) If we should allow section 124 the breadth of meaning asked by the widow, it would make necessary to say that property thus held by her would be protected from sale for taxes. * * * "

Section 3165, R. S. Missouri 1899 is now Section 1166 R. S. Missouri, 1929.

CONCLUSION

In view of the above authorities, it is the opinion of this department that no exemption can be claimed by a judgment debtor when the judgment was on personal taxes.

Yours very truly,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

SWEEPSTAKE TICKET: Lottery.

§31

August 29, 1939

FILED
65

Honorable Maurice L. Mushlin
Associate Prosecuting Attorney
Municipal Courts Building
St. Louis, Missouri

Dear Sir:

We have your request for an opinion on "Sweepstake Ticket". It appears that prizes are awarded each month, and that the plan is to give each merchant who advertises with the operator five hundred free coupons for each $3.50 worth of advertising done by the merchant. The merchant, in turn, gives the tickets to customers who purchase merchandise from him. The winners are determined by drawing.

The principle underlying all lottery law is that a lottery is a scheme or device wherein anything of value, is for a consideration, allotted by chance. It is universally agreed that a lottery contains three essential elements, namely, prize, chance and consideration. Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579; 38 Corpus Juris, page 289; George Washington Law Review, May 1936, page 480; 45 Harvard Law Review, page 1196.

This is the rule in Missouri. State v. Emerson, 1 S. W. (2d) 109; State ex rel. v. Hughes, 299 Mo. 529, 253 S. W. 229; State v. Becker, 248 Mo. 555, 154 S. W. 769.

Under the above cases a lottery is any scheme or device whereby anything of value is, for a consideration, allotted by chance. In the present case the prizes are allotted by chance, to-wit, the drawing. It is admitted there is a prize offered. The only remaining question is whether or not there is any consideration in order to make the above scheme a lottery.

The general rule is amply stated in Thomas on Non-Mailable Matter, Section 16, page 35, as follows:

> "The general rule relative to the consideration in schemes of this class, deducible from the adjudged cases and the elementary principles, may be formulated as follows: Where a promoter of a business enterprise, with the evident design of advertising his business and thereby increasing his profits, distributes prizes to some of those who call upon him or his agent, or write to him or his agent, or put themselves to trouble or inconvenience, even of a slight degree, or perform some service at the request of and for the promoter, the parties receiving the prize to be determined by lot or chance, a sufficient consideration exists to constitute the enterprise a lottery though the promoter does not require the payment of anything to him directly by those who hold chances to draw prizes."

It is not necessary that the promisor (respondent) receive any benefit, or that people pay directly or purchase a ticket. Brooklyn Daily Eagle v. Voorhies, 181 Fed. 579, but the question is: Did the promisee (public) suffer any detriment or inconvenience? Consideration may be either a benefit to the promisor or a detriment to the promisee. McNulty v. Kansas City, 198 S. W. 185. The promise made to the public by petitioner is to award a prize of a fixed sum of money. In accepting this promise, what loss, trouble or inconvenience is sustained by the public? If there is any loss, trouble or inconvenience, there is consideration given by the public. Mayfield v. Eubank, 278 S. W. 243, 246; Mayers v. Groves, Brothers and Co. 22 S. W. (2d) 174, l. c. 177.

The free distribution of these tickets to the customers of the store does not change the above rule. The purchase price of the goods sold also includes the price the customer pays for a sweepstake ticket, and such purchase price is sufficient consideration in law to make the scheme a lottery. Glover v. Malloska, 238 Mich. 216, 213 N. W. 107.

In the Gover Case chances in drawings by lot were distributed indiscriminately and <u>without charge</u> to customers and non-customers alike. Retail oil stations distributed numbered tickets without charge to purchasers and persons asking therefor. Once a month an automobile was disposed

of by chance to the ticket holder of the same number drawn. The court held it to be a lottery. The Michigan court said:

> "The scheme was clearly a lottery. People v. McPhee, 139 Mich. 687; 103 N. W. 174; 69 L. R. A. 505; 5 Ann. Cas. 835; People v. Wassmus, 214 Mich. 42; 182 N.W. 66. The often asserted, essentials of lottery, viz.: consideration, prize and chance, were all present. Malloska sold the tickets to his customers for distribution by them in the course of trade to further his pecuniary interest, and this established consideration. The fact that Malloska gave some tickets away at fairs and exhibitions and the purchasers of tickets for use in the retail trade gave them away, without pay, to their customers, and sometimes to others, did not at all save the scheme from being a lottery." (l. c. 108). (Italics ours.)

In Society et al. v. Seattle, 203 Pac. 21, 22; 118 Wash. 258, where an association by pre-arrangement with the manager of a theatre distributed numbered tickets without charge and awarded prizes by chance to the occupants of the theatre who had paid admission, and the association contended that the element of consideration was wanting because the theatre patrons paid nothing additional for the numbered tickets, the Supreme Court of Washington said:

> "But while the patrons may not pay, and the respondents may not receive any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theatres who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theatres reap a direct financial benefit." (Italics ours.)

CONCLUSION

It is therefore the opinion of this office that "Sweepstake Ticket" is a lottery prohibited by Section 4314, R. S. Mo. 1929.

Respectfully submitted,

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. Taylor
(Acting) Attorney General

FER:VC

ROAD DISTRICTS:
MUNICIPAL CORPORATIONS: City of the fourth class cannot organize itself into a special road district under Section 7047, R. S. Mo. 1929.

August 30, 1939

8-31
FILED
65

Mr. W. L. Mulvania
City Attorney
Rock Port, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "As the attorney for the City of Rock Port I have been requested by the Mayor and Board of Aldermen of this city to ascertain the opinion of your department upon the question of whether the City of Rock Port may in and of itself organize itself into a special road district pursuant to the provisions of Article Nine, Chapter 42 of the Revised Statutes of Missouri, 1929, beginning with section 8024 without including in said proposed district any territory beyond the limits of the City."

Article IX, Chapter 42 of the Revised Statutes of Missouri, 1929, provides for the organization of a special road district not exceeding eight miles square wherein is located a city, town or village containing less than one hundred thousand inhabitants.

Section 8033 of said Act provides in part as follows:

> "Said board (of commissioners of the road district) shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the cor-

porate limits of any city or village
* * * * * * * * * * * "

Section 8034, R. S. Missouri, 1929, provides in part:

> "Said board shall have authority to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district
> * * * * * * * * * "

Section 8051, R. S. Missouri, 1929, provides as follows:

> "Said boards may repair, grade, gravel, macadamize or pave any road in its district but nothing herein shall be taken or construed as enlarging the powers of the boards to expend money upon roads and streets within the corporate limits of any city within said special road district as limited by section 8034 of this article."

Rockport is a city of the fourth class. Section 7047, R. S. Missouri, 1929, provides that, "* * * * * * Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city."

In the construction of statutes the primary rule is to ascertain and give effect to the lawmakers' intent, and this should be done from the words used, if possible, considering the language honestly and faithfully. St. Louis v. Commission Co., 85 S. W. (2d) 21; Graves v. Purcell, 337 Mo. 574.

We believe it is the intention of the Legislature, as gleaned from the statutes quoted above, that the special road district, as provided for in Article IX, Chapter 42, was to include territory outside the limits of a city, town or village and was not meant to be confined to a municipality's boundaries.

We base this conclusion upon the fact that the board of commissioners is the managing and administrative body of the road districts, but under Section 7047 they would have no control over the streets and roads in the city, and, therefore, no control over the roads of their district. The exclusive control given by Section 8033, supra, over the public highways outside the corporate limits of a city, town or village is an empty grant because there would be no such highways.

Furthermore, since Sections 8034 and 8051, supra, provide that only one-fourth of the revenue of the district can be expended in any city in the district, the remaining three-fourths of the revenue would be left with no outlet for its expenditure.

CONCLUSION.

It is, therefore, the opinion of this department that a city of the fourth class may not incorporate itself into a special road district under Chapter 42, Article IX of the Revised Statutes of Missouri, 1929.

Respectfully submitted

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

AO'K:DA

TAXATION : Until final sale, under the provisions of Senate
AND REVENUE : Bill No. 311, Laws of Missouri 1939 and especially Section 9953a thereof, or delivery of a deed under the provisions of Section 9957, Senate Bill No. 94, Laws of Missouri 1933, cities may collect delinquent taxes on real estate as provided by statute, the lien for general taxes being paramount is unaffected by such procedure.

September 26, 1939.

9-28

FILED
65

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Mr. Murrell:

On September 23, 1939 we received your request for an opinion, which is as follows:

> "I would like to have the opinion of your department on the following question:
>
> "We have in this County certain pieces of real estate which are delinquent on both City and County taxes. The County Collector has informed me that he intends to sell the property for delinquent taxes under the Jones-Monger Law. If this property is sold by the County Collector is it subject to resale by the City for delinquent City taxes? Would also like to know if the City sells property for delinquent City taxes and if the County may resell it for delinquent County taxes? When I speak of County taxes I include both State and County real estate."

Section 9952c, Laws of Missouri 1933, at page 431, provides that lands and lots shall be subjected to sale and sold for delinquent and unpaid taxes on real estate.

Section 9953, thereof, provides for a reoffering of such lands and lots unless there is a bid at the first offering, in a sum equal to the delinquent taxes, interest, penalty and costs. Also that if at such reoffering no person shall bid a sum equal to the taxes, penalty, interest and costs, the clerk of the sale shall note such fact upon the note of such sale.

Section 9953a, thereof, providing for a third sale to the highest bidder and Section 9953b, thereof, providing for the redemption of delinquent lands were both repealed by Senate Bill No. 311 of the Laws of Missouri for 1939, at page 850, and especially by Section 9953a of said Senate Bill No. 311, which provided for a third sale and made the same final by providing for the delivery of a deed to the purchaser under such sale. It also provided that in event of no sale at such third offering the Collector, in his discretion, need not offer the same oftener than every five years after such third offering and that a sale thereunder would be final, entitling the purchaser to a collector's deed. It further provided that such reoffering would toll the operation of any applicable statute of limitations.

Section 9957 of the Laws of Missouri 1933, at page 438, provides that:

> "If no person shall redeem the lands sold for taxes within two years from the sale * * * the Collector * * * shall execute to the purchaser * * * a conveyance * * * which shall vest in the grantee an estate in fee simple, subject, however * * * ".

In Meriwether vs. Overly, 228 Mo. 218, 250, in construing the status of a lien for general taxes on real estate, the court said:

> "A tax against real estate is a tax against the property, and not against the owner. If the taxes have been legally assessed, they become a lien on the property prior to all other liens."

In Little River vs. Sheppard, 75 S. W. (2nd) 1013, 1014, the same principle was restated by the court, en banc, in the following language:

> "The lien for state and county taxes shall be paramount".

A final sale for county and state taxes under the provisions of Section 9953a of Senate Bill No. 311, supra, and a deed executed by the collector under the provisions of Section 9957, supra, after the two year redemption period, would foreclose the lien and equity of redemption of all junior lienors for taxes on real estate for the particular years involved.

The rights of certificate holders, obtained by sales consummated under the provisions of Sections 9952c and 9953, supra, are construed by the court in the case of Hilton vs. Smith, 33 S. W. 464, 465, 466 as follows:

> " * * * In the absence of provisions of law defining the rights of the holder of a certificate of purchase, the generally accepted rule is that until the delivery of a deed he takes no title to the land, either legal or equitable. * * * After the period allowed for redemption has expired, as was the case here, the holder of the certificate has a mere naked right to demand and receive a deed from the collector".

Therefore, until such time as a final sale is consummated under the provisions of Section 9953a, supra, or title conveyed under the provisions of 9957, supra, cities may collect their delinquent taxes on real estate in the manner

provided by statute. The lien for general taxes, being paramount, would be unaffected by such procedure.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BURKE
(Acting) Attorney-General

SVM:LB

SCHOOLS: It is not necessary that the Circuit
COUNTY COURT: Court be in session to constitute a valid sale under Section 9254 R. S. Missouri, 1929.

December 1, 1939

12-5

FILED
65

Hon. C. Glen Murray
Clerk of the County Court
Jefferson County
Hillsboro, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of October 27th, which reads as follows:

"Recently the County Court ordered the Sheriff to sell a piece of property on which Jefferson County Capital School Fund held a mortgage. The interest on this property was in default about eight years. The Sheriff advertised this foreclosure sale by four consecutive publications in a county weekly paper. The sale took place while the County Court was in session and as there were no bidders, I bid this property in on behalf of the County Court. After the sale, there were some who contend that the sale is illegal due to the fact that the Circuit Court was not in session at that time.

"I will greatly appreciate it if you will enlighten me on this matter and I would also like to know if the sureties on a School Fund Loan would be re-

> lieved of their obligation if a borrower from said fund should voluntarily sign a deed back to the county when in default of interest and principal."

Section 9252, R. S. Missouri, 1929, provides that every mortgage given to secure a school loan shall be in the ordinary form of a conveyance in fee and shall recite the bond and contain a condition that if default shall be made in any payments of the principal or interest, the sheriff may, under certain prescribed conditions, sell the mortgaged premises for an amount sufficient to satisfy the principal and interest.

> "Every mortgage taken under the provisions of this chapter shall be in the ordinary form of a conveyance in fee, shall recite the bond, and shall contain a condition that if default shall be made in payment of principal or interest, or any part thereof, at the time when they shall severally become due and payable, according to the t tenor and effect of the bond recited, the sheriff of the county may, upon giving twenty days' notice of the time and place of sale, by publication in some newspaper published in the county, if there be one published, and if not, by at least six written or printed handbills, put up in different public places in the county, without suit on the mortgage, proceed and sell the mortgaged premises, or any part thereof, to satisfy the principal and interest, and make an absolute conveyance thereof, in fee, to the purchaser, which shall be as effectual to all intents and purposes as if such sale and conveyance were made by virtue of a judgment of a

> court of competent jurisdiction foreclosing the mortgage. In all cases of loan of school funds in the various counties, the expense of drawing and preparing securities therefor, and of acknowledging and recording mortgages, including the fees of all officers for the filing, certifying or recording such mortgages and other securities, shall be paid by the borrowers respectively."

Section 9254, R. S. Missouri, 1929, provides that whenever the principal and interest is secured by a mortgage with the power to sell as provided in Section 9252, supra, and any part becomes due and payable, the county court may make an order directing the sheriff to levy on said property. A copy of such order duly certified must be delivered to the sheriff for such sale to be valid.

> "Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same, with costs, upon the property conveyed by said mortgage; which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly."

Section 9256, R. S. Missouri, 1929, grants authority to the county court to purchase property mortgaged to secure a loan of school funds, when in its discretion it is for the protection of the interest of the school.

"Whenever any property heretofore or hereafter conveyed in trust or mortgaged to secure the payment of a loan of school funds shall be ordered to be sold under the provisions of this chapter, or by virtue of any power in such conveyance in trust or mortgage contained, the county court having the care and management of the school fund or funds out of which such loan was made may, in its discretion, for the protection of the interest of the schools, become, through its agent thereto duly authorized, a bidder, on behalf of its county, at the sale of such property as aforesaid, and may purchase, take, hold and manage for said county, to the use of the township out of the school fund of which such loan was made, or in its own name where such loan has been made out of the general school funds, the property it may acquire at such sale aforesaid. The county court of any county holding property acquired as aforesaid may appoint an agent to take charge of, rent out or lease or otherwise manage the same, under the direction of said court; but as soon as practicable, and in the judgment of said court advantageous to the school or schools interested therein, such property shall be resold in such manner and on such terms, at public or private sale, as said court may deem best for the interest of said school or schools; and the money realized on such sale, after the payment of the necessary expenses thereof, shall become part of the school fund out of which the original loan was made."

In Benton County v. Morgan, et al., 163 Mo. 661, l. c. 672, 675, the court upheld the validity of Section 9835 R. S. Missouri, 1899, which is Section 9254 R. S. Missouri, 1929, in every respect. While the county

court was no longer authorized to enter a judgment, the court held that the county court has the power to make an order to the sheriff and that when a copy of such order is duly certified and delivered to the sheriff it will have the effect of a fieri facias on a judgment of foreclosure. This is what the court had to say in so holding:

> "Several questions are presented by the demurrer to the petition, especially by that portion of the demurrer which charges that the petition fails to state facts, etc.
>
> "Section 9835, Revised Statutes 1899, has been on our statute books ever since 1852, and is to be found in 2 Statutes 1855, p. 1425, and is Section 30, and reads now as it did then, which is:
>
> > 'Whenever the principal and interest, or any part thereof, secured by mortgage containing a power to sell, shall become due and payable, the county court may make an order to the sheriff, reciting the debt and interest to be received, and commanding him to levy the same with costs, upon the property conveyed by said mortgage, which shall be described as in the mortgage; and a copy of such order, duly certified, being delivered to the sheriff, shall have the effect of a fieri facias on a judgment of foreclosure by the circuit court, and shall be proceeded with accordingly.'
>
> "Of this section defendants assert that the Legislature in revising the school law, since the adoption of the present Constitution, cut out a part of the old

law and overlooked the quoted section, and that the county courts, under the present Constitution, had no power to enter judgments as provided for in the Acts of 1852, section 29, and no power to make any order, a certified copy of which would have the force and effect of a fi fa issued upon a judgment of foreclosure in the circuit court."

* * * * * * * * * * * * * * * * * * * *

"Section 1 of article 6 of the document now in use is couched in these words: 'The judicial power of the state, as to matters of law and equity, except as in this Constitution otherwise provided, shall be vested in a Supreme Court, the St. Louis Court of Appeals, circuit courts, criminal courts, probate courts, county courts and municipal corporation courts.'

"And section 36 of that article says: 'In each county there shall be a county court, which shall be a cort of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law.'

"Under the Constitutions of 1820 and 1865, respectively, it would seem that the Legislature had authority to enact such a section as that now under discussion; but if this were not so, that body certainly had that power of enactment under the Constitution of 1875. Section 1 of Article 6, aforesaid, evidently confers judicial power on the county courts of this State, and section 36, supra, says, that in each county such

> a court 'shall have jurisdiction to transact all county and such other business as may be prescribed by law.' Under such a broad provision, there is no room for reasonable doubt as to the power of the Legislature to enact such a section as 9835; and their revision of the statutes, after the Constitution of 1875 went into force, amounted to a re-enactment of that section, and made it valid, if invalid before."
>
> * * * * * * * * * * * * * * * * * * *
>
> "Taking section 9835, then, as a valid law, did its provisions meet with compliance in the case at bar? It can not be affirmed that they did. It is immaterial about the judgment, for the county court was no longer authorized to enter a judgment; but it did have the power to make an order to the sheriff and a copy of such order duly certified being delivered to the sheriff, would have the effect of a fieri facias on a judgment of foreclosure."

In Neil v. Tubb, et al. 145 S. W. 766, l. c. 767, the procedure in question is clarified to some extent. This court in this case held that Sections 9833 and 9835, R. S. Missouri, 1899, which are now Sections 9252 and 9254, R. S. Missouri, 1929, respectively, are to be construed together, that if the sheriff would undertake to sell without a duly certified copy of the order of the county court, his act would be null and void.

> "Under Section 9833, it is required that the mortgage contain an authorization to the sheriff, on condition broken, to proceed to advertise and

> sell to foreclose without suit; while section 9835 requires the county court, on default of payment, to make an order reciting the amount of debt, principal and interest, and commanding the sheriff to levy the same, with costs, on the mortgaged property, describing it; and that a copy of the order, duly certified, be delivered to the sheriff, and have the effect of a fieri facias as on a judgment of foreclosure in the circuit court. This court has held that those two sections are to be construed together; that if the sheriff should undertake to sell without a duly certified copy of the order of the county court, delivered to him in accordance with section 9835, his act would be null and void. Benton County v. Morgan, 163 Mo. 661, 64 S. W. 119. In that case, the county court had made the order required by the statute; but a certified copy of it had not been delivered to the sheriff, for the reason that it was held that his deed was void."

The court in this case held that the certificate of the county clerk ordering the sheriff to sell the mortgaged property was not the order of the court and, therefore, the sale was void. The certificate issued by the clerk of the county court recited the findings of the county court and directed a sale by the sheriff of said mortgaged property.

We are quoting from a part of the county clerk's certificate. While same is no authority that it follows the correct procedure as provided by law, the court only criticises same for the reason it was the certificate of the clerk instead of the order of the court, and that the court in the first instance made no order of this kind. We believe had the court issued

such an order and delivered a certified copy of the same to the sheriff instead of the clerk's certificate, and the sheriff had sold said mortgaged property and made his proper return to the county court, it would have been a valid sale, and that part of the clerk's certificate referred to reads as follows:

> "'Now, therefore, you, the Sheriff of said Butler County, are hereby commanded to levy the said last-mentioned sum of money upon the real estate hereinbefore described, and to sell the said real estate according to law to satisfy said debt, interest and costs; and make return of your proceedings under this order to the next term of this court, to be held on the 7th day of August, 1905.
>
> "'Witness my hand and the seal of said court the 6th day of June, 1905. George C. Orchard, Clerk of the County Court of Butler Co.'
>
> "The sheriff executed a deed to Mrs. Baird and made a report of the sale to the county court at the November term, 1905, and an order was then made by the court approving the sale."

That part of Section 9254, supra, which reads that when this order is certified and delivered to the sheriff, it "shall have the effect of a fieri facias on a judgment of foreclosure by the Circuit Court, and shall be proceeded with accordingly," merely means that the order certified and delivered to the sheriff by the county court has the same effect as if a fieri facias had issued out of a circuit court on a judgment of foreclosure by the Circuit Court. If the Legislature had seen fit to they could have probably clarified this provision by adding thereto, "insofar as applicable." A fieri facias issues out of the circuit court and is returnable to that court.

In like manner, it is the natural conclusion that this order of the county court issues out of the county court and is returnable to the same court. The circuit court has no jurisdiction over such an order.

Therefore, it is the opinion of this Department that if the county court has complied with the foregoing provisions, having given the notice by publication, having delivered a certified copy of said court to the sheriff of the county while the county court was in session, and the sheriff, in response to said order, sold the said mortgaged property and made his return to the county court, such shall constitute a valid sale and the fact that the Circuit Court was or was not in session at the time of the sale in no manner affected the validity of such sale. The only court having jurisdiction under this article is the county court.

In answering your second inquiry, we are enclosing a copy of an opinion rendered by this Department under date of May 16, 1939, to Hon. Henry B. Hunt, Prosecuting Attorney of Atchison County, Missouri, which we believe sufficiently answers your request.

Respectfully submitted,

APPROVED:

W. J. BURKE
(Acting) Attorney General

AUBREY R. HAMMETT, JR.
Assistant Attorney General

ARH:RV

Enc.

ROAD DISTRICTS: Under Section 7868, R. S. Missouri, 1929, County may organize only one road district for the whole county excluding all special road districts.

December 14, 1939

12-15

FILED
65

Honorable Charles E. Murrell, Jr.
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 12, 1939, which reads as follows:

"The County Court of Adair County, Missouri, would like to have the opinion of your office on the following question:

"May the County Court organize the entire County outside of the Special Road District contained in Adair County into one road district under Section 7868, R. S. Missouri 1929?

"Does the word districts as used in Section 7868 R. S. Missouri, 1929, require that the County Court organize two or more districts for road purposes, or would one district for the entire county be sufficient?"

Section 7868, R. S. Missouri, 1929, reads as follows:

> "The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

It will be noticed by this section that no specific prohibition or limitation is set out as to the amount or area of land in any district. Your inquiry specifically inquires as to the word "district" which is merely a descriptive word.

Section 651, R. S. Missouri, 1929, reads as follows:

> "Whenever, in any statute, words importing the plural number are used in describing or referring to any matter, parties or persons, any single matter, party or person shall be deemed to be included, although distributive words may not be used."

Although Section 7868, supra, sets out the plural of the word "district," it may be construed as the singular. It was so held in the case of State v. Sweeney, 93 Mo. 38, l. c. 41, where the court stated:

> "The permission to Messrs. Ramsey and Lane to prosecute was, in effect, an appointment to prosecute (State v. Griffin, 87 Mo. 608), and by virtue of that section, construed as required by section 3123, which provides that, when any subject-matter, party, or person is described or referred to by words importing the singular number several matters and persons shall be deemed to be included, the circuit court was invested with power to appoint one or more persons to prosecute in this case."

Also in the case of State ex rel. v. Hallen, 165 Mo. App. 422, l. c. 437, where the court said:

> "It is true that there are cases in which the use of the plural -- persons -- has been held not to be material; in fact our statute, section 8053, Revised Statutes 1909, expressly provides that in construing laws, whenever the plural numbers are used in describing any persons or things, a single person or thing shall be deemed to be included."

Also in the case of Arthaud et al. v. Grand River Drainage Dist. et al., 232 S. W. 264, l. c. 266, where the court said:

"However, section 27 of the act, in regard to the employment of an attorney, does not use the word 'office,' but says that the board 'shall employ an attorney,' and 'such employment shall be evidenced by an agreement in writing, which, as far as possible, shall specify the exact amount to be paid to said attorney for all services and expenses.' The apparent meaning of this section is that the board shall make a contract with some attorney or attorneys for the doing of all the legal work of the district. Public officers are not usually employed by agreements in writing, and their compensation is usually fixed at a certain amount for a given time, payable periodically. Section 27 of the act does not require this, but evidently contemplates that an attorney be employed to carry on specific legal work upon a fixed fee to be paid therefor. From all we have said he is not a public officer, and when this section says that the board shall 'employ' an attorney it does not mean that the board is limited to one person. The meaning is that the board may employ one or more; the singular including the plural. State v. Sweeney, 93 Mo. 38, 41, 5 S. W. 614; section 7054 R. S. 1919; Commonwealth v. Gabbert, 68 Ky. (5 Bush) 438, 446."

In all of the sections with reference to road districts, which also reads special road districts, a limitation has been placed in the section either limiting the amount of area of land in the district or provides the least amount of land that can be placed in a district. In the general section

regarding road districts in all counties except those under township organization, no limitation or prohibition has been set out.

Under Section 8024 R. S. Missouri, 1929, which applies to special road districts, it will be noticed that the districts organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred forty (640) acres of contiguous territory. This limitation was specifically set out in that section. Also, in Section 8059 R. S. Missouri, 1929, it will be noticed that it specifically states:

> "* * * Any special road district extended under the provisions of this section may be extended so that after such extension it shall not be more than twelve miles square."

CONCLUSION

In view of the above authorities it is the opinion of this Department that the County Court can organize the entire county outside of the special road districts in Adair County into one road district under Section 7868, R. S. Missouri, 1929, with the advice and assistance of the county highway engineer, or it may divide the county into more than one general road district.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RV

CITIES: May, by ordinance impose reasonable monthly service charge for sewer service connections.

February 23, 1939

2-28

FILED
66

Mr. R. J. Newport
City Clerk
Malden, Missouri

Dear Sir:

We wish to acknowledge your letter of February 13th, wherein you state in part as follows:

> "We want to ask your advise on whether or not it willbe permissable for the City to make a monthly service charge for Sewer Service connections in the City of Malden.
>
> "Will you please give us this information at you earliest convenience and oblige."

Section 7031, R. S. Missouri, 1929, provides for the establishment of sewer systems in fourth class cities, which you advisedrecently includes the city of Malden.

> "The board of aldermen shall have power to cause a general sewer system to be established, which shall be composed of three classes of sewers, to-wit: Public, district and private sewers. Public sewers shall be established along the principal courses of drainage, at such points, to such extent, of such dimensions and under such regulations as may be provided by ordinance, and these may be extensions or branches of sewers already constructed, or entirely new throughout, as may be deemed expedient. The board of aldermen may levy a tax on all property made taxable for state purposes over the whole city, to pay for the constructing, reconstructing and repairing of such work, which tax shall be called 'special public

> sewer tax,' and shall be such amount as may be required for the sewer provided by ordinance to be built; and the fund arising from said tax shall be appropriated solely to the constructing, reconstructing and repairing of said sewer."

We have been unable to find any statute which would prohibit the city of Malden from making a monthly service charge for sewer service connections.

44 C. J., section 230, page 173, in discussing the question of sewers, points out that:

> "General power to construct sewers may carry with it by implication the power to do those things necessary to make such system effective and complete *."

It might well be said that a monthly service charge by a city for sewer service connection is necessary to maintain the system, where the operation of the sewer was a heavy drain on the city finances.

There can be no doubt that the imposition of a monthly service charge is a municipal, as distinguished from a state matter, in view of the statement in 46 A.L.R., page 676 as follows:

> "The distinction between state and local purposes was thus stated by Dillon, J.: The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws proper, the establishment of gas works, of waterworks, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large. 1 Dill. Mun. Corp. Sec. 58."

And the same authority on page 704 as follows:

> "The courts are fairly uniform in the opinion that furnishing water for domestic, city, and industrial purposes is a corporate purpose of taxation, and the matter of sewage disposal, being closely related, is also held to be a matter to be left to the municipalities themselves."

We have also been unable to find any express statement or authority holding that a city may make a monthly service charge for sewer service connections, but we have found statements in analogous cases which throw light on the question presented.

Thus, in the case of Brewing Association v. St. Louis, 140 Mo. 419, l. c. 429, the court said:

> "Judge Dillon says: 'A city may be expressly authorized in its discretion to erect a public wharf and charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. In one sense such powers are public in their nature, because conferred for the public advantage. In another sense they may be considered private, because they are such as may be, and often are, conferred upon individuals and private corporations, and result in a special advantage or benefit to the municipality as distinct from the public at large.' 1 Dill. Mun. Corp., sec. 27."

We can see no distinction between a sewer as a public utility operated by a municipality from that of water, gas and electricity. The same public necessity exists for the former as it does for the latter.

In the case of Moore v. Logan, 10 S. W. (2d) (Tex.) 428 l. c. 434, the court, in defining a public utility, pointed out that it has been declared to include such public convenience as a sewer said:

> "There is no set definition of what

constitutes a 'public utility,' and in fact it would be difficult to construct one that would fit every conceivable case. 'Utility' means the state or quality of being useful, hence the expression 'public utility' means the state or quality of being useful to the public, generally used in the sense of 'public use,' carrying with it the duty to serve the public and treat all alike, and precludes the idea of service which is private in its nature. The adjudicated cases show that 'public utilities' have been held to include such public conveniences as sewers, waterworks, gas plants, public parks, a convention hall (owned, controlled, and used exclusively by the city), power stations and equipment, street cleaning equipment, electric light plants, street railways, city cemeteries (used exclusively for burial purposes and open to the public at large), auditoriums, bathing pools, wharves, and golf links (considered within the meaning of a city charter authorizing the municipality to acquire public utilities). McQuillan on Municipal Corporations, vol. 4, sec. 1618; Denton v. City of Sapulpa, 78 Okl. 178, 189 P. 532, 9 A. L. R. 1031 (1034); Capen v. City of Portland, 112 Or. 14, 228 P. 105, 35 A. L. R. 589; City of Belton v. Ellis (Tex. Civ. App.) 254 S. W. 1023(writ refused); 3 Bouv. Law Dict. 2767; 4 Words and Phrases, Second Series, 49. The term 'public utility' has a broader meaning than that of mere physical equipment. The term 'public utility,'as operated by a municipality, refers to the entire business, including both the plants and its operation. The collection and disposal of garbage in a city is a very important service, as much so as the furnishing of pure and wholesome water or an efficient sewerage system. "

In the case of Jolly v. Monaca Borough et al., 65 Atlantic (Pa.) 809, the Borough erected a water-works and for some ten years the cost of maintaining same was paid out of the general and special taxes assessed on the taxpayers of the Borough. Afterwards the Borough passed an ordinance requiring all consumers within the Borough to pay certain rates for the use of the water. In pursuance of the terms of the ordinance all consumers of water were notified to comply therewith or the water would be shut off. Plaintiffs, being taxpayers and consumers of water within the Borough, filed a bill in equity to restrain the Borough officials from shutting off the water, alleging that the ordinance was illegal because the Borough was without authority to enact it. The court in holding that same was legal and that the Borough could make a reasonable charge for supplying water to its residents, said:

> "The same principle is thus succinctly stated by Judge Orlady, in Penn Iron Co. v. Lancaster, 25 Pa. Super. Ct. 478: 'While it is no part of the ordinary and necessary duties of the municipal corporation to supply its citizens with gas and water, it is nevertheless true that it may lawfully do so. Such contracts are not made by a municipal corporation by virtue of incorporation. The supply of gas and water may be accomplished through the agency of individual or private corporations, and in many instances it is accomplished by such means. If this power is granted to a borough or city, it is a special, private franchise, and may be for emolument and advantage of the city and for the public good; but, when such a corporation engages in things not public in their nature, it acts as a private individual, no longer legislates, but contracts, and is as much bound by its engagements as a natural person.
>
> "If, then, the borough, when furnishing a supply of water, stands upon the same footing as a private corporation, it

> is entitled to the same privilege of receiving payment for the service rendered. It would be a strange place to draw the line, to hold that service must be rendered, and water supplied by the borough, without any compensation being made therefor. Water rates are paid as the compensation or equivalent, by those who choose to receive and use the water, as a commodity furnished by the borough. No one is compelled to receive or use the water, and, when any one does so with knowledge of the rates charged, he by implication agrees to pay those rates, and his obligation rests upon contract."

The collection of a monthly service charge for sewer service connections should not be confused with the power of taxation.

Thus, in the Jolly case, supra, at page 811, the state said:

> "The collection of water rates should not be in any way confused with the exercise of the power of taxation. In 30 Am. & Eng. Ency. of Law (2d Ed.), 422, the cases are thus summed up: 'Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity. The obligation to pay for the use of water rests either on express or implied contract on the part of the consumer to make compensation for water which he has applied for and received, on the terms and conditions made public.
>
> "We are of opinion that the borough of Monaca has the right to impose by ordinance reasonable rates and charges for the supply of water, furnished by it."

And in Volume 1, Cooley on Taxation, 4th Edition, section 36, page 115, the court in pointing out the difference between charge for services or conveniences, as distinguished from a tax said:

"There are impositions which, though having some of the characteristics of taxes, are, nevertheless, distinguishable from those burdens because laid for different purposes and not necessarily governed by the same rules. Charges for services rendered, or for conveniences furnished, are in no sense taxes."

CONCLUSION

From the foregoing we are of the opinion that the city of Malden has the right to impose by ordinance a reasonable monthly service charge for sewer service connections.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

MW:RW

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney-General.

WORKMEN'S COMPENSATION COMMISSION: RULES AND REGULATIONS IN REGARD TO EXAMINATION OF RECORDS OF EMPLOYERS:

Workmen's Compensation Commission may not make a rule authorizing the Commission to examine the records of employers to determine whether or not such rule has been violated.

October 6, 1939

10-20

FILED
66

Mr. Edgar C. Nelson, Chairman
Missouri Workmen's Compensation Commission
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department on the following state of facts:

> "Our attention has been called to the alleged failure of certain self-insurers to report all accidents as provided for by Section 3332, Revised Statutes of Missouri.
>
> "With this alleged situation in mind, do we have the right, under the Law, to send an investigator into an industrial plant and check its first-aid records or to make any investigation we deem necessary in order to ascertain whether or not the quoted section is being violated?
>
> "Self-insurers under the Missouri Workmen's Compensation Law are governed by our 'Revised Rules for Self-Insurers,' made effective January 1, 1936, which we set up under the authority given us by Section 3361, which reads as follows:
>
> "'The Commission and its members shall have such powers as may be necessary to carry out all the provisions of this chapter, and it may make such rules and regulations as may be neces-

sary for any such purpose.'

"A reading of these rules reveals that there is nothing said about any investigation on the part of the Commission, but it is our impression that under Section 3332 we would have the right to make an investigation where we thought that the section was being violated. I think that this would cover all employers, both self-insurers and those who carry insurance.

"If we do not have authority under this section, is our authority under Section 3361 broad enough to permit us to make a rule providing for such investigations when deemed necessary by the Commission?"

Section 3332, R. S. Missouri 1929, to which you refer in your letter is as follows:

"Every employer in this state, whether he has accepted or rejected the provisions of this chapter, shall within ten days after knowledge of an accident resulting in personal injury to an employe, notify the commission thereof, and shall, within one month, file with the commission under such rules and regulations and in such form and detail as the commission may require, a full and complete report of every injury or death to any employe for which the employer would be liable to furnish medical aid or compensation hereunder had he accepted this chapter, and every such employer shall also furnish the commission with such supplemental reports in regard thereto as the commission shall require. Every such employer and his insurer, and every injured employe, his dependents

> and every person entitled to any rights hereunder, and every other person, receiving from the commission any blank reports with direction to fill out the same shall cause the same to be promptly returned to the commission properly filled out and signed so as to answer fully and correctly to the best of his knowledge each question propounded therein and a good and sufficient reason shall be given for failure to answer any question. No information obtained under the provisions of this section shall be disclosed to persons other than the parties to compensation proceedings and their attorneys, save by order of the commission, or at a hearing of compensation proceeding, but such information may be used by the commission for statistical purposes. Every person who violates any of the provisions of this section, or who knowingly makes a false report or statement in writing to the commission, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment."

It will be noted that an employer who violates the provisions of this section is subject to prosecution and a fine.

You also refer in your letter to Section 3361, R. S. Missouri 1929. This section is as follows:

> "The commission and its members shall have such powers as may be necessary to carry out all the provisions of this chapter, and it may make such

rules and regulations as may be necessary for any such purpose."

Under this section we think the Commission may make a rule or regulation to carry out the provisions of the Workmen's Compensation Commission Act, provided such rule or regulation is not in violation of some statute or a constitutional provision. This rule is announced in Volume 71 Corpus Juris, page 922, Section 669, which provides in part as follows:

"The board is authorized to make such orders as in its judgment may meet the ends of justice, and to promulgate reasonable rules of procedure relative to the exercise of its powers and authority for the protection of those who are injured, and also to protect the rights of the employer and of the insurance carrier, and to safeguard the state insurance fund. The rules, however, must be reasonable, and must not be inconsistent with the workmen's compensation act or with other laws of the state. * * * * * * * * * Rules made by the board in compliance with the act, and not in conflict with organic laws, when proper and reasonable, have the force and effect of law. * "

Since the purpose of your proposed rule is to determine whether or not an employer has violated the provisions of said Section 3332, thereby subjecting such employer to prosecution, we think the first obstacle to such a rule would be: Does it require the employer to furnish evidence which might incriminate him? If it does, then such a rule would be in violation of Section 23 of Article II of the Constitution of Missouri, which is as follows:

"That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by

> a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

In the case of State ex rel. Attorney General v. The Simmons Hardware Co., 109 Mo. 118, the construction of a statute which required a corporation to furnish certain information was under consideration. This statute required the corporation to make a report in which the corporation was required to divulge information which might subject it to a prosecution. This statute was declared unconstitutional because it violated the provisions of said Section 23 of Article II of the Constitution of Missouri in that it required a person to furnish evidence against himself which might be used in a criminal case against such party. At l. c. 124 of said Hardware case the court, in speaking of this rule, said:

> "The defendant here does not attempt to assert any exemption from regulation or modification of its charter powers within the proper limits of constitutional authority, so that question need not be discussed; but it insists that to demand of one of its officers an answer under oath to an official inquiry, touching a matter which may form the subject of a criminal accusation against him, is an infringement of his rights and of its

own, as secured by the federal constitution as well as by that of our own state.

"In looking into the merits of this contention we shall merely consider it with reference to the constitution of Missouri, as in the view we take of the subject it will not be necessary to go further.

"It is scarcely essential at this day to premise that our written constitution, as the most direct expression of the will of the people, furnishes the paramount rules for their government. Any enactment by their accredited representatives which comes in conflict with it, must be regarded as in excess of the authority of the latter, and hence of no effect. When such a clash is plainly apparent, it is the province of the courts, when properly invoked, to so declare. In so doing they merely execute a power intrusted to them by the people, and which must, obviously, be lodged somewhere, to give the organic law a practical vitality.

"Strictly speaking, the courts do not assume, and have no authority, to nullify an act of the legislative department. They are simply empowered to decide, upon proper occasion, whether or not there is an inconsistency between such an act and the terms of the constitution."

Again in the same case the court further said at l. c. 125:

"The Missouri constitution asserts

'that no person shall be compelled to testify against himself in a criminal cause.' This command is found in the same, or closely similar, language in the fundamental law of most, if not of all, of the United States. To fully grasp its meaning we must note its place in the history of the law as one of the most important of the rules of procedure that express the fundamental difference between the criminal practice prevailing in continental Europe and that of countries which trace their laws, as we do, to the English source. In the former, the accused is required to submit to a rigid official examination touching the charge against him. In the latter such an examination is positively forbidden. The reason of this difference is found in that higher regard for the personal rights of the individual citizen, which obtains in countries following the English common law, and to which, in part at least, is traceable the growth of that independent spirit which has secured to the people of those countries so large a share of liberty, and placed them in the vanguard of the world's progress.

"The constitutional provision before us is, no doubt, quite inconvenient in some instances, as a barrier to investigation of criminal conduct, but its larger value in expressing and enforcing a principle of individual right is thought to more than counterbalance such inconvenience.

"But what is its scope? In answering this question, we must keep in view the reason and spirit which form its background. Does the term 'criminal cause' refer merely to litigated proceedings in a court of justice? If it does, then the provision in question does

not reach far enough to shield the defendant in its present position. Fortunately, at this point of our inquiry we are greatly aided by recent decisions elsewhere.

"In Counselman v. Hitchcock (1892), 142 U. S. 547, the supreme court of the United States construed the language of the federal constitution (declaring that no person 'shall be compelled in any criminal cause to be a witness against himself') as protecting one, subpoenaed before the grand jury, from making disclosures which might subject him to subsequent prosecution for violation of the interstate commerce act. In the course of the opinion in that case, reviewing a great number of state decisions on the same point (which we need not, therefore, otherwise cite) the court by Mr. Justice Blatchford says: 'But, as the manifest purpose of the constitutional provisions, both of the states and of the United States, is to prohibit the compelling of testimony of a self-criminating kind from a party or a witness, the liberal construction which must be placed upon constitutional provisions for the protection of personal rights would seem to require that the constitutional guaranties, however differently worded, should have as far as possible the same interpretation. * * * It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offense, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his conviction, without using his answers as direct admissions against him." Emery's Case, 107 Mass. 172, 182.'

"This led, of course, to the conclusion that the witness in question could not

be required to make the disclosures sought.

"In Boyd v. United States (1886), 116 U. S. 616, the same result was reached by that court in an elaborate opinion by Mr. Justice Bradley, in which it was held that the act of congress of June 22, 1874, was unconstitutional in that it required a claimant of property, seized for violation of the revenue laws, to produce his private books and invoices in court, or, in event of failure to do so, the allegations against him, respecting the property seized, should be 'taken as confessed.' That decision embodies the results of much research, and strongly supports the applicability of the constitutional protection to such a case as that at bar.

"One of the most philosophical text-writers on the law of evidence summarizes the conclusions of many decisions on the subject thus: 'It has been said that a witness cannot be compelled to give a link to a chain of evidence by which his conviction of a criminal offense can be insured, and this position is abundantly sustained by authority.' 1 Wharton on Evidence (3 Ed.) sec. 536, and cases cited."

Again at l. c. 129 the court said:

"In the formation of political organisms, called states, under written constitutions like ours, the people sometimes see fit to expressly reserve to themselves the continued enjoyment of certain rights, which they deem too sacred to be surrendered to the control or regulation of their governing representatives.

> "By those who are familiar with the historic struggles through which the present peaceful acknowledgment of the civil liberties of the people has been reached, those reserved rights are justly regarded as objects of the most tender and earnest care, and are accorded a reasonable construction in harmony with the principles of freedom, which they seem designed to embody. They form an important part of the personal liberty which all our American systems of government are intended to secure."

We have quoted the Simmons Hardware case, supra, quite at length because the reason for this provision of the constitution is so well discussed by the court in that case.

If the Compensation Commissioners were permitted to make and enforce a rule which would authorize them to go into the records of an employer to determine whether or not the law had been violated, we also think such a rule would be in violation of the search and seizure provisions of the Constitution of Missouri which are as follows: (Section 11, Article II)

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

We think that the foregoing constitutional provisions would apply so that the Workmen's Compensation Commission would be prohibited from obtaining evidence from an employer, either by the provisions of a rule and regulation of the Commission, or by any statute which

purported to authorize the search or inspection of records of an employer.

CONCLUSION.

From the foregoing it is the opinion of this department that the Workmen's Compensation Commission would neither under the provisions of the law nor under a rule it might make, be authorized to send an investigator into an industrial plant to determine whether or not the Workmen's Compensation law is being violated or whether a rule of the Commission is being violated.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

SOCIAL SECURITY: Residence requirement for aid for dependent children.

August 28, 1939

8-31

FILED
67

Honorable Wayne Norman
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of August 23, 1939, which reads as follows:

> "Will you kindly give me an opinion on the following facts:
>
> "A woman, who is now a resident of the state of Wisconsin, but who had lived in this state until about 3 years ago, is a widow with two children. Her husband was accidentally killed in this county. She is now drawing child's assistance, for her two children from the state of Wisconsin but desires to return and make her home here. I am informed that Wisconsin will pay to her or the state of Missouri the amount which the two children would draw for one year if she leaves that state and I understand that the children, in order to draw the assistance from this state must live here at least one year. Would the year which they live in this state and during which they are assisted by the state of Wisconsin, establish their residence here and make them eligible for child's assistance in this state?"

We will look to the Social Security Act to determine who is entitled to receive assistance under aid to dependent children. Section 13, page 474, Laws of 1937, reads as follows:

> "Aid to dependent children shall be granted with respect to any child who:
>
> (1) Is under the age of sixteen years;
>
> (2) has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with, father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle or aunt, in a place of residence maintained by one or more of such relatives as his or their own home;
>
> (3) has resided in the state for one year immediately preceding the application for benefits, or who was born within the state within one year immediately preceding the application and whose mother has resided in the state for one year immediately preceding the birth."

The residence requirement is contained in Subsection (3) of Section 13, supra. It requires a child to reside in the State of Missouri for one year immediately preceding the application for benefits.

We are enclosing a copy of an opinion rendered by this department to Colonel Allen M. Thompson, Commissioner, Old Age Assistance Division, Jefferson City, Missouri under date of September 28, 1935, defining the words "reside" and "residence" as used under the State Social Security Act.

The fact that some state offers or gives anyone a certain sum of money to move back to the State of Missouri will

of itself not interfere in any manner with her establishing a residence in this state.

It is the opinion of this department that if this mother returns to Missouri with her children and makes her home in this state for one year with the intention of making this state her residence, her children will be able to meet the requirements of Subsection (3) of Section 13 of the State Social Security Act, requiring one to reside in this state for one year.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARH:HR

CHIROPRACTIC BOARD: Member whose term expires and office is filled by another's appointment is out of office.

January 21, 1939

2-2

FILED
68

Honorable T. C. Oyler, D. C.
President, State Board of Chiropractic Examiners
Brookfield, Missouri

Dear Sir:

We acknowledge your request for an opinion dated Jan. 20, which reads as follows:

"I am writing you to find out the present status of the State Chiropractic Board. Dr. Keller was appointed January 1, 1934 and confirmed at the 1935 Legislative session. His term expired January 1, 1937. Dr. T. C. Oyler and Dr. Geer were appointed January 1, 1935 and confirmed by the 1935 Legislature, their terms expiring January 1, 1938. Dr. Trotter and Dr. Fontana were appointed January 1, 1933 and were confirmed by the 1933 Legislature. The terms of the last two expired January 1, 1936, when they were reappointed, but no action taken by the Senate to confirm them.

No successor has been appointed to succeed Dr. Keller, Dr. Geer or Dr. Trotter. The writer, Dr. Oyler, was appointed January 1, 1939 to succeed Dr. Fontana. The other members of the Board will soon be appointed.

Should any business occur which demands action, would Dr. Fontana be considered a member of the Board since he was dropped on January 1, 1939? And also would he continue as Secretary of the Board and would his salary continue until the Board meets and reorganizes?"

Article 5, Section 11, Missouri Constitution provides:

"When any office shall become vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed and qualified according to law."

Article 14, Section 5, Missouri Constitution provides as follows:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Section 13547 R. S. Mo. 1929, provides as follows:

"A state board of chiropractic examiners is hereby created, consisting of five persons, not more than two of whom shall be graduated from the same school or college of chiropractic, to be appointed by the governor, with the advice and consent of the senate, in the following manner, to-wit: Within thirty days after the passage of this law, the governor shall appoint five persons as aforesaid who shall be chiropractic practitioners, having practiced chiropractic continuously in this state for a period of at least two years prior to such appointment. Provided, that no person shall be appointed to the state board of chiropractic examiners who practices any other method of healing than chiropractic as herein defined. They shall constitute the first board of chiropractic examiners, their term of office shall expire, one in one year, two in two years, and two in three years, from the date of appointment. At the expiration of the term of office of any member of said board the governor shall appoint a member for a term of three years. All vacancies shall be filled by the governor in like manner, and the person appointed to fill such vacancy shall serve for the unexpired term only."

Laws of 1933, page 326, Section 1, provides as follows:

> "The Governor shall have power and he is hereby authorized to remove from office, without assigning any other reason therefor, any appointive state official required by law to be appointed by the Governor, whenever in his opinion such removal is necessary for the betterment of the public service, but the Governor may, at his discretion, in any order of removal which he may make under authority of this act, assign additional and more specific reasons for such removal."

In the case of State ex inf. v. Lund, 167 Mo. 228, 66 S. W. 1062, 57 S. W. 572, the respondent Lund contended, that having been appointed for a term of 2 years, he had the constitutional right to hold over until the successor be appointed and confirmed, but the court thought otherwise and at l. c. 242 said:

> "No one will contend that that provision of the charter is in conflict with the Constitution, and if it is valid and the term of office of those officers who were appointed under that provision expired at the expiration of one year from the time of their appointments, it must logically follow that those who were thereafter appointed for two years, in the absence of a provision in the charter that they are to hold until their successors are appointed and qualified, held for two years only from the time of their appointments, * * * * * *"

CONCLUSION

This department is of the opinion that the action of Governor Stark appointing Dr. Oyler on January 1, 1939 to succeed Dr. Fontana on the State Chiropractic Board now eliminates Dr. Fontana from membership on said board. After January 1, 1939, it would not be legal for Dr. Fontana to act as Secretary of the

board or draw any salary as Secretary of the board, and this is true even though the new board has delayed its reorganization until after that date.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WOS:WW

DEAD BODIES: If any person shall die without means of burial expenses, the person or persons having the body of such person in their custody are required to notify the Secretary of the Anatomical Board.

January 30, 1939

2-18

FILED 68

Dr. M.D. Overholser, Secretary
Missouri State Anatomical Board
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion with respect to anatomical material, and in which request, you quote a letter you received from the President of the Anatomical Board, which reads as follows:

> "Dr. Lohr just called to tell me that the County Court's legal advisor had submitted to him the following Article of the Revised Statutes of 1929, Sect. 12955 - Paragraph 4, relating to the support of the poor, which states that the County Court shall appropriate the necessary sums for the funeral expenses to anyone who does not have the means for same. Does not our State Anatomical Law take precedence over this Statute?"

In determining your request for an opinion, your attention is especially directed to Section 9129, R.S. Missouri, 1929, relating to the bodies of paupers and their disposition. This section of the statutes reads as follows:

> "Superintendents or wardens of penitentiaries, houses of correction and bridewells, of hospitals, insane asylums and poorhouses, and coroners,

> sheriffs, jailers, city and county undertakers, and all other state, county, town or city officers in whose custody the body of any deceased person, required to be buried at public expense, shall be and are hereby required immediately to notify the secretary of the board of distribution, whenever any such body or bodies come to his or their possession, charge or control, and shall thereafter dispose of such body or bodies, as the secretary of the state board may direct: Provided, that at any time before said body or bodies have actually been distributed, as provided in this article, any relative or friend of any such deceased person or persons, shall have the right to take and receive the same from the possession of any person in whose charge or custody it may be found, for the purpose of interment: Provided, that when a claim is made for such body or bodies by any person, not a relative of such deceased person or persons, the expense of the interment shall be borne by the person making such claim. * * * * *."

Where the statute is plain and unambiguous, as we believe the above section of the statute to be, no room for construction exists. Cummins v. Kansas City Public Service Commission, 66 S.W. (2nd) 920. You will particularly note that the above section only permits the Secretary of the Anatomical Board to direct how dead bodies may be disposed of in the event no relative or friend of the deceased person or persons has undertaken to inter the body. In the event the body of any deceased person is required to be buried at public expense, and such body is claimed by a relative of such deceased person before such body is actually distributed, then the county court of the proper county shall allow such sum as is reasonable for the funeral expenses.

CONCLUSION.

Due to the above, it is the opinion of this department that if any person shall die within any county, the officers enumerated in the statute shall immediately contact the Secretary of the Anatomical Board, and in the event no claim is made for the body of such deceased person by a friend or relative, then the Secretary of the Board shall dispose of the body.

We further rule that Section 12955, R.S. Missouri, 1929, does not conflict with the provisions of the Anatomical Law.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

J.W. BUFFINGTON
(Acting) Attorney General

RCS:VAC

CHIROPRACTIC: Four members can issue license. Biennial successive renewals of license with attendant fee is compulsory and without exception.

March 27, 1939.

FILED 68

Honorable T. C. Oyler, Secretary
State Board of Chiropractic Examiners
Frances Building
Brookfield, Missouri

Dear Mr. Oyler:

We acknowledge your request for an opinion dated March 13, 1939, which reads as follows:

> "The law provides that when an applicant files for the examination he deposit $15.00 and then at a later date, if he is successful in the examination, he is required to send another $10.00 forthwith the license is issued. At the present time there are only four members on the board as Dr. Fontana has been removed. I have received the final payment from an applicant who recently took the examination. Would it be legal for the four members now acting to sign the license, leaving the space for the fifth member vacant?
>
> "Also the law requires that license be renewed every two years. I have a letter from Dr. W. N. Cade who was issued a license in June of 1936 and removed from the state. He now returns to the state to renew his license. Shall he pay both the 1936 renewal and the 1938 renewal fee?
>
> "At out meeting of the board on February 27, we agreed to admit him back to the state."

Section 13548 R. S. Mo. 1929, relating to the organization and powers of the State Board of Chiropractic Examiners, provides, in part:

> "* * * Four members shall constitute a quorum. * * *"

At no place in the law regulating issuing a chiropractic license does it specifically require the signature of five members to authenticate a license to practice chiropractic.

Four members of the chiropractic board constitute a quorum to do business, and part of the statutory business of said board is to issue licenses. It follows that when four members sign a license, the licensee is duly licensed by the board, the fifth signature being surplusage.

Section 13552 R. S. Mo. 1929 provides for renewal licenses, as follows:

> " * * * All persons practicing chiropractic in this state shall pay on or before September 1st of each even-numbered year after a license is issued to them as herein provided, to said state board of chiropractic examiners, a renewal license fee of $10.00, and no person shall practice chiropractic after September 1st of the even-numbered years following the issuance of such license, without such renewal. The secretary of the board shall on or before August 1st, of each even-numbered year, mail to all chiropractors in the state a notice that the renewal fee shall be due on or before the 1st day of September following such notice. Nothing in this chapter shall be construed so as to require that the renewal receipt shall be recorded as the original licenses are required to be recorded.

> Each practitioner of chiropractic shall display in his office in a conspicuous place his renewal license together with his license showing that he is lawfully entitled to practice chiropractic."

The language of the above statute is clear and unambiguous. In Missouri, renewal of a chiropractic license, with the $10.00 renewal fee, is biennial and compulsory. Successive biennial renewals, with the attendant statutory fee, is a condition precedent to the lawful practice of chiropractic by any person. Dr. Cade must pay both the 1936 and 1938 biennial renewal fees in order to be in good standing with Missouri.

Respectfully submitted,

WILLIAM ORR SAWYERS
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

WOS:LB

ASSESSMENT: Assessors should assess all real property if the ownership on June 1st of the year preceeding the collection of taxes.

April 20th, 1939.

5-1

FILED
68

Hon. Henry F. Oelze,
Assessor of St. Charles County,
St. Charles, Missouri.

Dear Sir:

We wish to acknowledge receipt of your inquiry which is as follows:

"The question has arisen in St. Charles County, Missouri, as to whether or not lands in process of condemnation by the United States of America, in connection with the canalization of the Mississippi River, and more particularly by the construction of what is known as Lock and Dam No. 26 in the Mississippi River at Alton, Illinois, because of which certain property along the Mississippi River in St. Charles County, Missouri, which will be inundated, should be assessed for taxation purposes.

The policy of the Federal Government is to acquire the greater portion of this land in fee, taking flowage easements over land where the particular tract is highly developed or contains costly improvements.

The War Department files a petition in the United States District Court, asking for the condemnation of a particular tract of land. On the same day the petition is filed, the District Judge signs an order giving the United States the right to take im-

mediate possession. This is in accordance with Section 594, Title 33, United States Code Annotated. Under authority of this Order, when the dam at Alton was completed, it was placed in operation about July 1, 1938. Most of the suits for the condemnation of land overflowed as a result of the creation of this pool are still pending in the Federal Court. I am told by the District Engineer at St. Louis, Missouri, that, when the amount of compensation to be paid the property owners is finally determined by the court, that 6% interest is allowed the property owner as additional compensation for the taking of his land, from the date the Order of Immediate Possession was filed until the sum of money is deposited into the Registry of the Court. When the money is paid into the Registry of the Court, an Order Vesting Title in the United States is signed by the Federal Judge, and a certified copy thereof filed for record in the Office of the Recorder of Deeds.

Shall I stop assessing the property described in the various petitions (1) On the date the Order of Immediate Possession is entered, or (2) On the date when the dam was placed in operation, towit, on or about July 1, 1938, or (3) Wait until the Order Vesting Title in the United States is filed in the Recorder's Office?

An early reply will be appreciated, inasmuch as I shall soon have to begin preparing the books for the assessments as of June 1, 1939."

It occurs to us as a primary and undisputed principle of law that the Federal Courts will apply the State law in the decision of a case involving the construction of the revenue laws of Missouri, although the case being tried is in the Federal forum, provided the law on such question has been declared by the highest courts of the State.

As far back as 1864 the question was before the Supreme Court of this State as to when the lien attached in favor of the State for taxes, and in the case of Blossom v. Van Court, 34 Mo. 390, this State declared the law to be that the tax lien in favor of the State attached on the first day of February of the year that the assessment was to be made. Van Court deeded certain lands to Blossom by deed dated February 11, 1857. Van Court was owner of said land on the 1st day of February, 1857. The statute on the duty of assessors at that time, the 18th section of the 2nd article of the Act of 1855, provided:

> "Every assessor shall commence on the first day of February in each year, during his continuance in office, and go through all parts of the county * * * in which he is the assessor, and require every person who shall have owned * * * any property on the said first day of Februmay in each year, taxable by law, * * * to deliver him a written list of the same * * * ."

The court, speaking of the above provision, said (page 394):

> "The section above quoted appears to fix definitely that the tax should be assessed against the person who was on the first day of February the owner of the property, thus fixing his liability on that day,

> and charging the property with it as an encumbrance, (although the amount of the encumbrance is not ascertained until afterwards.) The defendant having conveyed the land on the eleventh day of February, was liable for the taxes assessed against the property on the first day of that month."

The court in that opinion states that the state and county taxes constitute a liability of the owner of the property as well as an encumbrance upon the land itself, which could be sold for their non-payment.

The principle and holding of the Supreme Court of this State as declared in the above case was reaffirmed in the case of McLaren v. Sheble, 45 Mo. 130. The facts in the latter case were that the defendant Sheble on the first Monday of September, 1866, owned certain real estate and thereafter in October conveyed the same to the plaintiff. The deed contained the covenant of warranty implied in the words "grant, bargain and sell." The grantee, plaintiff therein, paid the state and county taxes assessed against the property in the name of the defendant for the fiscal year 1866-7, the defendant refusing to do so, and brought this suit to recover from the defendant such payment. No actual assessment of the property for the year 1866 had been made at the date of the conveyance by deed. The assessment, however, was subsequently made in accordance with the statute in the name of the defendant as being the owner on the first Monday of September of that year. The court said, page 131:

> "Did the lien of the tax imposed by virtue of the assessment take effect by relation from that date? That is the only question presented for consideration, and it is substantially determined by the decision in Blossom v. Van Court, 34 Mo. 390. * * * That case decides in effect that the tax lien does relate back to

and take effect from the inception point of the assessment, although the assessment may not be consummated till a later day or month in the year. The language of the court on this point is clear and explicit. The statute under which that decision was made required the assessor to begin hiswork on the first day of February; thepresent statute requires the assessment to date from the first Monday of September.

* * *

"According to the rule laid down in Blossom v. Van Court, the defendant, being the owner and occupier of the premises on the first Monday of September, 1866, was liable for the taxes of the fiscal year beginning at that date, and such taxes consituted a lien upon the property, by relation, from and after the first Monday of September, although not actually levied till the year 1867. The rule is just. Suppose that A., on the first Monday of September in any given year, had $10,000 cash, and returned it as the law requires; and B., on the same day, had $10,000 invested in real estate, and in like manner returned it for taxation. Suppose then, that these parties, on some subsequent day prior to the consummation of the assessment, should exchange property, who should pay the taxes? A. would be compelled to pay the personal taxes assessed on account of the $10,000 cash returned, and, according to the theory of the defendant, also, the taxes assessed on account of the real estate returned by B.--thus paying the taxes of the two for that year, relieving his vendor from all tax payments whatever, in the case supposed. The true and equitable

> rule is for each party to pay the taxes assessed on account of the property owned by them respectively on the initial day of the assessment, in the absence of any stipulation to the contrary.
>
> This equitable rule is recognized in Blossom V. Van Court, and that case, as already observed, decides that the tax lien takes effect and becomes an encumbrance from the inception of the assessment."

The statutes of 1865, which were operative when the case of McLaren v. Sheble was decided, provided (Sec. 31, p. 103, General Statutes 1865:

> "The clerk of the county court shall deliver to the assessor on or before the first day of September in every year the assessor's books of the preceding year * * * * and take his receipt therefor, and the assessor, so soon as he shall have completed his assessment and made his assessor's book for the year, shall return the whole of such papers and documents to the clerk."

We have examined the Laws of 1865, Chap. 12, beginning on page 98, and find that it is substantially the same with reference to the assessor's duties as the present law of Missouri, except it has no provision similar to Sections 9746 and 9747, R. S. Mo. 1929, which are noted hereafter.

The above two cases of Blossom v. Van Court and McLaren v. Sheble are approvingly cited by the Supreme Court of Missouri in the case of Stafford v. Fizer, 82 Mo. 393, 397.

In State ex rel. Watson v. Harper, 83 Mo. 670, these two cases are again approvingly cited, and on page 676 the court says:

> "Then again, this lien which attached upon the assessment of the taxes under the law 1867, supra, is retained and preserved by sec. 6832, R. S. 1879, which provides that the 'taxes due and unpaid on any real estate * * * shall be deemed and held to be back taxes, and the lien heretofore created in favor of the state of Missouri is hereby retained.' It is thus very evident that the law of 1867 provided for, and created a lien for the taxes and the law of 1877 preserved it."

Again in 1912, in the case of Morey Eng. & Const. Co. v. Ice Rink Co., 242 Mo. 241, the Supreme Court of this State approvingly cites the case of Blossom v. Van Court and McLaren v. Sheble, and with reference to said two cases states, page 249:

> "Both cases hold that the lien of the tax takes effect from the initial point of the assessment, and by virtue of the assessment."

Likewise, the Blossom and the McLaren cases are approvingly cited by the Supreme Court of Missouri as late as 1936. See the case of Dennig v. Swift & Co., 339 Mo. 604, 609, 610, where the court says:

> "Blossom v. Van Court and McLaren v. Sheble, as indicated by our previous reference to those cases, turned on the question of when the lien of the tax attached."

It will be noted that under the well defined law as declared by the highest court of this state, it is determined and settled that the lien for taxes attaches to the land and becomes fixed upon the initial date when it becomes the duty of the assessor to begin assessing the property. Section 9756, R. S. 1929, fixes the first day of June as the day he shall begin his work of assessing the property of his county, and under the holding in the McLaren case and the Blossom case, the lien attaches on the first day of June of a given year for the taxes that are payable in the fall of the next year.

In addition to the statutory law under which the Blossom and McLaren cases were decided, there has since then been placed on the statute books of Missouri Section 9746, R. S. Mo. 1929, which provides:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

and Section 9747, which in part provides:

> "Real property shall in all cases be liable for the taxes thereon, and a lien is hereby vested in favor of the State in all real property for all taxes thereon, which lien shall be enforced as hereinafter provided * * *."

The cases of Bannon v. Burnes, 39 Fed. 892, and United States v. Pierce County, 193 Fed. 529, relied on by the Justice Department of the United States as authority for the conclusion reached in their opinion, were both decisions of the inferior Federal Court. The Bannon case was decided by the Circuit Court for the Western District of Missouri in 1889, which is the same as the District Court at this time.

The case of United States v. Pierce County was decided by the District Court of the State of Washington in 1912. Both of those cases have been disapproved.

The Circuit Court of Appeals for the Second Circuit, in 1931, in the case of United States v. City of Buffalo, 54 Fed. (2d) 471, cited the above two cases, 39 Fed. and 193 Fed., and Judge Hand, writing a separate concurring opinion, said the following, page 474:

> "I agree in the result but for other reasons than my brothers. The question appears to me wholly one of state law, with which the sovereignty of the United States has nothing to do, although of course I agree that no state may tax property of the United States. On the other hand I do not understand it to be disputed that when the United States takes over property, it takes it subject to whatever liens are upon it, tax liens like the rest. If the law of a state were that all taxes should be liens as of March first, the time of the assessment, but might be computed, levied and extended on the rolls before July first, I see no reason why they should not be a lien upon land conveyed to the United States on March second. The act of liquidating and formally imposing the tax would not in my judgment be in defeasance of the sovereignty of the United States. I cannot agree with the contrary ruling in U. S. v. Pierce County (D.C.) 193 F. 529. Bennon v. Burnes (C.C.) 39 F. 892, contains a dictum in accord, but it was altogether unnecessary to the

> result. The levy and extension on the rolls are not adversary proceedings against the United States, like an arrest or seizure of its property; they do no more than fix the amount of a charge already imposed, and the liquidation does not depend upon questions in which the United States is interested except as all other owners of property. They are not directed against it individually, as is a suit, or a condemnation."

This view above expressed by Judge Hand was approved by the United States Circuit Court of Appeals of the 9th District in 1933 in the case of United States v. John K. & Catherine S. Mullen Benev. Corp., 65 Fed. (2d) 48. The court there in a unanimous opinion, after quoting the above quoted portion of the opinion of Judge Hand, said, page 54:

> "While it is conceded in the case at bar that the assessments made by the City of American Falls was void by reason of the fact that the government owns the property subjected to the assessment, we are inclined to agree with the position taken by Circuit Judge L. Hand in his concurring opinion."

The decisions cited in the opinion of the Department of Justice are not authority for the conclusion reached in said opinion because those decisions are overruled in later cases by superior Federal Courts. The Bannon and the Pierce County cases, sup a, overlook the fact that in the construction of state revenue laws the Federal Court will adopt the construction of the highest State Courts as placed on said laws by the State Courts. If authority were desired supporting this latter statement, see Stone v. Southern Illinois & Missouri Bridge Co., 206 U. S. 267, 51 L. Ed. 1057, where the court said:

> "These questions involve the powers of corporations under the laws of Missouri, which are concluded by the adjudication of the State Supreme Court."

Also, Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. Ed. 327, where the Supreme Court of the United States, speaking of the construction of a state statute said:

> "Whether the notice to produce was broader than the statute provided for is a question of the construction of the state statute, and of the notice, and the decision of the state court is final on that question."

Likewise, Ughbanks v. Armstrong, 208 U. S. 481, 52 L. Ed. 582, where the Supreme Court said with reference to the construction of a statute defining the Michigan indeterminate sentence and the construction thereof by the Michigan courts, the following:

> "In such a case as this we follow that construction of the Constitution and laws of the state which has been given them by the highest court thereof."

Such a rule has also been applied with reference to treaties. See Re. Ghio, 157 Cal. 552, 108 Pac. 516, 37 L.R.A. (N.S.) 549, 555, where the Supreme Court of California said:

> "The clause of the Argentine treaty relates to legal proceedings for the settlement of estates, and the words used are to be given the meaning they usually have in their respective countries when used in that connection."

If question might be raised as to the liability of the United States for the lien which had attached to real estate at the time the United States became the record owner thereof, the case of Mullen Benev. Corp. v. United States, 40 Fed. (2d) 937, holds that the United States by taking possession of realty impliedly contracts to pay the amount of liens at that time against said property. The court says:

> "Admittedly an action may be maintained against the United States and upon an implied contract. If, under circumstances, where it has taken over for a public purpose, the private property of another, a contractual obligation will be imposed by law on it to compensate for destroying the interests of another, * * *. When the United States, without compensating the plaintiff, a lienholder, took permanent and exclusive possession of the lands and devoted them to reservoir purposes, it destroyed the lien back of the bonds and made it impossible for the plaintiff to collect on its bonds, and when in doing so it was taking private property without just compensation and impliedly contracted with the bondholder and obligated itself to pay the lien upon the property. Otherwise, one who may have a lien interest in land would be deprived of his right to realize upon his lien."

It is noted that your inquiry is based upon the statement that when the money is awarded by the Commissioners as damages for the land is paid into the registry of the court, " an order vesting title in the United States" is made by the Federal Court.

The ownership of the land is your guiding star as to when you should or should not assess real estate for taxation purposes.

The date under the Laws of Missouri that real estate is taxable is June 1st of a given year, the taxes then so assessed being payable in the fall of the following year. If the title to the land in question was on June 1st of a given year vested in the Federal Government, then it would be your duty as assessor to not assess said land. If, on the contrary, on June 1st of a given year the title was not in the Federal Government but was in an individual, then it would be your duty to assess said property, although the taxes were not actually payable until some eighteen months thereafter.

The question of whether the dam was actually in operation has nothing to do with whether you as assessor should assess the property, likewise, the question of whether the order is filed in the Recorder's Office can not be the determining fact.

CONCLUSION

It is our opinion that it is your duty as assessor of St. Charles County to assess for taxation purposes such real estate as on June 1, 1939, located in St. Charles County, if, at that time, the title thereto had not been actually vested in the Federal Government. However, when the title has been vested in the Federal Government, then it is your duty not to assess said real estate as of June 1st, of any year thereafter and this is true regardless of whether the dam for the erection of which the land was condemned, was placed into operation and regardless of

whether the order vesting title is filed in the Recorder's Office of your county.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

HARRY H. KAY
(Acting) Attorney General.

DW:RV

THE COUNTY COLLECTOR:
TAX RECEIPTS:

County collector may make a tax receipt in any form he desires so long as it evidences the payment of the taxes on the property and for the period for which the taxes are paid.

May 16, 1939

517

FILED
68

Mr. William J. Olenhouse
County Clerk
Livingston County
Chillicothe, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the question of whether or not your collector would be authorized to use tax receipts for the year 1939 which have been printed for some prior year.

In our search on this question we find that the statutes are somewhat silent as to the making of tax receipts and as to the duties of the collector in relation to such receipts. However, from a reading of the statutes there is no doubt but what the lawmakers have intended that the collector, when he collects these taxes should issue some sort of a receipt to the taxpayer. Section 9912 R. S. Missouri 1929, shows this indication and is as follows:

> "It shall be the duty of the collector to furnish to all nonresident taxpayers a statement of the amount of taxes assessed against any tract of land or town lot in his county for any year or years during which he is collector, and send the same by mail to the address of any person applying to him by letter for the same; and if no taxes are due on any such tracts or lots, he shall answer such letters of inquiry, stating

> the fact; and whenever any funds are remitted by mail or otherwise to any collector for the payment of any taxes appearing to be due on his tax book, it shall be his duty to receive the same and send a receipt therefor by mail to the person remitting the same: Provided, that he may charge all sums which he may have to pay for postage as costs against the person applying or remitting to him, but no other costs."

There is no fixed form for the tax receipt and so long as it shows that the money has been received and describes the properties upon which the taxes are paid, the funds to which they belong and the period for which they are paid, we think under the practical rule that would be sufficient. Tax receipts are printed for the convenience of the officials. It would be impossible for a collector to write out in longhand a receipt for all of the taxes paid to him and for that reason by giving the statutes a reasonable construction we think he would be authorized to have the forms printed. As to his authority to use a receipt printed for some prior year and change the date in it so that it will conform to the facts under which the taxes are paid, we think there is no doubt but what the officer would have authority to do that.

In our search of the opinions written by this office on this subject we find that under date of January 20th, 1937, Mr. William Orr Sawyers, Assistant Attorney General, wrote an opinion for Honorable Morgan M. Moulder, Prosecuting Attorney, Camden County, Camdenton, Missouri, which will give you some light on the authority of the county court to furnish these supplies. We are enclosing a copy of that opinion with this opinion.

CONCLUSION

From the foregoing it is the opinion of this

department that the tax collector would be authorized, if he saw fit, to use tax receipts which have been printed for prior years and issue them in receipt of taxes paid for the current year providing he can alter these receipts to conform to the facts under which the current taxes are paid.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

PROSECUTING ATTORNEY: Duty to represent county hospitals.
COUNTY HOSPITALS: May spend hospital funds to pay cost of litigation, but may not hire or pay private counsel.

October 7, 1939

10-11

FILED
68

Honorable Edwin C. Orr
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your letter dated September 27, 1939, asking our opinion on two questions that have arisen as a result of our opinion of September 9, 1939, to W. T. Conley, holding that osteopaths were not authorized to practice their system of healing the sick in the Boone County Hospital. The questions are:

(1) May the board of trustees of said hospital retain private counsel to represent said institution in the event a suit is brought to ascertain the right of osteopaths to practice in the hospital, or is it the duty of the county prosecuting attorney to represent the institution?

(2) May the board, if authorized to retain private counsel, pay attorneys fees, expenses and cost of litigation out of hospital funds?

The Boone County Hospital is one organized under the provisions of Article 4, Chapter 120, R. S. Mo. 1929. It was established by a petition and vote on the question by the citizens of Boone County and was built and is supported by a tax levied upon the taxable wealth of the county. The end sought to be reached by the establishment of the institution was to furnish the inhabitants of the county adequate facilities so that they may derive the greatest benefit from medical care. Said institution is also for

the use of the indigent, insane and tubercular inhabitants of the county. In order to effectuate this purpose, said institution is invested with two of the highest attributes of sovereignty - the right to be supported by taxation and the power of eminent domain by the county in its behalf.

This summary clearly illustrates that the maintenance of this hospital is but a valid, authorized function of the county as a governmental unit that has long been recognized.

Section 11316 R. S. Mo. 1929, provides:

> "The prosecuting attorneys shall commence and prosecute all civil * * actions in their respective counties in which the county * * * may be concerned, defend all suits against the county * * * * *."

Section 11318 R. S. Mo. 1929, provides:

> "He (the prosecuting attorney) shall * * defend * * * all civil suits in which the county is interested, represent generally the county in all matters of law * * * *."

Is not the county "concerned" and "interested" in litigation affecting a unit of the county government? We think it is vitally concerned in seeing that the statutes under which the hospital operates are not violated by permitting unauthorized persons to use the institution. It will be noticed also that the above statutes in speaking of the prosecutor's duty to represent the county do not restrict it to suits in which the county is "defendant" or "plaintiff" or a "party".

In United States vs. Burton 131 Fed. 552, defendant, a United States Senator, was charged with receiving a pecuniary compensation for services rendered for a certain company in a matter pending before the Post Office Department. At that time (1904) a federal statute existed prohibiting a senator from receiving compensation for services rendered

by him to any person in relation to a matter in which the United States was interested. The service rendered was in connection with a "fraud order" issued by the Postal Department. The court held that the United States was interested in the fraud order, saying of the word "interested", "Its primary meaning is 'to be concerned in a cause or its consequences,' and this meaning is the one which ordinarily should be given to legislative enactments."

We think the county and its people are concerned in any action affecting the Boone County Hospital - a public institution, and it is the duty of the Prosecuting Attorney of Boone County to represent said institution in any litigation affecting it.

The next question to be disposed of is: May the board of trustees of said institution retain private attorneys, even though it is the duty of the prosecutor to represent them, and pay said attorneys out of hospital funds.

In Dixon v. Livingston County 70 Mo. 239, the point involved was whether or not a county could hire private counsel to represent it in a certain matter. The statute at that time (1871) authorized the county court to hire a county attorney except that if the circuit attorney, of the judicial circuit in which county was, lived in the county he was to be that county's legal counsel. The county court of Livingston County retained private counsel to represent the county even though the circuit attorney lived in Livingston County. This case was one by said private counsel to collect his fee. The petition was successfully demurred to and on this the court said, l.c. 243:

> "We are of opinion that the demurrer to the petition was properly sustained, on the ground that the duty of prosecuting such suit was, by express statute, cast upon the circuit attorney, and that the county court had no warrant in law to employ another attorney to perform this duty."

The rule that would seem to be announced in that case is

that if the legislature provides legal counsel for a governmental agency it must rely on that legal counsel for its representation and can not hire private counsel to represent it. By analogy that case applies to the instant question with equal force. The legislature has designated the prosecuting attorneys to attend to litigation which interests the county and having done so it impliedly prohibited the employment of other counsel.

The remaining question deals with how the expenses and cost of litigation (exclusive of attorneys fees) affecting the Boone County Hospital are to be paid.

Section 13976 R. S. Mo. 1929 provides for the levy of a tax to support county hospitals. This section then provides that said taxes "shall be collected in the same manner as other taxes are collected and credited to the 'hospital fund' and shall be paid out on the order of the hospital trustees for the purpose authorized by this article and for no other purpose whatever."

The purpose that said funds can be spent for, and upon which this question turns, is found in Section 13978, Laws 1937, page 357, and is - maintenance, supervision, care and custody of the grounds, rooms or buildings comprising the hospital.

The board having supervision, care and custody of the hospital also has the duty to see that no one uses said hospital facilities except those that the legislature authorized.

It is a familiar rule of law in this state that where an officer is given express power there is carried with the express grant by necessary implication every other power necessary and proper to the execution of the power expressly granted. (Ex parte Sanford 236 Mo. 665; State ex rel. v. Speer 284 Mo. 45). Here we have the board with the express power to supervise and control the hospital and to spend the hospital fund for that purpose. The law establishes who may use the county hospital facilities and a part of the board's supervision and control is to see that no one except those authorized do use said facilities. If a law suit becomes necessary to maintain said supervision and control, then by implication the board of trustees may spend the hospital fund

to effectuate their express power to supervise and control the hospital.

CONCLUSION

Therefore, it is our opinion that the Board of Trustees of the Boone County Hospital may not retain private counsel to defend a suit brought by an osteopath to determine said osteopaths right to treat patients in said institution. The prosecuting attorney is charged with this duty under the law. However, the trustees may spend "hospital funds" to pay necessary costs of this litigation, exclusive of attorneys fees.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
LLB:RT

MUNICIPAL CORPORATIONS: Jefferson City, being a city of the third class may issue bonds for the erection of a municipal office building that may be partly used by state offices.

December 29, 1939

1-10

FILED
68

Mr. Jesse N. Owens, Mayor
City Hall
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated December 20, 1939, which reads as follows:

"I am attaching hereto an ordinance which the City Council of Jefferson City is contemplating passing. It provides for the calling of an election to authorize the city to issue bonds in the amount of $200,000 for the purpose of constructing a municipal office building.

"The contemplated building may house some of the municipal offices. About five per cent of the space in the building will be used for municipal purposes. The remainder of the building will be constructed not as an auditorium or armory, but as an office building, to house mainly, it is hoped, departments of state government. No revenue will be derived for the city from the occupants of the building.

"It cannot be contemplated this building will be used entirely for municipal purposes. It is true, however, it will be designated as a 'municipal office building', and will be so known to the public. The public may know when bonds for the construction are considered that in the

strictest sense the building will not be used exclusively for municipal purposes, and that no revenue will be derived from the use of this building.

"This is an unusual case, but inasmuch as great benefit may be derived by the community at large from the erection of the building, through the pay roll and wages paid to the workers in the building, it is thought that citizens generally will derive indirect benefits.

"The question has arisen as to whether an election can be legally called by a city of the third class for the purpose outlined above. Could bonds so voted be legally sold and collected upon? Could city officers now, or in the future, be guilty of any infraction of the law if this ordinance were passed and the money derived from the sale of the bonds so voted were used to construct a building in conformity with the ordinance but a state agency would be permitted to largely occupy the building, whether rent-free or if rent were collected? Would they be guilty of diversion of the bond money? Would they be guilty of diverting use of the building?

"If it were known to a state department that bonds had been voted and sold for the purpose of constructing a municipal office building but planned for use for such state department, could said state department legally accept from the city the use of said building for its own office use?

"Would the term or name 'municipal office building', used at the time of the bond election, bring such project within the statutes and make the action legal?

"There may be some defects in the ordinance about which inquiry is not made, such as the selection of judges of election, but these matters can be corrected when the above inquiries are answered.

> "We request your opinion on these questions for it is vitally important to the citizens of our city that we know what action their city government may take to further the best interests of the community. We realize this request will require time and research and assure you that for your assistance we will be most grateful."

Your request being in reference to the laws applicable to Jefferson City, is covered by the laws included in Article 4, Chapter 38, R. S. Missouri, 1929, which concerns cities of the third class.

Section 6808 R. S. Missouri, 1929, partially reads as follows:

> "* * * * * The council may also provide for the erection, purchase or renting of a city hall, workhouses, houses of correction, prisons, engine houses and any and all other necessary buildings for the city; and may sell, lease, abolish or otherwise dispose of the same, and may enclose, improve, regulate, purchase or sell all public parks or other public grounds belonging to the city, and may purchase and hold grounds for public parks within the city, or within three miles thereof."

Under the above section, the legislature has seen fit to specifically state that a city of the third class may erect, purchase or rent a city hall or any and all other necessary buildings for the city. This section also specifically states that the city may sell, lease, or otherwise dispose of the buildings.

Section 6834 R. S. Missouri, 1929, reads as follows:

> "The city council is hereby authorized and empowered to provide for the purchase

> of ground, and the erection of city halls, fire stations, assembly halls, memorial halls, convention halls, public library, hospital buildings, equipment and other buildings and the improvement thereof, and for the payment of the same, and also for all necessary work of improvement specified in this article, by the issue of bonds or otherwise, subject, however, to the conditions and limitations herein specified. No city shall be allowed to become indebted in any manner or for any purpose to any amount exceeding in any one year the income and revenue provided for such year, without the assent of two-thirds of the voters of such city, voting at an election to be held for that purpose, nor in any case requiring such assent shall any indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness: Provided, that any city incurring any indebtedness requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the date of contracting and incurring such indebtedness and may provide by ordinance the manner of conducting said election under this section, and ascertaining the result of the same."

Under this section a city of the third class is empowered to issue bonds for city halls, buildings etc., which would include a city hall or a "municipal office building", for the reason that it specifically states "other building."

Section 3, Article 10, of the Missouri State Constitution, reads as follows:

> "Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws."

This section of the Constitution is one of the sections upon which the facts stated in your request will be based as to whether or not this section will be violated by the erection, by bond issue, of a "municipal office building," which may be used partially by a state department.

Under Section 6808 and Section 6834, supra, there is no question but what the City of Jefferson City, may build, by bond issue, a "municipal office building." There is no question but that building an office building, or which is described by an ordinance as a "municipal office building" is for a public purpose, omitting or including the fact that the "municipal office building" may later contain a state office. It is not a misuse of public money in erecting a "municipal office building." It is also true that if the "municipal office building" should contain a state office, that office would be for a public purpose, and not for private gain to any corporation, company, partnership or individual.

In the case of Halbruegger v. City of St. Louis, et al, 262 S. W. 379, a tax-paying citizen of the city of St. Louis sought to enjoin the city and its officers from issuing bonds voted to procure money to acquire a site for erecting a civic building to be known as the "municipal auditorium and community center building." In that case the court said, at page 382:

> "There seems to be no dissent from the rule that the erection of a city hall is within corporate purposes of municipalities, and that a room for public assemblages may be included therein, and paid for with public money. Town of Beaver Dam v. Frings, 17 Wis. 398, cited in State ex rel Jordon v. Haynes, supra; Torrent v. Muskegon, 47 Mich. 115, 10 N. W. 132, 41 Am. Rep. 715;

Hightower v. Raleigh, 150 N. C. 569, 65 S. E. 279; Ross v. Long Branch, 73 N. J. Law, 292, 63 Atl. 609; Wheelock v. City of Lowell, 196 Mass. loc. cit. 224, 81 N. E. 977, 124 Am. St. Rep. 54; Denver v. Hallett, 34 Colo. loc. cit. 405 et seq., 83 Pac. 1066; and cases cited; White v. Town of Stamford, 37 Conn. 586; Greeley v. People, 60 Ill. loc. cit. 22; Bates v. Bassett, 60 Vt. 534, 15 Atl. 200, 1 L. R. A. 166; Callam v. Saginaw, 50 Mich. loc. cit. 10, 14 N. W. 677; Parker v. Concord, 71 N. H. loc. cit. 471, 52 Atl. 1095.

"In Wheelock v. City of Lowell, 196 Mass. 220, 81 N. E. 977, 124 Am. St. Rep. 543, 12 Ann. Cas. 1109, it was proposed to erect a public hall to replace a building which had been destroyed by fire, and which had been theretofore used by various sorts of public assemblages. The city had another building in which its officers and boards were adequately housed. The suit was to restrain the expenditure. The court said, in part:

"'The reported facts show a substantial use of Huntington Hall for political rallies, conventions, and other public meetings of citizens, although, from time to time, it has been rented for purposes of amusement and instruction. That the building has been also let for private uses, when not required by the public needs, does not affect the general legal purpose. * * * It is hard to overestimate the historical significance * * * of the public meetings held in all the towns of Massachusetts before, and during the Revolution. No small part of the capacity for honest and efficient local government, manifested by the people of this commonwealth, has been due to the training of citizens in the forum of the town meeting. * * * The practical in-

> struction of the citizen in affairs of government, through the instrumentality of public meetings, and face to face discussions, may be regarded quite as important as their amusement, edification, or assumed temporal advancement in ways heretofore expressly authorized by statute, and held constitutional * * * ."
>
> "'A commodious and convenient hall in which the citizens are to exercise their right of assembling, and of considering and discussing public affairs, is therefore an object for which the defendant city may legally spend money.' * * *"

The fact that the proposed building is called a "municipal office building" and not a city hall, does not prevent section 6808, supra, from covering such a procedure, for the reason that that section specifically stated "other buildings."

In the case of Halbruegger v. City of St. Louis et al, supra, on page 383, the court said:

> "If a public hall legally may be erected by a municipality out of public funds at all, it is because it serves, or may serve, a public use within the meaning of the Constitution. It is settled law, generally, in Missouri and elsewhere, that it does serve such a use. If so, it is because it serves that use, and not because it is nailed to the top of or beside a number of rooms designated 'city offices,' or the like. The right of the people 'peacably to assemble for their common good' is thought of sufficient importance to justify its protection, by constitutional provision, from all interference. The duty to assemble for the purpose of securing and disseminating information, and interchanging views on public questions is becoming increasingly obligatory. The

increase of opportunities for assembling for the better diffusion of 'light and knowledge,' on all subjects which will advance the cause of education and morals among the people of a community, will aid in contributing to the general welfare the progressive influences of moral and cultural forces, which are essential to the advancement of the race. The policy of our people, as evidenced by the Constitution and the Charter of St. Louis and other cities, is to retain, in themselves, the power to initiate legislation and to veto acts of the lawmaking body. By this means the people of each community become a constituent part of a great legislative body which acts for the whole state, and, on occasion, become the municipal Legislature. Public discussion of such questions fairly calls for a place where it can be held, and such public discussion is a reasonable means whereby the electorate can aid itself, or be aided, in arriving at the conclusions it has become its duty to form, in furtherance of the public good, under an adopted policy. In many matters of local, and even more general concern the need of the citizens of a municipality for a convenient and adequate place of assemblage is too obvious to require particularization. The arts and sciences require places for display of their works. The cause of education can be served in many ways by such a structure. When all these things are considered, we find no difficulty in holding that, under the generally approved rule stated above, the court cannot say the purpose, evidenced by the proposal in question, is not a public one within the meaning of the principle formulated in the quoted provision of the Constitution.

"The decision in Brooks v. Town of Brooklyn, 146 Iowa, 136, 124 N. W. 868, 26 L. R. A. (N.S.) 425, pertained to the proposed erection

> of a municipal theater. It obviously deals with a structure quite unlike that contemplated by the city of St. Louis. What the court said to the effect that, by reason of the fact that municipal government in Iowa was representative, and voting was by ballot, cities in that state were not in need of a public assembly hall like those justifiable where local government was conducted by 'town meetings,' perhaps puts too much stress upon the method of voting, and too little upon the public advantage and need of discussion of public questions. In New England, itself, another view is taken of the effect of the substitution of representative municipal government, and voting by ballot on the public right and necessity to erect and maintain a hall for public assemblages. Wheelock v. City of Lowell, 196 Mass. loc, cit. 227, 81 N. E. 977, 124 Am. St. Rep. 543, 12 Ann. Cas. 1109."

In view of the above citations it is not necessary that the bonds read exactly as set out in section 6808, supra, but may mean any other like office which may be designated "city offices", or the like.

There is no question but that a state office situated in a city-owned office building would also be considered the same as a public purpose, although it serves people other than those who reside in Jefferson City, yet, it serves the residence and citizens of Jefferson City, and would not be a violation of Section 3, Article 10, of the Missouri State Constitution, supra.

Under Section 6808, supra, the city may lease, but not state the amount required to be placed in the lease. Even if no consideration was given for the lease and space in the municipal office building by the city to the state the service given by the state is for a public service and serves the city as well as the state. In some cases the public service is not of benefit to all of the taxpayers in the community; nevertheless, if it is a public service for the public's need, and for a public purpose it is not a violation of Section

47, Article 4, of the Constitution of Missouri, which reads as follows:

> "The General Assembly shall have no power to authorize any county, city, town or township, or other political corporation or subdivision of the State now existing, or that may be hereafter established, to lend its credit, or to grant public money or thing of value in aid of or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company: * * * "

This was upheld in the case of Jasper County Farm Bureau v. Jasper County, 286 S. W. 2d 381, which was a case brought by the Jasper County Farm Bureau against Jasper County to recover from the county the unpaid balance of an appropriation made by the county court for the use of the Jasper County Farm Bureau. In this case Jasper County claimed that the appropriation was in conflict with the provisions of Section 46, of Article 4, and of Section 47, of Article 4, and of Section 6 of Article 9, of the Constitution of Missouri, and therefore unconstitutional and void. The whole case depended mostly as to whether the purpose was a public purpose or an appropriation for a private individual, corporation or company. The court in that case, at page 383 said:

> "It is also true that many objects for which money may be appropriated are so clearly public in their nature that there could not well be any difference of opinion on the subject, such, for example, as public charities, and appropriations provided for the care of the indigent, destitute, and insane, either in institutions exclusively under state control or those maintained by corporations for purely charitable purposes. In 1894 this court, in banc, in the case of State ex rel. City of St. Louis v.

Seibert, 123 Mo. 424, 24 S. W. 750, 27 S. W. 624, held that an appropriation for the support of the indigent insane in the asylum of the city of St. Louis who belonged to the state outside of the city was not unconstitutional even though such insane asylum was a private institution of such city and was not one of the state eleemosynary institutions. So also public funds appropriated for the state and county system of schools. Likewise the expending of public funds in the construction of necessary public buildings and the construction and maintenance of public roads. On the other hand, there are many other enterprises helpful to the public in the community in which they are located, and that contribute very largely to the development and progress of the state, that are so purely private in their nature as not to admit of any doubt about the matter. Such, for example, are manufacturing or commercial enterprises established and maintained by private individuals or corporations for purely private gain.

"There are also many purposes for which public money may be appropriated from the use of which some persons derive more benefit than others, but this circumstance does not detract from the fact that their chief function is to administer to the public good, although the enjoyment and advantages derived from their maintenance are not distributed equally, even between members of the public who are situated alike or in the same class. If it were essential to the establishment or existence of an enterprise to be set up and sustained by public aid that all members of the public or all members of any class should derive from it the same or like benefits or advantages, then it would be entirely impossible to describe a public enterprise in aid of which public funds might be set apart."

Under the above holding the court held that it was for a public purpose, although some persons derived more benefit than the others out of the farm bureau.

The theory that it be necessary that all should not be benefited out of taxes assessed for public service for a public purpose was also upheld in the case of Dysart v. City of St. Louis, 11 S. W. 2d 1045, which was a suit brought by a resident and taxpayer of the City of St. Louis to restrain the City of St. Louis and its officers from delivering certain bonds for the improvement and development of land for an airport. In this case the court, at page 1047 said:

> "'"In the very nature of things, the vast majority of the inhabitants of the city, a 99 per cent. majority, cannot now and never can, reap any benefit from the existence of an airport. * * * "

Also, at page 1049, the court said:

> "'The point is suggested, but not pressed, that the power to establish and maintain an airport is not within those granted the City of St. Louis by its charter. While there is no specific reference to an airport in the charter, there can be no doubt but that the power in question is expressly conferred by the broad all-comprehensive language employed in the granting of powers, when construed conformably to the rule of construction which the charter itself provides. St. Louis Charter, art. 1, sec. 1, paragraphs 8,15, 32, 33 and 35; art. 1, sec. 2. See, also, St. Louis v. Baskowitz, 273 Mo. 543, 201 S. W. 870; Halbruegger v. City of St. Louis, 302 Mo. 573, 262 S. W. 379.'"

In this case the court held that although the charter did not provide for establishing and maintaining an airport under the rules of construction, it was for a public purpose and in accordance with the request

at hand. Section 6808, supra, does not specifically mention "municipal office building", it is to be considered as "other buildings" set out in said section.

As said before the ordinance attached to your request calling for the bond election describes the purpose of the bonds as being voted for to be used in the building of a "municipal office building." There is nothing in the ordinance pertaining to any other use, except a "municipal office building" although your request states "it cannot be contemplated that this building will be used entirely for municipal purposes. It is true, however, it will be designated as a 'municipal office building', and will be so known to the public. The public may know when bonds for the construction are considered that in the strictest sense the building will not be used exclusively for municipal purposes, and that no revenue will be derived from the use of this building." Since nothing is said in the ordinance calling the bond election, the secret or other arrangements, outisde of the record are not a part of the election and the proceeding is assumed to be a legal proceeding. This theory was upheld in Halbruegger v. City of St. Louis, 262 S. W. 379, supra, at page 384, where the court said:

> "It is urged that there is an intent to use the proposed structure, in some instances, for purposes not strictly public, in the proper sense. A secret intent of certain individuals, if such an intent exists, cannot be invoked to render illegal a purpose which in itself is legal. It is not to be assumed that a building adapted to public purposes will be used for others which are of such a character as to be unlawful. Ross v. v. Long Branch, 73 N. J. Law, loc. cit. 294, 63 Atl. 609. In case any illegal use of the building is attempted, the courts will be open for proper proceedings to prevent it. Wheelock v. City of Lowell, supra."

For the conclusion in that case the court further said:

> "It may be added that the board of aldermen, in passing the bond ordinance, and the people (who made the charter), in approving the loan by a decided majority, have construed the charter in accordance with the conclusion we have reached, which is that the purpose is public, and the city has due authority in the premises. This disposes of the questions presented. The judgment is affirmed."

The legislature gave its views of a public service or a public purpose when it enacted section 6808, supra, and said:

> "* * * and may sell, lease, abolish or otherwise dispose of the same. * * * "

In the case of State v. Smith, 82 S. W. 2d 37, which was a mandamus by the City of Excelsior Springs, Missouri v. Forrest Smith, State Auditor to compel the auditor to register certain bonds, the court, at page 40 said:

> "Furthermore, the law authorizing the improvement is a determination by the Legislature that the control, equipment, and management of mineral springs and wells, as provided therein, is for a public purpose. The view of the Legislature should be given consideration. Halbruegger v. City of St. Louis, supra."

The proposed municipal office building, as described in the request is for the purpose of providing space for city offices and for the purpose of offering space to state offices, in order that certain state offices shall remain in Jefferson City as a benefit to the City of Jefferson City.

According to your request there has been no definite arrangement made with any state office or department that may allow space in the building without compensation. Your request states that it is possible that a state office may be allowed to use space in the municipal office building, and that the city would receive no revenue from them. This fact does not prevent the use of the building for the public purpose. This theory was upheld in the case of State v. Hackmann, 240 S. W. 135, which was a mandamus proceeding which compelled the State Auditor, George E. Hackman to register certain bonds of the City of Boonville, a city of the third class for the improving of a street which was an appropriation to a toll bridge built by a private corporation. The court in that case held, at page 137, as follows:

> "The purpose of the bond issue under consideration is in no wise similar to the bond issues and loans of public credit at which the above sections were leveled. It is true the private corporation owning and operating the proposed toll bridge will be unable to profit by its investment therein unless approaches to such bridge are built, and to that extent the bond issue is of benefit to such corporation. The great purpose of the construction of the bridge is for the public benefit--to facilitate public travel over the public highways. The right to collect toll charges is a mere incident. In order to have such bridge built, it is necessary, either, that bonds be issued by the proper political subdivisions to pay for its construction and that sufficient taxes be levied thereafter to provide a sinking fund for the retirement of the bonds, to pay interest thereon and to care for its current maintenance, or that private interests furnish the means therefor and be permitted to make toll or other charges for its use sufficient to pay a reasonable return on the investment, to keep it in proper repair and to make provision against inevitable depreciation. The fact that the private corporation own-

ing the bridge will incidentally be benefited by the improvement is no more reason for denying the authority of the relator to issue such bonds than would the fact that the owner of a lot abutting any street improved by public money profits similarly by such improvement. In either case the benefit to the general public renders insignificant the incidental benefits accruing to the private interests.

"While in one sense a bridge and its approaches are one structure, yet physically and for many purposes they are entirely different things. This distinction has been recognized in the case of St. Louis v. Terminal Railroad Association, 211 Mo. 364, loc. cit. 386, 109 S. W. 641. True, the improvement of Fifth street is solely for the purpose of providing an approach to the proposed bridge and, when constructed, will be used almost exclusively for the purpose of going upon or leaving said bridge. Nevertheless said street throughout its entire length and up to its connection with the bridge will necessarily remain a public street and the bridge company will have no control over it whatever. No funds secured by the bond issue will be loaned to the bridge company or given in aid of the construction of the bridge. We conclude, therefore, that the contention of respondent that the issuance of such bonds is violative of said constitutional provisions must be disallowed."

I am presuming you intend to offer space in the municipal office building to the Unemployment Compensation Commission. Under section 6808, supra, a city

of the third class is empowered to lease its buildings without a limitation as to the amount. It would be advisable if a lease is made that a dollar consideration be shown in the lease, which I believe would be satisfactory to the Commission and the Federal Social Security Board, as set out under Section 4a, Laws of Missouri 1939, page 926, and which reads as follows:

> "The office of the Unemployment Compensation Commission shall be maintained in the City of Jefferson, provided, that within a reasonable time after the passage of this Act there shall be satisfactory arrangements made for the housing of the Commission at a location in said City and in a modern fireproof building appropriate for that purpose, and at a rental to be paid by the Commission, all satisfactory to the Commission and the Federal Social Security Board."

CONCLUSION

In view of the above authorities, it is the opinion of this department that an election can be legally called by a city of the third class for the issuance of bonds for the erection of a "municipal office building." It is further the opinion of this department that in view of Section 6808 and 6834 R. S. Missouri, 1929, that bonds voted for a municipal office building could be legally sold and collected upon.

It is the further opinion of this department that the city officers now, or in the future, would not be guilty of any infraction of the law if this ordinance was passed and the money derived from the sale of the bonds so voted were used to construct a building in conformity with the ordinance and a state agency would

be permitted to largely occupy the building whether rented free or if rent were collected.

It is also the further opinion of this department that the city officers would not be guilty of diversion of the bond/money nor of diverting the use of the building where part of the building is occupied by city offices.

It is further the opinion of this department that the Unemployment Compensation Commission knowing that bonds had been voted and sold for the purpose of constructing a municipal office building but planned for the use of part of the building by the state department, the Unemployment Compensation Commission under section 4a, Laws of Missouri, 1939, page 926, could legally accept from the city the use of part of said building for its offices.

It is further the opinion of this department that the term or name "municipal office building" used at the time of the bond election brings such project within the statutes and makes the action legal.

However, from a study of the authorities, as heretofore set forth in this opinion, one is driven to the conclusion that it is always a question of fact as to whether or not a municipal building is used or not used within the purview of the statute. Each and every case is ruled on by the higher courts upon stated facts before them at the time, instead of by any hard and fast rule, and a history of the cases shows that the courts are continually becoming more liberal in these matters.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

WJB:RW

COUNTY COURTS:
COUNTY BUDGET:

County courts where they have transferred funds from the road fund to the general fund may not replace such moneys until all claims, including the fifth class claims, have been paid.

January 26, 1939

2-10

FILED
69

Mr. Eldon W. Palmer
County Clerk
Butler County
Poplar Bluff, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which is as follows:

> "Since our Prosecuting Attorney is absent from the County we would like to have your opinion on the following matter:
>
> "The previous County Court paid salaries and various other bills out of the County Road Fund, which should have been paid out of General Revenue, in the amount of approximately $1800.00. Our present Court wants to know if they can legally transfer this amount of money back into the County Road account. We have no money in our revenue, and our December collections will not be sufficient to pay our outstanding warrants. Can a transfer of this nature have priority over warrants issued in 1938, for 1938 bills?

In the first place we will say that the county court had no authority to pay claims of the general revenue fund out of the road fund. On this particular point we are enclosing a copy of an opinion dated August 17, 1937, to

L. B. Shuck, Prosecuting Attorney of Shannon County, written by Mr. Olliver W. Nolen, Assistant Attorney General, of this office. This opinion holds that such funds may be recovered from the general fund.

You state in your letter the county treasury is depleted and that your December collections will be insufficient to pay outstanding warrants. We note from the records that Butler County contains a population of less than fifty thousand (50,000) inhabitants so the first eight sections of the County Budget Law applies to that county. Section 1 of the Budget Act, Laws of Missouri, 1933, page 340, provides as follows:

> "This act may be cited and quoted as the county budget law. All counties now or hereafter having a population of 50,000 inhabitants or less, according to the last federal decennial census, shall be governed by Sections 1 to 8 inclusive, of this act. Whenever the term revenue is used in this act it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this act regardless of the source from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the cur-

> rent year. It is hereby made the duty of the clerks of the county courts of the several counties of this state to prepare all data, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this act but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payment shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

This law was enacted for the purpose of compelling the counties to carry their business on a cash basis, that is, so that the counties would not be permitted to obligate themselves in any one year in an amount in excess of the estimated revenue for that year. The same idea is carried in Section 12 of Article X of the Constitution of Missouri, which provides in part as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * * * * * "

In the case of Holloway to use v. Howell County, 240 Mo., 601, l.c. 613, the court, in discussing the authority

of the county to become indebted, used this language:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system.' (Decker v. Diemer, supra, l.c. 330.) Running in debt is easy and pleasant while it lasts. Paying is 'another story.' The pleasure of debt making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year. * * * * * * * * * * * * * "

Apparently the previous county court paid salaries to the county officers out of the road fund after it had issued the limit of warrants against the general fund from which such salaries were supposed to be paid.

As stated by the court in Holloway to use v. Howell County, supra:

> "* * * Running in debt is easy and pleasant while it lasts. Paying is 'another story.' The pleasure of debt making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year. * * * * * * * "

So in the case which you have submitted, the county court was authorized to anticipate the revenue available for salaries for the year 1938 and issue warrants therefor, which would be payable only out of the said 1938 revenue when it came into the treasury.

The only reason we can see for the court to have paid official salaries out of the road fund is because the court had issued to the limit warrants on the general fund based on the 1938 receipts and was attempting to increase the amount of money it could expend for salaries by paying

them out of the road fund. As stated above this was illegal and could not be done.

This rule of law is based on Section 4091, R. S. Missouri, 1929, which provides as follows:

> "If any member of any town or city council, or of any county court or commission or body charged with the administration or management of the affairs of any county, or any executive officer or member of any executive department of any city, town or county in this state, or any member of any board or commission charged with the administration or management of any charity or fund of a public nature, by whatever name the same may be called, shall knowingly and without authority of law vote for the appropriation, disposition or disbursement of any money or property belonging to any such city, town, county, charity or fund, or any subdivision of any such city, town or county, to any use or purpose other than the specific use or purpose for which the same was devised, appropriated and collected, or authorized to be collected by law, or shall knowingly aid, advise or promote the appropriation, disbursement or disposition of any such money or property, for any purpose not directed and warranted by law, and such illegal appropriation, disbursement or disposition be in fact effected, every person so offending against the provisions of this section shall be deemed and taken to have feloniously embezzled and converted to his own use such money or property; but if the same be not effected, then such person so voting, advising or promoting the said illegal

> appropriation, disbursement or disposition of said money or property, as aforesaid, shall be deemed and taken to have feloniously attempted to embezzle and convert the same to his own use, and, upon conviction of either or any such offense, shall be punished by imprisonment in the penitentiary not exceeding five years, or in the county jail not less than six months, or by a fine not exceeding fourfold the value of such money or property: Provided, however, that in any case when any money has been or shall have been collected by any city, town or county for any specific use or purpose, and it is or shall have become impossible to use such money for that specific purpose, either by reason of the abandonment or failure of such use or purpose, or the satisfaction of such use or purpose, then the members of any such town or city council, and the proper officers of such city, town, county or board hereinbefore mentioned, may appropriate such money to any other legitimate use or purpose without becoming liable to any of the aforesaid penalties."

From this section the county courts are not authorized to appropriate from the road funds salaries which should be paid out of the county revenue.

County courts must look to the statutes for their authority. There are so many cases holding this and it is so generally known that we do not deem it necessary to cite authorities. The courts can only pay claims and only from the funds authorized by the statutes. Section 2 of the County Budget Act provides that the salaries of county officers be paid out of county revenue and from the fourth class. Class 4 of this section is as follows:

> "Class 4: The county court shall next

> set aside the amount required to pay the salaries of all county officers where the same is by law made payable out of the ordinary revenue of the county, together with the estimated amount necessary for the conduct of the offices of such officers, including stamps, stationery, blanks and other office supplies as are authorized by law. Only supplies for current office use and of an expendible nature shall be included in this class. Furniture, office machines and equipment of whatever kind shall be listed under class six."

From the question that you have submitted it seems that the previous county court was about in the same position that the County of Knox was in the case of Knox County v. Hunolt, 110 Mo. 67, l.c. 71, namely:

> "* * * The county had no money in its treasury, and county warrants were depreciated. The county was indebted to the insane asylum for care of the insane poor, and to pay this and some other county debts the judges caused warrants to be issued upon and paid out of the county school fund. * * * "

In your case salaries were paid out of the road fund, but this makes no difference if the funds are misappropriated.

At. l.c. 73 in the Knox County case the court said:

> "We come then to these questions, whether there has been a breach of duty on the part of the defendants; and, if there has, then whether that breach of duty furnishes the county a cause of action for the use of the county school fund.
>
> "As to the first question there can

be no doubt. The eighth section of article 11 of the constitution points out from what source the county school fund shall be derived, and provides that the same 'shall belong to and be securely invested and sacredly preserved in the several counties, as a county public school fund; the income of which fund shall be faithfully appropriated for establishing and maintaining free public schools in the several counties of this state.' And to the same effect is section 7103, Revised Statutes, 1879, and amended in 1881. It is made the duty of the county courts to loan this fund only on unincumbered real estate with personal security in addition thereto; and the income can be used only for the payment of teachers' wages. Sec. 7073. The use of these funds for other county purposes was an act in direct violation of the constitution and laws of this state. The fact that the defendants treated the use of these funds as a loan to the county does not help the matter, for there is no warrant in the law for any such transaction. That the defendants, in using this money as they did, violated the plain letter of the law must be conceded. * * * * * "

Again at l.c. 75, the court, in the Knox County case, said:

"* * * * The use of the fund for the payment of ordinary county debts was an act in direct violation of the constitution and laws creating that fund, and was, therefore, nothing short of malfeasance. That the judges would be liable in a private suit to persons especially injured for such a violation of law is clear, and we can see no reason why they are not liable to the county.

"The county, it is true, received the

benefit of the money thus diverted since it was applied in the payment of ordinary county debts. But the counties in this state are quasi-corporations only, with limited corporate powers. The county owned this county school fund, but it owned and held the same for a specific purpose. As to this fund the county is rather a trustee of a trust declared by law than the unqualified owner. The county court and the judges thereof were the agents of the county, but they were agents appointed by and under the general laws. Their authority is limited and defined by law. As the defendants have misapplied this fund, and that, too, without any authority of law whatever, they must be held accountable to the county as trustee of the fund for such unlawful act. As they had no discretion by which they could apply the fund to the payment of ordinary county debts, it can make no difference that the act was not corrupt or a wilful violation of the law, and so the trial court ruled. This fund should be replaced by those who diverted it.

"As the county received the benefit of the money thus misapplied, it is but simple justice that it should return to the defendants from its general revenues such sums as they may be obliged to pay in restoring this county school fund, But the defendants cannot complain that warrants given them are depreciated."

Following the rule laid down in the Knox County case, supra, the county judges are personally liable if they misappropriate the funds, yet the court holds in that case that

from the fund which receives the benefit of such misappropriation, the county should return to the judges the amount they had to replace, but it holds that the judges who committed the wrong in being paid for the amount they have replaced must take warrants on the funds so benefited even though such warrants are depreciated.

So in your case the class four county revenue fund which received the benefit of wrongful payment of the road funds may be charged with the duty of repaying such moneys, yet if the amount so paid by the road fund was in excess of the anticipated receipts of Class four claims of the general revenue fund for 1938, then it is illegal and could not be paid out of the fund for that year. The officer who made the misappropriation, under the Knox County case, supra, would then be liable for the entire amount misappropriated.

CONCLUSION

It is, therefore, the opinion of this department that the present county court is not authorized to pay out of Class four of the County Budget for 1938, the amount of money which has been paid out of the road fund for salaries in 1938 unless there is enough surplus in that class in the county revenue for 1938 to pay all warrants outstanding on December 31st of that year; that a transfer or repayment of such money to the road fund could not have priority over warrants legally issued in 1938 for 1938 bills.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

STATE BOARD OF HEALTH: Definition of hotel - certain hotels required to have fire escapes.

July 5, 1939

FILED
69

Honorable Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of June 27, 1939, in which you request our opinion as to the proper interpretation of Sections 13091, 13096, 13097 and 13099 of the Missouri hotel inspection laws.

Section 13091, R. S. Missouri, 1929, is as follows:

> "That every building or other structure, kept, used, maintained, advertised or held out to the public to be a place where sleeping accomodations are furnished for pay to transient or permanent guests, in which ten or more rooms are furnished for the accomodation of such guests, whether with or without meals, shall for the purpose of this article be deemed a hotel, and upon proper application the food and drug commissioner shall issue to such above described business a license to conduct a hotel: Provided, that it shall be unlawful for the owner of any such building or other structure to lease or let the same to be used as a hotel until the same has been inspected and approved by the food and drug commissioner."

Under this section, it is our opinion that every building or other structure, and we believe that the word "structure"

should include tourist camps or cabins, where at least ten rooms are furnished for the sleeping accomodation of transient or permanent guests, whether with or without meals, shall be considered a hotel. We believe, also, that rooming houses in college towns, referred to in your letter, come within this law regardless of the city ordinances in the various municipalities.

You will note that Section 13094 states that the parlor, dining room, kitchen and office shall be construed to mean "guest rooms", but we believe that this section was meant to modify Section 13093 in regard to license fees of hotels, and that these rooms shall not be included in computing the original "ten rooms".

Section 13096 provides that hotels having more than three stories shall be provided with fire escapes.

Section 13097 provides that hotels having three stories, or less, must have a rope ladder in each room. In this connection, we wish to refer you to Section 13757, which provides that the owner, proprietor, lessee or keeper of every hotel which has a height of three or more stories must provide iron or steel fire escapes. Therefore, your inspectors should see that every hotel having over two stories is provided with the fire escapes described in that section. This last section has been upheld in the case of Yawll vs. Gillham 187 Mo. 393.

In regard to Section 13099, we believe that you have reached a proper conclusion. That is, that every hotel, as defined in the hotel inspection act, must be equipped with fire extinguishers, the number to be determined as provided in said section.

Respectfully submitted,

APPROVED:

ROBERT L. HYDER
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General
RLH:RT

STATE BOARD OF HEALTH: Not required to register births of children adopted in this state, when not born in Missouri.

July 24, 1939 7/25

FILED 69

Honorable Harry F. Parker, M. D.
State Health Commissioner
Jefferson City, Missouri

Dear Sir:

We are in receipt of your letter of July 17, 1939, in which you ask that we suggest a means whereby your department of Vital Statistics can furnish a birth certificate to a child born in the State of Illinois, and subsequently adopted in Missouri.

Section 9051 R. S. Mo. 1929 provides:

> "All births that occur in the state shall be immediately registered in the districts in which they occur, as hereinafter provided."

The only provision found in our statutes for registering births occuring outside of Missouri, is that in Laws of 1931 at page 230, which is Section 9054a. This section makes provision for the registration of residents of Missouri, who were born outside of this state prior to the taking effect of Article 2, Chapter 52 R. S. Mo. 1929; in other words, prior to the enactment of our law requiring registration of births. This section was enacted evidently to take care of those cases in which there had been no registration in any other state.

An examination of the laws of Illinois discloses a law requiring the registration of births submitted similar to our laws, with a special law relating to the amendment of the original record on the adoption of the child. Chapter 111½, Section 48a, R. S. of Illinois provides as follows:

> "Whenever a decree of adoption has been entered declaring a child adopted

> in any court of competent jurisdiction in the State of Illinois, a certificate of the decree may be recorded with the proper department of registration of births and a certificate of birth shall issue upon request, bearing the new name of the child as shown in the decree of adoption, the names of the foster parents, the sex, age and date of birth, but without reference to the adoption of said child."

This was adopted in July 1931.

In 1937 at page 1006 of the Session Laws of that year, an exact form to be used in such an instance was adopted by the legislature.

Section 1, Article 4 of the Constitution of the United States is as follows:

> "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

In pursuance of this provision of the Constitution, Congress has enacted Sections 687 and 688, Title 28 of the United States Code of Laws. These set out the manner in which records shall be proved and admitted by the courts and officers of other states.

In the case of Lucas vs. Vulcon Iron Works, 233 Federal 823 and in the case of Whitley vs. Spokane Railway Company, 237 United States 487, as well as in a great number of other cases to the same effect, the courts have uniformly held that every state court must give such credit to the judgments of other states as is given in its own courts.

From this, it is apparent that the proper remedy in the case outlined by you is to compel the State Board of Health of Illinois to accept the decree of adoption rendered in this

state and to amend its records accordingly.

In the event that your department desires to register this Illinois birth or any other birth in another state, the original certificate filed in the State of birth will be the best evidence in any proceeding; since the certificate in your department would show on its face that the birth occured without the state.

In the event that the party whom you have in mind is unwilling to go to the expense of a proceeding in Illinois, it is our suggestion that the Illinois Birth Certificate, together with a certified copy of a decree of adoption in this state, would constitute acceptable evidence of the child's parentage under any circumstances that might arise.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney-General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney-General

RLH/ww

STATE BOARD OF HEALTH: Regulations respecting control of venereal diseases within statutory powers of Board.

11/20

November 16, 1939

FILED

Dr. Harry F. Parker
State Health Commissioner
Jefferson City, Missouri

Dear Dr. Parker:

We are in receipt of your letter of October 31st, together with enclosures, wherein you state as follows:

> "At a meeting of the State Board of Health on October 25, some changes were made in the Missouri Public Health Manual on the control of venereal diseases. I am enclosing these changes and will ask you to kindly furnish us with an opinion to see that the Board has kept within its powers in this matter."

Section 9016, R. S. Mo. 1929, vests the State Board of Health with authority to make and enforce adequate rules and regulations to prevent the spread of diseases in this state.

> "The board shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate rules, regulations and procedures to prevent the spread of those diseases and to determine the prevalence of said diseases within the state."

In accordance with such authority, the State Board of Health has adopted specific measures for the control of venereal diseases, and you now seek to make certain new regulations governing such diseases.

The first change provides that:

> "Every physician, or other person who makes a diagnosis in or treats a case of syphilis, gonorrhea or chancroid, and every superintendent or manager of a hospital, dispensary or charitable or penal institution, in which there is a case of venereal disease, shall report such case immediately in writing on forms provided by the State Board of Health to the local or district health officer stating the name or initials and address or the office number and age, sex, color and occupation of the diseased person, and the date of the onset of the disease, and probable source of infection."

Under the above section every physician, among others, who makes a diagnosis of venereal diseases must report same immediately in writing, setting out the name, address, etc., of the diseased person and the probable source of infection.

48 C. J., Section 96, p. 1111, states that:

> "While communications between a physician and his patient are ordinarily privileged, it has been held that the question whether a breach of medical confidence is actionable depends on the character of the disclosure made."

In the case of Simonsen v. Swenson, 177 N. W. (Neb.) 831, l. c. 832, the court, in recognizing that a physician treating a person suffering from a contagious or infectious disease owes the public a duty to make such disclosure as to prevent the spread of disease, said:

> "The doctor's duty does not necessarily end with the patient, for on the other hand, the malady of his patient may be such that a duty may be owing to the public and, in some cases, to other particular individuals. Recognition of that fact is given by the statutes in this state, which delegate power to the state board of health, and to municipalities generally

> to require reports of, and provide rules of quarantine for, diseases which are contagious and dangerous."

And further in the opinion the court said:

> "When a physician, in response to a duty imposed by statute, makes disclosure to public authorities of private confidences of his patient, to the extent only of what is necessary to a strict compliance with the statute on his part, and when his report is made in the manner prescribed by law, he of course has committed no breach of duty toward his patient, and has betrayed no confidence and no liability could result."

Where a regulation is designed to promote the health and welfare of the people of this state it is within the police power of the state and valid. Thus, the court, in the case of Ex Parte Lewis, 42 S. W. (2d) (Mo. in Banc) 21, said:

> "It is well settled that laws and ordinances prescribing regulations for the promotion of the health and welfare of the people are referable to the police power, and, if reasonable, are not obnoxious to the due process clause of either the state or Federal Constitution. Speaking to that question in Valley Spring Hog Ranch Co. v. Plagmann, 282 Mo. 1, 14, 220 S. W. 1, 5, 15 A. L. R. 266, we said:
>
> 'The constitutional guaranties that no person shall be deprived of life, liberty, or property without due process of law, and that no state shall deny to any person within its jurisdiction the equal protection of the laws, were not intended to limit the subjects upon which the police power of a state may lawfully be exerted. Minneapolis Railway Co. v. Beckwith,

> 129 U. S. 26, 9 S. Ct. 207, 32 L. Ed. 585; Jones v. Brim, 165 U. S. 180, 17 S. Ct. 282, 41 L. Ed. 677. In Barbier v. Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923, the court used this language: "But neither the amendment (Fourteenth)--broad as it is--nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people."
>
> A like ruling was made in the recent case of Bellerive Inv. Co. v. Kansas City, 321 Mo. 969, 13 S. W. (2d) 628, 634, where many cases dealing with the subject are cited and discussed.
>
> It appears from the provisions of the ordinance in question that it was enacted to protect and promote the health of the people, and is therefore fairly referable to the police power of the city, and for that reason is not violative of the constitutional provisions invoked."

From the foregoing, we are of the opinion that the State Board of Health, by adoption of the above rule, has kept within its statutory powers.

The second change provides that:

> "All city, county or other local Boards of Health shall use every available means to ascertain the existence of, and investigate all cases of syphilis, gonorrhea or chancroid in their jurisdiction. Such Boards are empowered and directed to make such examinations of persons reasonably suspected of having such diseases."

It is to be noted that the Boards are empowered and directed to make such examinations of persons <u>reasonably</u> suspected of having such diseases.

29 C. J., Section 44, page 254, declares that:

> "Persons infected with venereal diseases may be confined or sequestered. The detention may be justified if the person is one whose habits are such as to warrant the belief that he or she is afflicted with a venereal disease, as in the case of prostitutes. However, mere suspicion that the person is a prostitute is insufficient; such inference is not a fairly reasonable one to be deduced under proof of mere sexual acts of intercourse between unmarried persons. Ordinarily health authorities have no power to force a person, suspected of being afflicted with a venereal disease, to an examination of his body, at least where there is no cause for suspicion; nor have they power to compel the withdrawal of blood from his veins in search of evidence of the disease."

And, in the case of Ex Parte Shepard, 195 Pac. (Cal. App.) 1077, the court, in holding that mere suspicion that an individual is afflicted with an isolable disease did not give a health officer reason to believe that such person was afflicted, said:

> "If the respondent has any power to deprive Mrs. Shepard of her liberty, that power is to be predicated upon the provisions of section 2979a of the Political Code, which makes it the duty of health officers and others to take necessary measures to protect the public against the spread of certain diseases from persons whom such officers know or have reason to believe are afflicted with such diseases. There is certainly nothing in the record here to show that the respondent knows Mrs. Shepard to be diseased, and we cannot see that he has sufficient reason to believe that she is diseased. Paying just regard to the constitutional guaranties of the right to personal liberty and personal security, it must be asserted that more than a mere suspicion that an individual is afflicted with an isolable disease is necessary to give an officer 'reason to believe' that such person is so afflicted."

And in the case of Ex Parte Dillon, 186 Pac. (Cal.) 170, the court said:

> "Where sufficient reasonable cause exists to believe that a person is afflicted with a quarantinable disease, there is no doubt of the right of the health authorities to examine into the case and, in a proper way, determine the fact. Such preliminary investigation must be made without delay, and, if quarantining is found to be justifiable, such quarantine measures may be resorted to only as are reasonably necessary to protect the public health, remembering that the persons so affected are to be treated as patients and not as criminals."

From the foregoing, we are of the opinion that the State Board of Health, by adoption of the above rule, has kept within its statutory powers, but in the enforcement of such rule it must be borne in mind that what constitutes reasonable grounds for suspecting a person of a quarantinable disease must depend in each particular case upon the circumstances.

The third change provides:

> "Any person suspected of having any disease enumerated in Division 13, Section I, Book IV, who fails to submit himself or herself to examination or treatment as ordered by the district or local health officer and who fails to report regularly for treatment until released as cured by said health officer, shall be subject to quarantine as hereinafter provided.
>
> In establishing quarantine, the district or local health officer shall designate a place or define the limits of the area in which the suspect shall be quarantined and no other person, except the attending physician, shall enter or leave said quarantined area without permission of the proper authorities.

> No one shall have the authority to terminate said quarantine except the officer responsible for it and only after the disease has become non-infectious as determined by said health officer or his authorized deputy.
>
> Anyone released from quarantine but not cured shall sign a statement agreeing to place himself or herself under the medical care of a physician or clinic and remain under treatment until finally released by the health officer."

As previously pointed out, where there is reasonable sufficient cause to believe that a person is afflicted with a quarantinable disease, he may be quarantined, however, as pointed out in 29 C. J., Section 45, page 254, the character and extent of such quarantine must be reasonable.

> "While a large discretion is vested in sanitary authorities as to the character and extent of a regulation establishing quarantine, it must be reasonable, under the circumstances of the particular case, tending to prevent the spread of the disease. It cannot extend beyond the scope of the necessary protection."

And in 29 C. J., Section 48, page 255:

> "The period of quarantine detention and observation may be for so long as is necessary to insure against the spread of the disease. But the period of detention must be reasonable; it cannot be extended where there is no longer necessity for any further precaution."

We are of the opinion that the adoption of the above rule is within the statutory powers of the State Board of Health, but, as we have previously stated, the application of the rule must be reasonable, which, in turn, depends upon the circumstances of the particular case.

The fourth change provides:

> "No druggist or other person not a licensed physician shall prescribe or recommend to any person any drugs, medicine or other substance to be used for the cure of gonorrhea, syphilis, or chancroid, or shall compound any drugs or medicine for said purpose from any written formula or order not written for the person for whom the drugs or medicines are compounded and not signed by a physician, licensed under the laws of the State.

In the case of Ex Parte Lewis, supra, l. c. 22, the court said:

> "If it is within the power of the Legislature to provide for the licensing of all those who are skilled in the profession devoted to the health of the people and to lodge the determination of their qualifications in a board of professional men, it ought to follow that the Legislature could provide by a similar law for taking the judgment of men having the same skill upon a question of fact as to the existence of, or whether a given person was, or is, afflicted with a contagious, dangerous or infectious disease."

Licensed physicians being particularly skilled in the treatment of communicable diseases, we are of the opinion that such regulation is clearly within the police power of the state, and that the adoption of such rule by the State Board of Health would be within its statutory powers.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:VC

MUNICIPAL CORPORATIONS: City of the Third Class may enter into an exclusive contract with an individual for collection of garbage and assess a fee for its removal.

May 23, 1939

5-25

FILED 70

Mr. John S. Phillips
City Attorney
Poplar Bluff, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of April 20th, 1939, which reads a s follows:

"I would like to have your opinion, as City Counselor, as to whether a city of the third class may employ a garbage commissioner, whose duties it shall be to collect all the garbage in the City and also to see that all open toilets are cleaned at certain stated intervals, and as to whether this commissioner can compel the people of this city to pay him a fee for the removing of this garbage and for the cleaning of the open toilets.

"It is my opinion, and I so stated to the Council that we would not have the power to give anyone person a concession of this kind, due to the fact that there would be discrimination against other people who might want to do this work. The facts are, that there are several people in the City who have been in the habit of collecting garbage and of cleaning open toilets. Of course, if the City was able to appoint a gargage commissioner to take care of these duties, it would be much easier to handle, due to the fact that it would be much easier to control him and see that his work was done.

"There has been no tax levy for this purpose as our tax levy is up to the limit prescribed in the statute, and it would be a fee in addition to this for the purposes which I have stated. It is further my opinion that if the people of Poplar Bluff wish to pay a fee to the garbage commissioner for the purposes stated above, that they would have a perfect right to do so, but that the City, by ordinance, could not compel them to do it.

"I have been unable to find anything in the Statute of the State, or anything in the chapters regulating cities of the third class in regard to this, and the Mayor and the City Council and I would appreciate very much an opinion as to this matter."

Section 6807, R. S. Mo. 1929, reads as follows:

"The council may make regulations and pass ordinances for the prevention of the introduction of contagious diseases into the city, and for the abatement of the same, and may make quarantine laws and enforce the same within five miles of the city. * * * * * * * * *"

Under the above section a city of the third class may pass ordinances for the prevention of contagious diseases and if garbage becomes detrimental to the health of the community, a city of the third class may pass an ordinance

which would allow the city to contract with an individual and assess a fee for the collection of the garbage. It was so held in the case of Valley Spring Hog Ranch Co., v. Plagmann et al, 220 S. W. 1, l. c. 6; in which the court said:

> "Of course, every ordinance in the exercise of the police power must be reasonable, but, as shown above, there is nothing in this Joplin ordinance which is unreasonable. The city had the right to contract with either one or more than one person to collect and dispose of its garbage. Nor is the value of garbage such as precludes the exercise of the police power for its destruction or otherwise disposal.
>
> "We are, however, cited to the case of River Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6. This case reached this court by appeal from the St. Louis Court of Appeals, and the opinion of that court is found in 7 Mo. App. 345. Many of the courts draw a distinction between garbage (which is concededly of small value even during the time between its creation, and the time of its decay or decomposition) and dead animals, which for certain purposes have some substantial value. In some cases it is held that a reasonable time (short time) should be given the owner to get what value there was in the carcass. We might distinguish the instant case from the Behr Case, supra, on the theory of there being substantial value to the carcass, but we deem that case out of harmony with the great weight of authority. The opinion of the Court of Appeals is more in line with modern authority on the subject.

> "The ever-present house fly and other flies will reach the carcass of dead animals as quickly as they reach the open garbage can. Germs of disease may be thus spread in thickly populated communities. Even the additional value of carcasses should not curb the police power in regulating their removal and disposition."

Also, in the case of Harper v. Richardson, 297 S. W. 141, l.c. 145, where the court said:

> "It is also the law, as insisted by plaintiffs, that the owners of premises where garbage is collected should pay for its removal. 15 A. L. R. 292, note; 27 A. L. R. 972; Hog Ranch v. Plagmann, supra; Reduction Co. v. Reduction Co., 199 U. S. 306, 26 S. Ct. 100, 50 L. Ed. 204.
>
> "It is also insisted that the power to regulate includes the power to make such regulation effective. The provisions of sections 8, 19, 20, and 24 were directed to this end, in that they provided a penalty of arrest and punishment for a violation of their provisions. These provisions are salutary and proper."

Under the holding in the above case the court set out that where garbage is collected by an exclusive collector the owners of the premises should pay for its removal.

CONCLUSION.

Under the above authorities it is the opinion of this department that a city of the third class under the statute and by virtue of its police power may by ordinance empower the city to enter into a contract with a private individual who may have the exclusive right for the collection of garbage and the city can compel the owners of the property where the garbage is collected to pay a fee for the removal.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

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HARRY H. KAY
(Acting) Attorney General

WJB:RW

COUNTY TREASURER: No vacancy exists in the office of county treasurer by virtue of the failure of treasurer-elect to qualify under Laws of Mo. 1937, p. 425.

January 31, 1939

FILED
2
11

Honorable Wilson Plank
Treasurer
Dent County
Salem, Missouri

Dear Sir:

This Department is in receipt of your letter of January 26th with the following request for an opinion:

> "The newly elected treasurer of this county has not, as yet, filed bond, and I would like to have your advice and opinion as to necessary and legal steps in connection therewith. Do I hold over until next election, or is it necessary for the Governor to make an appointment?"

In 1937 the office of treasurer was restored, Laws of Missouri, 1937, page 425. Section 12130a provides as follows:

> "On the Tuesday after the first Monday in November, 1938, and every four (4) years thereafter there shall be elected by the qualified voters of the several counties in this state, now or hereafter having a population of less than 40,000 inhabitants and in counties having a population of 75,000 and less than 90,000 inhabitants, according to the last Decennial United States Census, a

> county treasurer, who shall be commissioned by the county court of his county, and who shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election, and shall hold his office for a term of four (4) years, and until his successor is elected and qualified, unless sooner removed from office. Provided, that nothing in this section shall apply to counties under township organization."

Since you state that your successor has not yet filed bond, it is necessary to consult Section 12133, Laws of Missouri, 1937, page 426, which relates to the giving of bond, providing as follows:

> "The person elected or appointed county treasurer under the provisions of this article shall, within ten days after his election or appointment as such, enter into bond to the county in a sum not less than twenty thousand dollars, to be fixed by the county court, and with such sureties, resident landholders of the county, as shall be approved by such court, conditioned for the faithful performance of the duties of his office."

We are particularly concerned with the clause, "within ten days after his election or appointment as such." We think the case of Bank of Mt. Moriah v. Mt. Moriah, 226 Mo. App., l. c. 1231, decides the matter. We quote extensively from the decision for the reason that it recites all of the early decisions and differentiates the same:

> "The main question in dispute between the parties is whether this section of the statute, requiring

a bond of the treasurer of the village, is directory or mandatory, it being conceded by the defendant that, if it is mandatory, Downey never became treasurer of the village and was not entitled to possession of its funds.

"'If a statute merely requires certain things to be done and nowhere prescribes the result that shall follow if such things are not done, then the statute should be held to be directory. The rule thus stated is in harmony with that other well-recognized canon that statutes directing the mode of proceedings by public officers are to be held to be directory and are not to be regarded as essential to the validity of a proceeding unless it be so declared by law. (State v. Cook, 14 Barb. 259.) By this we mean that if a fair consideration of the statute shows that unless the Legislature intended compliance with the proviso to be essential to the validity of the proceeding, which nowhere appears, then it is to be regarded as merely directory.' (State ex inf. Frank W. McAllister v. Bird et al. 295 Mo. 344, 351, 352.)

"In State ex rel. v. Churchhill, 41 Mo. 41, the provision of a statute requiring the county treasurer to give bond within ten days after his appointment or election was held to be merely directory, it being said that the matter of time was not essential to the validity of the bond nor a condition precedent to the party's title to the office. In

State ex rel. v. Findley, 101 Mo. 368, it was held that the statute forbidding county courts from accepting an official bond with the name of a judge of the court as a surety thereon was directory only.

"'In the absence of a statute so providing, it is generally held that a failure to qualify, although it affords cause for forfeiture of the office, does not create a vacancy, and even though it is irregular and improper to induct one into office, without giving the required bond, such a one is legally in office, and so remains until removed by judicial process, and if the oath is taken or the bond filed at any time before proceedings are taken to declare a vacancy, it is sufficient.'
(46 C. J., pp. 962, 963.)

"The case of United States v. Bradley, 10 Peters, 343, involved an act of Congress providing that 'all officers of the pay, commissary and quartermaster's department shall, previous to entering on the duties of their respective offices, give bond and sufficient bonds to the United States, fully to account for all moneys and public property which they may receive, in such sums as the secretary of war shall direct.' It was held that the giving of such a bond was a mere ministerial act, and not a condition precedent to the officer's authority to act as pay master; that the appointment was complete, when made by the president and confirmed by the senate. A similar ruling was

made in the cases of U. S. v. Eaton, 169 U. S. 331, 346; Glavey v. U. S. 182 U. S. 595; State ex rel. v. Carroll, 57 Wash. 202; Board of Commissioners v. Johnson, 124 Ind. 145; Pickering v. Day, 95 Am. Decisions, 291. The following cases involve statutes making the giving of a bond mandatory and a condition precedent to qualifying for the office. (Rounds v. Bangor, 46 Me. 541; 543; Andrews v. Covington, 69 Miss. 740; State ex rel. v. Tucker, 54 Ala. 205; Advisory Opinion to Governor, 65 Fla. 434; C. N. O. & T. R. Co. v. Cundiff, 166 Ky. 594; Patterson v. State of Nebraska, 92 Neb. 729.)

"Section 7155 is not similar to the statutes construed in the cases last cited but more like those in the cases heretofore cited.

"Some statutes provide that the failure to give bond shall work a vacancy or a forfeiture of the office, but it is usually held that, under these statutes, the officer continues to be a de jure officer until a vacancy or forfeiture is declared. (See State ex rel. v. Ely, 43 Ala. 568; State ex rel. v. Callow, 78 Mont. 308; People ex rel. v. Thomas, 80 Mich. 265; People ex rel. v. Watts, 26 N. Y. S. 280.) In the case last cited the court quoted approvingly (page 282) from Dill, Mun. Corp. (4 Ed.) as follows:

"'Statutes requiring an oath of office and bond are usually directory in their nature; and unless the failure

to take the oath or give the bond by the time prescribed is expressly declared, ipso facto, to vacate the office, the oath may be taken or the bond given afterwards, if no vacancy has been declared.'"

Conclusion.

For the reason that the statute, to-wit, Section 12133, quoted supra, does not provide that the failure to give the bond within the time mentioned in said statute works a vacancy or a forfeiture, we are of the opinion that no vacancy exists in the office of Treasurer in your county at this time. Under the decision of State ex inf. Hulen v. Brown, 220 Mo. App. 468, and many other similar ones, you, as the present Treasurer, provided you have not surrendered your office, can hold office until your successor qualifies. Your successor may qualify any time during your term; otherwise, you will hold until the next regular election for the election of county treasurer.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

INTOXICATING LIQUOR: Shipments of intoxicating liquor when interstate and when intrastate.

CRIMINAL PROCEDURE: When officers may search and seize liquor.

February 23, 1939

3, 4

FILED

Mr. Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

This is in reply to yours wherein you requested an opinion from this department on two questions, namely:

> "Assuming that a transporter from Tennessee, who is a bootlegger in Tennessee, personally or by individual agent acquires a truck load of distilled spirits and wine in Illinois from an Illinois wholesaler and then in order to deliver the whiskey and wine so acquired to his own place of business, transports them across the state of Missouri, then is such a transaction in interstate or intra-state commerce?
>
> "Assuming that an officer authorized to make arrests should make an arrest of one of these cars on a motor vehicle violation charge and in procuring the evidence necessary to obtain a conviction for the motor vehicle violation should find unstamped liquor, would that liquor be contraband and could it be used as evidence in prosecuting a case involving the transportation of unstamped liquor, even though the liquor was not obtained by search warrant?"

I.

The first request involves the question of whether or not the transaction which you have described is one in interstate commerce. For the purpose of reviewing the background of the commerce clause, we find a statement made by Justice Brown in Cook v. Marshall County, 196 U. S. 471, 49 L. Ed. l.c. 475, which is as follows:

> "The power of Congress to regulate commerce among the states is perhaps the most benign gift of the Constitution. Indeed, it may be said that without it the Constitution would not have been adopted. One of the chief evils of the confederation was the power exercised by the commercial states of exacting duties upon the importation of goods destined for the interior of the country or for other states. The vast territory to the west of the Alleghanies had not yet been developed or subdivided into states, but the evil had already become so flagrant that it threatened an utter dissolution of the confederacy. The article was adopted that all of states of the Union might have the benefit of the duties collected at the maritime ports, and to relieve them from the embarrassing restrictions imposed upon the internal commerce of the country. But the same policy which authorizes the use of this power as a shield to protect commerce from the vexatious interference of the states forbids its employment as a sword to assail measures designed for the preservation of the public health, morals, and comfort. States may differ among themselves as to the necessity and scope of such measures, but so long as they are adopted in good faith, with an eye single to the public welfare, they are as much entitled

> to the recognition of the general government as if they were uniformly adopted by all the states.
>
> "While this court has been alert to protect the rights of nonresident citizens, and has felt it its duty, not always with the approbation of the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the states, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a state. The power of Congress to regulate commerce is undoubtedly a beneficient one. The police laws of the state are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded; but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the states to administer their own internal affairs."

Since the enactment of the twenty-first amendment to the United States Constitution, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause. This amendment was ratified December 5, 1933, and the second section provides as follows:

> "The transportation or importation into any state or territory, or possession of the United States for delivery therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

This amendment was under consideration in Finch and

Company v. McKittrick, Volume 83 L. Ed. Supreme Court Advance Opinions, Volume 6, page 238, 240, and the court said:

> "* * * * Since that amendment, the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause. As was said in State Bd. of Equalization v. Young's Market Co. 299 U. S. 59, 62, 81 L. ed. 38, 40, 57 S. Ct. 77, 'The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.' To limit the power of the states as urged 'would involve not a construction of the Amendment, but a rewriting of it.' * * * * * * * * "

In our research on your question we find that nearly all of the cases in which such a transaction was involved were brought either in the state from which the shipment came, or the state to which the shipment was destined. However, we have found one case in which the facts are similar to yours in this respect, namely, a state which is neither the state in which the shipment originates nor the state to which the shipment is destined. In other words, it is the state through which such shipment passes to reach its destination in another state.

The Supreme Court of Tennessee in Haumschilt v. State, 221 S. W. 196, had before it a case in which whiskey was being purchased in Missouri, loaded into an automobile by the purchaser who intended to take it to Mississippi. In order to reach his destination, the purchaser passed through the State of Tennessee which state had a law prohibiting transportation of intoxicating liquor. In that opinion we find the following statement of the court:

> "The trial judge instructed the jury that if the defendant below brought whisky in an automobile from another state to Richardson's Landing, in

> Tipton county, Tenn., and drove the automobile containing such whisky off the ferryboat to any point in Tipton county, Tenn., he would be guilty as charged in the presentment, and that this would be true, whether he was going to Mississippi as the destination of his journey or not."

And the court said at l.c. 97, paragraphs (1) and (2):

> "We think the propriety of the instruction depends on whether or not it was legal under Mississippi statutes to sell whisky in that state. If it was legal to bring whisky into Mississippi for sale, we do not think that the journey of the plaintiff in error from Missouri across the state of Tennessee could have legally been interrupted or penalized by our officers or courts. Kelley v. Rhoads, 188 U. S. 1, 23 Sup. Ct. 259, 47 L. Ed. 359; Bowman v. Chicago & N. W. R. Co., 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700; Rhodes v. Iowa, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088.
>
> "On the other hand, if it was not lawful to sell whisky, in Mississippi, then we think such liquor while in transit for such purpose was deprived of the protection of the commerce clause of the federal Constitution, by reason of the provisions of the Webb-Kenyon Act. 37 Stat. 699, c. 90 (U.S. Comp. St. section 8739).
>
> "This transaction occurred prior to the Federal Wartime Prohibition Act (40 Stat. 1045), the Eighteenth Amendment, and the Volstead Act (41 Stat. 305). At that time such transportation of liquor from one state to another state in which it could lawfully be sold was legitimate interstate

commerce.

"The Webb-Kenyon Act divests intoxicating liquors of their interstate character, as we understand it, when they are being shipped into a state to be received, possessed, sold or in any manner used in violation of the law of that state. In other words, such liquors, when in transit to such a state, are not legitimate articles of commerce, and are subject to the laws of the states into which they are brought or through which they pass. That the law of the state controls in such cases fully appears from Austin v. State, 101 Tenn. 563, 48 S. W. 305, 50 L. R. A. 478, 70 Am. St. Rep. 703, and the Supreme Court decisions therein reviewed.

"Now we cannot judicially know what the statutes of Mississippi were. If it should develop on a subsequent trial that the sale of intoxicating liquor in Mississippi was illegal, then we think that defendant was not protected by the commerce clause of the federal Constitution while passing through Tennessee with such liquors, but was subject to the Tennessee laws against the transporation of liquor within the boundaries of this state. On the other hand, if it should develop that there was no statute of Mississippi prohibiting the use of the whisky in that state to which defendant intended to put his liquor when he arrived there, we think, as stated before, that he was not amenable to the Tennessee Transportation Act while pursuing his journey through this state. We think this conclusion is borne out by the decision of the Supreme Court of the United States in United States v. Gudger, 249 U. S. 373, 39 Sup. Ct. 323, 63 L. Ed. 653, and other cases. The decision in the Gudger Case, while construing the Reed Amendment (U.S. Comp. St. sections 8739a, 10387a-10387c), and not the Webb-Kenyon Act, is in

> point, since the language of these two federal enactments is quite similar."

In Collins v. U. S. 263 Fed. 657, l.c. 660, the court, in passing on a somewhat similar question, said:

> "* * * * * By a like liberality of construction, the causing of intoxicating liquor to be transported from one state into another state, where its sale or manufacture is prohibited, would seem to be complete as soon as the interstate journey was entered upon, even though the liquor failed to reach the prohibited territory."

Since the Volstead Act has been repealed, the commerce clause applies to intoxicating liquor shipments the same as to shipments of any other property unless they are in violation of the Webb-Kenyon Act, which provides as follows: (U. S. C. A. Vol. 27, section 122 (1935) found in the pocket supplement to said volume)

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any

> manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

or unless it is in violation of section 2 of the 21st Amendment to the Constitution of the United States which is as follows:

> "'The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.'"

In Dunn v. U. S. 98 Fed. (2d) 119, 121, the court said:

> "The effect of Section 2 of the Twenty-First Amendment U. S. C. A. Amend. 21, section 2, was to qualify the Commerce Clause, U.S.C.A. Const. art. 1, section 8, cl. 3 so as to permit a state to prohibit or condition the importation or transportation of intoxicating liquor thereinto."

In State v. Kirmeyer, 88 Kansas 589, the court held:

> "Where the commerce clause of the federal constitution is invoked as a protection to traffic in intoxicating liquor, the courts are not precluded from an inquiry into methods and practices to determine whether the transactions involved constitute legitimate interstate commerce, or are colorable merely and intended to

> evade and defeat the just operation of the constitution and laws of this state."

On the question of whether or not the commerce clause applies to transportation of liquor by a private person in an automobile, we find that the United States Supreme Court has held in United States v. Simpson, 252 U. S. 465, 64 L. Ed. 665, cited in 10 A. L. R., page 510, as follows:

> "The transportation by the owner in his own automobile of intoxicating liquors for his personal use is comprehended by the prohibition of the Reed Amendment of March 3, 1917, section 5, against the transportation of intoxicating liquors in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any state the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes."

> "Transportation, in order to constitute interstate commerce, need not be by common carrier, and may consist of the transportation by one of his own goods."

You state in your request that bootleggers are carrying on these questionable intoxicating liquor activities. From this expression, we assume that you mean that such persons are violating the intoxicating liquor laws of the state in which they reside and which is the destination of the liquor shipment. In State v. Frazee, 97 S. E. 604, 605, the court, in discussing a similar question and applying the provisions of the Webb-Kenyon Act, supra, said:

> "Thus is withdrawn from the shipment of transporation of intoxicating liquors the immunity of interstate commerce, and expressly forbidden the shipment or transportation into a state of liquors intended to be received or possessed

> there in violation of the law of such state. In Clark Distilling Co. v. Western Maryland Ry. Co., supra, 242 U. S. 325, 37 Sup. Ct. 185, L.R.A. 1917B, 1218, Ann. Cas. 1917B, 845, the court said:
>
> "'The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that * * there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution.' The Webb-Kenyon Act 'did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.'"

If these parties are taking this intoxicating liquor into a state with the intention of violating the liquor laws of that state, then they cannot claim the protection of the provisions of the Interstate Commerce Clause of the Constitution. Each of these cases will have to stand on its own bottom and since it is a question of law and fact whether such a person is carrying as an interstate commerce carrier depends on the destination of the shipment and the provisions of the liquor law of the state to which the liquor is destined.

CONCLUSION.

From the foregoing, we are of the opinion that the transportation and possession of intoxicating liquor by a

carrier, public or private, in any form of a vehicle across the State of Missouri, which shipment originates in another state and is destined to a state for the purpose of violating the laws of the state to which it is destined, is not protected by the interstate commerce provision and such a shipment is intrastate. In such case the officers of the State of Missouri may arrest the carrier for any violation of the liquor laws of the State of Missouri and he may be prosecuted therefor.

II.

Your second question has to do with the right of search and seizure, in the event the driver of a car transporting intoxicating liquor is apprehended and arrested in connection with another violation of law, a traffic violation for instance.

Section 11, Article II, of the Missouri Constitution has the following provision:

> "That the people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by oath or affirmation reduced to writing."

From a reading of the above section, it is apparent that it is the unreasonable search and seizure that is prohibited by the Constitution.

The Supreme Court of Missouri in the case of State v. Padgett, 289 S. W. 954, had before it a situation similar to

the question you have proposed. The statement of facts as given by the court in that case is as follows (l.c. 955):

> "The city marshal of Versailles stopped a car on the streets of that town, in which the defendant and another were riding, on account of the reckless manner in which they were driving. In so doing the marshal jumped upon the running board, and, turning off the switch, stopped the car. While thus engaged, he discovered that the defendant and his companion were drunk, and he took them into custody. As he pulled the defendant out of the car, a bottle of whisky fell out of his pocket, and, upon an examination of the car, two other bottles were found beneath the seat where the defendant had been sitting. One of these contained intoxicating liquor, commonly called 'hootch' or 'moonshine.'"

At the close of the plaintiff's testimony, defendant filed a motion to suppress the evidence which was overruled by the trial court. In holding that the city marshal of Versailles had the unquestioned right to search the car under the circumstances without a search warrant and to seize the intoxicating liquor, the court said (l.c. 956):

> "Defendant contends that he was deprived of his liberty without due process of law, in that he was arrested without process, and that his automobile was examined without a search warrant. The legality of his arrest is to be determined by the facts and circumstances attending the same and the law applicable thereto. The place of his arrest was in the city of Versailles, and the moving cause for same was his driving an automobile while in an intoxicated condition. We will take judicial notice, not only of the corporate character of municipalities within the state (State v.

White (Mo. Sup.) 263 S. W. 192), but also that the population of Versailles, as shown by the last federal census, authorizes its designation as a city of the fourth class (State v. McBrien, 265 Mo. 594, 178 S. W. 489), and that it is within the purview of the statutes defining the powers of officers of this class of cities (section 7613 and art. 6 of chapter 72, R. S. 1919). A marshal in a city of the fourth class is a police officer, and, as such, is empowered to arrest any person without a warrant violating any law of the state or city when committed in his presence. Section 8426, R.S. 1919; State v. Underwood, 75 Mo. 230.

"Irrespective of the place where committed, it is declared to be a misdemeanor for any one to operate a motor vehicle while in an intoxicated condition. Section 7595, R.S. 1919. Of this offense the defendant was guilty when arrested by the marshal. His apprehension under this state of facts was authorized, and he has no valid cause of complaint on this account. In making this arrest, it was disclosed that the defendant was in the act of transporting whisky, and, the evidence of his guilt being, as the marshal determined, present and apparent from the bottles of liquor found beneath the seat of the defendant's car, and the offense being a felony, his detention to answer the charge of the latter after his arrest for the misdemeanor was authorized. The felony no less than the misdemeanor was being committed in the presence of the marshal, and hence within the terms of the statute, the potential effect of which is to include within the marshal's power arrests without process of parties guilty of any offense against the state or city. * * * * * * * * * * * * *

"The marshal was not required to procure

a search warrant to authorize him to search the defendant's car. The Supreme Court of the United States, in an exhaustive opinion on searches and seizures as applied to automobiles (Carroll v. U. S., 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790), holds that search and seizure, without a warrant, of an automobile engaged in the illegal transportation of intoxicating liquors, is not a violation of the Fourth Amendment to the federal Constitution, provided such search and seizure is made upon probable cause; that is, upon a belief, well founded, arising out of the circumstances known to the officer that the automobile contains contraband goods which by law are subject to search and seizure. Of like tenor are the rulings of several United States District Courts and Courts of Appeals. U.S. v. Fenton (D.C.) 268 F. 221; O'Connor v. U.S. (D.C.) 281 F. 396; Elrod v. Moss (C.C.A.) 278 F. 123; Lambert v. U.S. (C.C.A.) 282 F. 413.

"The facts in the instant case are of like effect to those set forth in the Carroll Case, and the rule there invoked is deemed appropriate here. The reason for the rule, as announced by Chief Justice Taft in that opinion, is that such delay would be occasioned in obtaining a warrant as to afford a vehicle of the character of an automobile time to be beyond the reach of officers or to have disposed of its cargo before the writ could be procured. This reasoning is in harmony with a purpose to effectively administer the law and punish offenders, and should meet with our approval. We therefore overrule defendant's contention in this behalf."

Consequently, if an officer should arrest a person in charge of one of such cars on a traffic violation, it being a misdemeanor, such officer can without a search warrant search the automobile following the arrest if such person were thereby found to be engaged in the commission of another crime and particularly that of illegally transporting intoxicating liquor which is in fact contraband goods, the liquor can be seized and will constitute proper evidence.

The legislature, in enacting Section 30-g of the Liqour Laws, Laws of Missouri, 1935, page 279, declared that any liquor being unlawfully transported is contraband, and that arrests for such violations can be made with or without warrant. The pertinent parts of said section read as follows:

> "* * * * * * * * * * * * * * * * All intoxicating liquor unlawfully manufactured, stored, kept, sold, transported or otherwise disposed of, and the containers thereof and all equipment used or fit for use in the manufacture or production of the same, including all grain or other materials used, in the unlawful manufacture of intoxicating liquor, and which are found at or about any still or outfit for the unlawful making or manufacture of intoxicating liquor, are hereby declared contraband, and no right of property shall be or exist in any person or persons, firm, or corporation owning, furnishing or possessing any such property, liquor, material or equipment;
> *
> *
> but it is hereby expressly made the duty of the sheriffs and constables and their deputies within their respective counties, and of marshals, chiefs of police and policemen in cities, towns and villages, and of all other officials whose duty it is or shall be to make arrests, to diligently suppress any violation of this Act, and to this end such officers are hereby authorized and directed to arrest,

> with or without a warrant, any person or persons found violating any such provisions; * * * * * * * * * * * * * * "

Furthermore, under the authority of the case of Jackson v. City of Columbia, 217 S. W. 869, rendered by the Kansas City Court of Appeals, we are of the opinion that no action in replevin would lie to recover such liquor from the officers. In that case the officers, without a warrant, seized intoxicating liquor, arrested the plaintiff and charged him with storing the same illegally. The plaintiff brought replevin action and the court said at l.c. 870-871:

> "The plaintiff, while insisting that he was the exclusive owner of the goods, admitted he got them for the purpose and with the intention of selling them in violation of the law. This raises an interesting question whether or not a court is bound to aid him in obtaining possession of such goods thereby enabling him to violate the law, even though there be no law in Missouri destroying property rights in intoxicating liquors. Courts will not enforce rights arising out of an illegal contract. Oscanyan v. Arms Co., 103 U.S. 261, 26 L. Ed. 539; Haggerty v. St. Louis Ice Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; Smith v. Rose, 192 Mo. App. 580, 184 S. W. 910. Nor will they assist a party to regain what he has parted with for an illegal purpose, and the same principle prevails where it is attempted to recover that which was intended to be sold in violation of the law. Marienthal v. Shafer, 6 Iowa, 223. In Blunk v. Waugh, 32 Okl. 616, 122 Pac. 717, 39 L. R. A. (N.S.) 1093, it was held that--
>
> "'If the courts will not open their doors to enforce an illegal contract, we do not

think they should lend their aid to enable a person to unlawfully engage in the liquor traffic.'

"See, also, Robertson v. Porter, 1 Ga. App. 223, 57 S. E. 993; Howe v. Stewart, 40 Vt. 145; Crigler v. Shepler, 79 Kan. 834, 101 Pac. 619, 23 L. R. A. (N.S.) 500. In most, if not all, of these cases, however, there were statutes which either forbade recovery or destroyed property rights in the goods in question. There is no such statute in Missouri, and, on the contrary, sections 4855 and 4856, R. S. 1909, provide that liquors being sold illegally may be taken and held until the prosecutions therefor are ended, and the fines paid, and for the selling of such liquors to pay the fines in case they are unpaid. However, in a case where the plaintiff seeking to recover liquors admits he got them for the purpose of violating the law and the court is convinced that the result of turning them over to plaintiff will enable him to violate the law, it is an interesting question whether, in such a case, the court may not withhold its aid and leave the plaintiff 'unsanctified by its favor and unaided by its process,' even in the absence of a statute forbidding recovery or destroying property rights in the goods sought. * * * * * * * * * * * * * * "

CONCLUSION.

It is our conclusion, therefore, that if an officer arrests the driver of a motor vehicle for the violation of any law governing the use of motor vehicles such officer then has the right to search the automobile. If in the course of such search the officer discovers evidence which

tends to show that the driver of the car is transporting intoxicating liquors illegally and in violation of law, then such officer is within his rights in seizing such liquor and the same may be used as evidence against the offender in the case in which he is charged with the violation of the intoxicating liquor laws. In order to make such evidence competent it is not necessary, under those circumstances, that the officer be armed with a search warrant at the time the intoxicating liquor was seized.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION: 1. Drainage Districts by Circuit Court. Refunding under Sec. 11022 R. S. Mo. 1929. Powers of Board of supervisors.

2. Collector must collect and pay over tax included in "drainage tax book" and in so doing is not liable on his bond.

April 17, 1939.

5-15

FILED
71

Mr. Robert T. Pogue
Treasurer and Ex-Officio Collector
Daviess County
Gallatin, Missouri

Dear Mr. Pogue:

We desire to acknowledge receipt of your request for an opinion on March 21, which reads as follows:

> "The Secretary of the Hope Drainage District, of Daviess County, Missouri (organized under Ch. 64, Art. 1, R. S. Mo. 1929) has annually certified to this office delinquent drainage taxes levied under Sec. 10760. A considerable part of these taxes have been collected, but a large amount remains unpaid. These taxes were levied to pay bonds issued in 1923.
>
> "In 1934, the Reconstruction Finance Corporation made a loan to this district, with the proceeds of which it purchased the outstanding bonds of 1923 (except one), under an agreement with the district to exchange these bonds for a much smaller amount of new bonds, pursuant to Sec. 11022, R. S. Mo. 1929. This exchange was effected in February, 1939, the new bonds being then delivered to R. F. C. and the old bonds surrendered by it and cancelled. The resolution of the Board of Supervisors of the district

authorizing the issuance of the new bonds provided that the collection of taxes heretofore levied for the payment of the original bonds, to and including the year 1938, should proceed as originally set out and should be held for the payment of the bonded indebtedness of the district, including the refunding bonds thereby authorized and the one outstanding bond of the original issue.

"One of the conditions under which the R. F. C. loan was made was that the District would submit an equitable plan for the collection of back taxes, same to be approved by the R. F. C. The District submitted a plan calling for collection on a 40% basis and this was approved by the R. F. C., and has been followed in collecting taxes for the last four years. It is probable the R. F. C. will oppose any further reduction.

"I am now advised by the Secretary of this District that on March 15, 1939, the Board of Supervisors, by resolution, provided that the delinquent taxes for 1935 and prior years should be collected on the basis of 10% of the original amount, free from any penalty or costs, and the taxpayer receipted in full upon payment on that basis. This action was taken without the knowledge or consent of the R. F. C. and the indications are that the R. F.-C. will oppose it.

"Does the Board of Supervisors have the right to make this reduction, and if I collect taxes and give receipts on that basis, will I be protected as against any action or objection which the R. F. C., or other bondholders, or a future Board of Supervisors of the district, might take?

"I am asking for your opinion and advice in this matter for my protection, as collector of delinquent drainage tax in this district.

"An early reply will be appreciated as some of the land owners in the district intend to pay their drainage tax within the next few days."

I.

Section 11022 R. S. Mo. 1929 is, in part, as follows:

"The board of supervisors of any drainage or levee district heretofore organized or that may be hereafter organized in any circuit court or the county court of any drainage or levee district heretofore organized or that may be hereafter organized in any county court of this state, whether said original district has been reorganized in whole or in part, or whether said district in whole or in part has elected to be reorganized under article 1, chapter 64, R. S. 1929, or the board of directors of any district organized or reorganized under article 7, chapter 64, R. S. 1929, whenever in the judgment of such board or court, as the case may be, it is advisable and for the best interest of the landowners of any such district, may, unless a majority of the owners owning a majority of the acres of land within said district shall, at the hearing hereinafter provided for, object to said proceedings, from time to time as may be necessary, to refund all or any part of its bond indebtedness by taking up and exchanging such of its outstanding bonds as the holders thereof may be willing to surrender, and issue in lieu thereof new bonds of such district payable at such longer time, not exceeding forty years from their date, as such district may determine and the holders of the outstanding bonds are willing to accept. * * * *

> "Unless and until refunding bonds shall have been authorized and issued, the rate of tax or assessment or amount of assessment applicable to the bonds to be refunded shall not be reduced. * * * It shall be the duty of the district issuing such refunding bonds to make proper provisions for their payment in like manner as is required in the case of the issuance of original bonds by the act under which such district is or shall be incorporated, and the holder of such refunding bonds shall have the same rights as are given the holders of bonds under the act or acts under which such districts are respectively incorporated. * * * " (Underscoring ours)

Section 11023 R. S. Mo. 1929, is as follows:

> "All drainage and levee districts heretofore or that may be hereafter organized under any law of this state are hereby authorized and empowered to do each and every act necessary to be by them performed in order to comply with or avail themselves of the provisions of any legislation now enacted or that may be hereafter enacted by the Congress of the United States of America, having for its purpose the refunding or extending the time of payment of the bonded indebtedness of any drainage or levee district or otherwise lightening the present burdens of taxation resting on the lands and property in such districts."

Section 10760 Article 1, Chapter 64 R. S. Mo. 1929, is as follows:

> "The said board of supervisors shall each year thereafter determine, order and levy the amount of the annual installment of the total taxes levied

under the preceding section, which shall become due and be collected during said year at the same time that state and county taxes are due and collected, which said annual installment and levy shall be evidenced and certified by the said board not later than September 1st of each year to the collector of revenue of each county in which lands and other property of said district are situate. The certificate of said installment tax shall be in substantially the following form:"

In construing the Refunding Act of 1929, as to the manner of payment of bonded indebtedness, under the County Court Drainage Act, the Supreme Court, in State ex rel. Drainage District v. Thompson, 328 Mo. 728, 737, says:

"We have what may be called the County Court Act under which a county court may incorporate drainage districts. We also have what may be called the Circuit Court Act by which a circuit court is authorized to incorporate drainage districts. The Refunding Act does not say that provision for the payment of refunding bonds shall be made in the manner as was provided by the act under which such district was organized. If that had been the intention of the Legislature it would not have used the language it did use. The statute uses the word 'is' the present tense of the verb, which means 'now'. The statute says that the district shall make proper provision for the payment of the bonds in like manner as is required by the act under which such district is incorporated. The district in question is incorporated under the County Court Act. The Refunding Act when properly construed and applied to the facts in this case made it the duty of the county court, at the time it issued the refunding bonds, to make proper provision for their payment in like manner as is now provided by the County Court Act under which the district is incorporated. The county court did that and we approve its action in so doing."

The court further held that the Act did not violate the equal protection clause of the Federal Constitution nor the uniformity clause of the State Constitution.

This Refunding Act, delegating authority to statutory officers, applies to drainage districts organized under the county court and those organized under the Circuit Court.

As to the payment of benefit assessments, the parties responsible therefor and the manner of payment thereof, the same rule applies with reference to County Court proceedings and those had in Circuit Court. Such was the holding of the court in Drainage District vs. Trail Creek Township, 317 Mo. 933, 948, which is as follows:

> "In Platte River Drainage District v. Andrew County, 278 S. W. 387, 388, the plaintiff drainage district (as in the instant case) was organized, and the benefit assessments were levied, under the Circuit Court Drainage Law (Secs. 4378 et seq., R. S. 1919). In that case, we expressed our satisfaction with the conclusions and principles of law announced in the Bates County case, supra, and ruled that Andrew County was liable for the payment, out of its general treasury, of the benefit assessments levied against the public roads and highways situate within that county. We therein said, again speaking through Graves, J., who was the author of the opinion in the Bates County case: 'The Bates County case had reference to a county court proceeding, but we are impressed with the view that, owing to the amendments, and the language used in the Circuit Court law, the same rule should prevail. The property of a county is benefited in each instance. Benefits should be paid for by the party whose duty it is to keep up the public improvement. Drainage districts help all roads within their territory, as a rule. Such benefits are public, and not private. Under the Circuit Court Act, railroad property,

> which is a public highway, is obligated to pay its part of a public improvement. We can see no difference between it and a public highway which is under the control of the county."

Section 11023, supra, gave to the proper authorities, of the drainage district, the right to contract with the R. F. C. to avail itself

> " * * * of the provisions of any legislation now enacted or that may be hereafter enacted by the Congress of the United States of America having for its purpose the refunding or extending the time of payment of the bonded indebtedness of any drainage or levee district * * * ".

which grant of authority created the duty to carry out the terms of such contract in meeting such obligations.

The law providing that the board of Supervisors should levy an annual installment tax to pay the bonded indebtedness and the refunding act in Section 11022, supra, providing that

> " * * * It shall be the duty of the drainage district issuing such refunding bonds to make proper provisions for their payment in like manner as is required in the case of the issuance of original bonds by the Act under which such District is or shall be incorporated, and the holder of such refunding bonds shall have the same rights, etc."

should be followed by the board. But Section 11023 providing that such boards may act in accord with action of Congress and therefore contract with governmental agencies in refunding bonded indebtedness did not provide for a method of payment or collection of such indebtedness.

CONCLUSION

Therefore, it is the conclusion of this department that if, under the terms of the contract, the proper officials of the drainage district agreed to levy and collect 40% of the annual installment tax theretofore levied and collected to pay the refunded indebtedness, such drainage district has no legal right, without the consent of the R. F. C., to reduce such levy and collection.

II.

Section 10760 Article 1, Chapter 64, supra, in providing that the Board of Supervisors of a Drainage District organized by the Circuit Court shall levy an annual installment of tax and make a certificate thereof, further provides that the same "shall be prepared in the form of a well bound book, which shall be endorsed and named Drainage tax book" of the proper drainage district.

Section 10761 R. S. Mo. 1929, providing that the collector shall collect the drainage taxes and delinquent drainage taxes, also provides for the bond of the collector, as follows:

> "It shall be the duty of the collector of revenue of each county in which lands or other property of any drainage district organized under this article are situate to receive the 'drainage tax book' each year, and he is hereby empowered and it shall be his duty to promptly and faithfully collect the tax therein set out and to exercise all due diligence in so doing. He is further directed and ordered to demand and collect such taxes at the same time that he demands and collects state and county taxes due on the same lands and other properties. * * * Before receiving the aforesaid 'drainage tax book' the collector of each county in which lands or other property of the drainage district are located shall execute to the board of supervisors of the district a bond with at least two good and sufficient sureties in a sum that is equal to the probable amount of any annual installment of said tax to be

> collected by him during any one year, conditioned that said collector shall pay over and account for all taxes so collected by him according to law. Said bond after approval by said board of supervisors shall be deposited with the secretary of the board of supervisors, who shall be custodian thereof and who shall produce same for inspection and use as evidence whenever and wherever lawfully requested to do." (Underscoring ours)

Section 10763 is, in part, as follows:

> "If any county collector of the revenues refuses, fails or neglects to make prompt payment of the tax or any part thereof collected under this article to the aforesaid secretary, then he shall pay a penalty of ten per cent on the amount of his delinquency; * * * "

Under said Section 10761, supra, the collector is to "promptly and faithfully collect the tax therein set out" in the "drainage tax book" and before receiving such book he shall make bond that he "shall pay over and account for all taxes so collected by him according to law". Under Section 10763, supra, failure of the collector to pay over the tax "collected under this article" make him liable for a penalty.

The above sections provide the only authority of a collector to collect annual installment of tax levied and certified by a Board of Supervisors of a drainage district organized by the Circuit Court. Therefore, it is the duty of the collector to collect the tax as appearing in the "drainage tax book""promptly and faithfully" and in so doing, and subsequently paying over the tax so collected, he can not be held liable.

CONCLUSION

Therefore, it is the opinion of this department that a county

collector should promptly and faithfully collect and pay over the tax shown to be due by the "drainage tax book" of a drainage district under Circuit Court organization and, in so doing, is not liable on his bond.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

GUARDIANS:
CURATORS:
REAL ESTATE OF WARDS:
MANAGING OF:

A guardian of an insane ward may convey mineral rights of ward's real estate but should follow the statutes relating to conveyance of real estate for his procedure.

May 24, 1939

5526

FILED

Mr. John W. Porter
Circuit Clerk and Recorder
Clinton County
Plattsburg, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion based on the following letter:

> "I am writing to you for an opinion as to whether or not the Probate Court has the right to approve the sale by Guardian of an insane ward of oil and gas lease or an interest in the royalty rights of the ward. As royalties are conveyed by mineral deeds, would there be any more restriction on the Court approving a mineral deed than exists when the Court approves the sale of land for a guardian, which of course conveys all mineral rights?"

Under the statutes, after a guardian has sold real estate of his ward, he is required to make a report to the probate court and obtain approval of that court before such sale is final and binding on the ward's estate. Section 407, R. S. Missouri 1929, sets out this requirement. It is as follows:

> "Whenever any guardian or curator shall sell any real estate belonging to his ward, under an order of

> court, he shall report such sale to the court ordering the sale, in the same manner as executors and administrators are then required by law to report sales of real estate made by them for the payment of debts; and such sale, if approved by said court shall be valid to all intents and purposes: Provided, however, that no such sale shall be approved by the court unless the property sold for not less than three-fourths of the appraised value thereof. If the court refuse to approve the report, the order of sale may thereupon be renewed, and the same proceeding shall be had as upon the original order: Provided further, that within ten days after any sale made by a guardian or curator of minors in this state, such guardian or curator shall make a full report of his proceedings, with a certificate of appraisement and a copy of the advertisement, if such sale is made at public sale, which report shall be verified by affidavit stating that he did not, directly or indirectly purchase said real estate or any part thereof, or any interest therein and that he is not interested in the property sold except as stated in said report: Provided further, that such report of sale shall be and remain on file ten days before being acted upon by the court."

A guardian is authorized to sell his ward's real estate under Section 402, R. S. Missouri 1929, which is as follows:

> "The probate court shall order the proper education, support and maintenance of minors, according to their

> means, and for such purposes may, from time to time, make the necessary appropriations of the money or the personal estate or income of such minor not otherwise provided to be used; and when the money, income or personal estate of such minor shall be insufficient or not applicable to such objects, purpose or purposes, the court may order the lease or sale of the real estate of such minor, or so much thereof as may be requisite, or that said real estate be mortgaged, to raise the funds necessary to maintain, support and educate such minor, or to raise the funds necessary to pay off any pre-existing debts, for which the estate of such minor is legally liable."

And under Section 410, R. S. Missouri 1929, he may sell or lease his ward's real estate.

On the question of the authority of the guardian to lease his ward's real estate, the court, in discussing a lease of a ward's real estate which was made by the guardian for a short term in the case of Richardson, by Guardian, v. Richardson et al., 49 Mo. 29, l.c. 34, said:

> "He had no authority, without judicial sanction, to sell his ward's real estate, but he might lease it. * * * "

While the foregoing rule as to the necessity of obtaining an order of court to lease the ward's estate might apply to a lease for a short period of time, we do not think it would apply to a mineral lease which generally extends over a period of years. It seems from our statutes relating to estates of minors and insane persons that the lawmakers have intended to extend the arm of protection over such persons and we think these statutes should be construed in favor of

such persons when it can be done.

The lease of the mineral rights to real estate affects the title to such property, and this is another reason why the general statutes applicable to sales of real estate of minors and guardians should apply. The Richardson case, supra, also holds that the guardian cannot sell the real estate of his ward without an order of court. This order of court takes with it the report of the sale and the approval by the court, and such sale can only be made when it is authorized by said Sections 402 and 410.

CONCLUSION.

From the foregoing it is the opinion of this department that a guardian may convey, by a lease, the mineral rights of his ward's estate under the conditions named in the foregoing statutes. The probate court, having jurisdiction over the ward, should approve such lease in the same manner that a sale of the real estate of the ward is approved by the court.

This department is further of the opinion that there would be no more restriction on the court in approving a lease conveying mineral rights than exists when the court approves the outright sale of the real estate by the guardian.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

LIQUOR)
TAXPAYERS) A person paying only sales taxes and no other taxes is not eligible for a liquor license.

May 26, 1939

5-29

FILED
71

Hon. Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of May 18th, 1939, which reads as follows:

"Will you please advise me what constitutes a taxpayer as the word is used in Section 27 of the Liquor Control Act.

"Will you advise me particularly as to whether or not a person who pays sales tax comes within the meaning of the word as used in the above section."

The pertinent part of Section 27 of the Liquor Control Act, Laws of Missouri, 1937, page 533, reads as follows:

"No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a taxpaying citizen of the county, town, city or village,
* * * * * * * * * * * *"

A person therefore must be a "taxpaying citizen of the county, town, city or village" in which he seeks a liquor license in order to be eligible. The question then is whether a person who pays only a sales tax and who does not pay taxes to the county, town, city or village can qualify.

We do not find that the Missouri courts have ever passed on this question or one similar. However, other courts have been called upon to construe similar statutes. In the case of Hicks v. Krigbaum, 108 Pac. 482, the Supreme Court of Arizona had before it for construction the phrase "taxpayers of the district". In holding that under the terms of this statute that it was the legislative intent that only those taxpayers who paid taxes upon property within the particular district were intended, the court said: (l.c. 485)

> "For the reasons already stated, the expression 'taxpayers of the district' in paragraph 2182 is not ambiguous and uncertain in that it does not appear whether it includes only residents of the district or whether it includes nonresidents who are taxpayers of the district. There remains the suggestion that, even so interpreted, it is ambiguous in that it may mean a taxpayer residing in the district who pays taxes upon property within the district, or one who pays upon property without the district. We are of the opinion, in view of the provisions of paragraph 2186,

> providing that the money for the redemption of said bonds and the payment of interest thereon shall be raised by taxation upon the taxable property in said district, that both the legislative intent and a reasonable construction require us to read the phrase to mean those who pay taxes upon property within the school district."

In the case of City of Pocatello v. Murray, 130 Pac. 383, the Supreme Court of Idaho had before it a statute which provided that certain commissioners in order to be eligible had to be "taxpayers of such town or city". The principal point at issue was whether one of the commissioners owned and paid taxes or was liable for the payment of taxes on property located within the city. The court found that the commissioner did in fact own property within the city and was therefore eligible. The court held, however, that the term "taxpayer of such town or city" means one who owns property within the municipality and who pays a tax, or is subject to or liable for the payment of a tax on such property. The court then said: (l.c. 387).

> "From these facts it necessarily follows that each of said parties was a 'taxpayer' within the meaning of the statute in controversy in this case. 'A taxpayer' is one who owns property within the municipality, and who pays a tax or is subject to and liable for a tax."

It follows then that the term "taxpaying citizen of the county, town, city or village" means that each liquor licensee must own property within the county, town, city or village in which he seeks a license to do business and he must be a taxpayer to such county, city, town or village.

There is no statute which authorizes a county, town, city or village to levy a sales tax. The sales tax now in force provides that such tax shall be paid to the state auditor.

Section 8, of the Sales Tax Act, Laws of Missouri, 1937, page 559, provides that the revenues derived from the sales tax shall be deposited to the credit of the ordinary revenue fund. This section reads as follows:

> "All revenue collected or received by the State Auditor from the taxes imposed by this Act shall be deposited in the State Treasury weekly to the credit of the ordinary revenue fund."

Section 31, of the Sales Tax Act, Laws of Missouri, 1937, page 565 reads in part as follows:

> "Any tax due and unpaid under the provisions of this Act shall constitute a debt due the State and in any case of failure to pay the tax, or any portion thereof, or any penalty or interest provided for in this Act, when due, the Auditor in the name of the State may recover the amount of such tax, penalty and interest by an action at law or other appropriate judicial proceedings." * * * *

Section 31 states that the sales tax is a"debt to the state". Therefore it cannot be a debt to the county, town, city or village or a tax due and owing to it.

In your letter you also asked us to advise you "what constitutes a taxpayer as the word is used in section 27 of the Liquor Control Act." In this connection we are enclosing a copy of an opinion rendered by this office to the Hon. Charles D. Brandon, Prosecuting Attorney of Daviess County, Missouri, dated May 5th, 1938, in which this question in connection with Section 27 is treated generally.

CONCLUSION

Section 27 of the Liquor Control Act provides that no person shall be granted a liquor license unless such person is a "taxpaying citizen of the county, town, city or village." This means that each person seeking a liquor license must have paid a tax, or at least be liable for the payment of a tax to the county, town, city or village. Since the Missouri Sales Tax is a tax payable to the state and to the state alone, and not to any county, town, city or village, it follows that a person who pays only sales taxes and pays no taxes whatsoever to the county, town, city or village in which he seeks a liquor license is not eligible under the law for a license to engage in the liquor business in the State of Missouri.

APPROVED:

W. J. BURKE
(Acting) Attorney General

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

JFA:RW

LIQUOR CONTROL:
LICENSING OF A
CORPORATION:

The managing officer of a corporation which desires to obtain a license to sell intoxicating liquor is not required to be a resident and taxpaying citizen of a town or village in which he proposes to sell intoxicating liquor.

June 24, 1939

FILED
71

Honorable Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Mr. Pierce:

This is in reply to yours of recent date wherein you submitted the following question:

> "The Crown Drug Company, Atlantic & Pacific Company, Kroger Grocery Stores and Katz Drug Company operate places of business in the state in counties and towns other than the county and town in which their principal office is located. It is my contention that this section requires the application to be made by the manager of the local store even though he could hardly qualify as the managing officer.
>
> "I am inclined to this view for the reason that I think the legislature intended that the city council should have a right to pass upon the qualifications of an applicant whom they knew and who had lived in their city for the proper length of time."

The section of the liquor law which is applicable to your question is found at Section 27, page 533, Laws of Missouri, 1937, which provides in part as follows:

> "No person shall be granted a license hereunder unless such person is of good moral character and a qualified

> legal voter and a taxpaying citizen of the county, town, city or village, nor shall any corporation be granted a license hereunder unless the managing officer of such corporation is of good moral character and a qualified legal voter and taxpaying citizen of the county, town, city or village;
> * * * * * * ** * * * * * * * * * "

The qualifications set out in the foregoing section seem to apply to all persons or corporations who desire to sell intoxicating liquor in this state.

The only question involved in your request is whether or not the managing officer who applies for the license to sell liquor for the corporation must be a resident of the county, city, town or village in which he proposes to sell intoxicating liquor.

Section 27 aforesaid is somewhat ambiguous and uncertain on this question. It provides that the corporation may obtain the license through its managing officer who must be of good moral character and a qualified legal voter and taxpaying citizen of the county, city, town or village. This section is silent on the question of whether or not he must possess these qualifications in the locality in which the corporation proposes to sell the liquor or in the locality in which he resides. This section could easily be construed to mean that he must possess these qualifications at the place which the corporation proposes to sell the intoxicating liquor. However, on this particular question there are other things to be taken into consideration.

There is no doubt but that the managing officer is the one who is required to make the application. It is a well known fact that the various chain stores throughout the state do not have a managing officer in every locality in which they have a store. From a reading of the intoxicating liquor act there is no doubt that the lawmakers have intended to grant the same privilege to corporations to sell intoxicating liquor

as they have granted to individuals.

While the law provides that the managing officer is the person who shall make the application for the license, yet it is the corporation to whom the license is granted and it is the corporation to which the state is looking for the faithful performance of the duties of the licensee. In case a suit is brought on the bond the corporation is the one to whom the state is looking for the violation of the provisions of the bond. By placing the requirement on a corporation that the managing officer should reside in the locality in which the intoxicating liquor is expected to be sold would be imposing an impractical and almost impossible duty on such applicants.

On the question of construing statutes under circumstances similar to those involved in this case we think in State ex rel. Gass v. Gordon, 181 S. W. 1016, the court has well stated the rule:

> "Statutes should receive a sensible construction such as will affect the Legislative intention, and if possible so as to avoid an unjust or an absurd conclusion."

And in Hawkins v. Smith, 147 S. W. 1042, the rule is stated:

> "Where possible, a statute will not be construed so as to lead to evil, oppressive or absurd consequences or to self-contradiction."

To place the construction on this statute that the managing o ficer must reside in the locality in which the corporation proposes to sell intoxicating liquor would be in violation of the rule of statutory construction as stated in the Gass and Smith cases, supra, because it would place a duty upon the corporations which they are unable to perform even though the clear intention of the statute is that they may be permitted to sell intoxicating liquor. Such a construction would be injurious

absurd and oppressive on the applicants. In Bowers v. Missouri Mutual Association, 62 S. W. (2d) 1058, another rule is stated which is applicable here:

> "In arriving at Legislative intent, doubtful words of the Statute may be enlarged or restricted in meaning to perform to law-makers' intent when manifested by aid of sound principles of interpretation."

And in State v. Irvine, 72 S. W. (2d) 96, another rule is announced which is very appropriate here:

> "Statutes will not be so construed as to require impossibility or lead to absurd results if susceptible of reasonable interpretation."

Applying the two foregoing rules to the question here this statute is doubtful on the question of where the managing officer should reside. By applying the rule of giving the construction to the statute which will not impose an impossibility on the applicant for the license in this case and keeping within the general intent and purpose of the act, then it seems that Section 27, supra, could be construed to mean that the managing officer must be of good moral character and a qualified legal voter and taxpaying citizen of the town, county, city or village in which he resides in the state of Missouri. It does not mean that he must possess these qualifications in the locality in which the corporation proposes to sell intoxicating liquor.

CONCLUSION.

From the foregoing it is the opinion of this department that a corporation, through its managing officer, may obtain a license to sell intoxicating liquor in any city, town or village in the state providing such officer possesses the qualifications set out in Section 27 of the Intoxicating

Liquor Act in the town, city or village in which he resides.

We are further of the opinion that such managing officer is not required to be a qualified voter and taxpaying citizen of the county, town, city or village in which the corporation proposes to sell intoxicating liquor.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

INTOXICATING LIQUOR:
CORPORATIONS CRIMINALLY
LIABLE FOR VIOLATIONS OF
LIQUOR CONTROL ACT:

Officers, agents, servants and employes participating in violations also criminally liable.

7/26

July 24, 1939

FILED
71

Honorable Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your recent request for an opinion which reads as follows:

> "I am in receipt of a letter addressed to me by the Honorable Latney Barnes, Prosecuting Attorney of Audrain County, pertinent parts of which are as follows:
>
> "'On Wednesday night April 19, 1939, Mr. D. E. Woodworth, local manager of the Ruskin Mercantile Company, sold six bottles of beer to R. T. Kannen, Vice-President of the Springfield Brewing Company. On the same night Mr. Woodworth sold a full case containing 24 bottles of beer to Garnett C. Skinner, President and Treasurer of the Springfield Brewing Company. In both cases the beer sold bore labels "Stadt Brand Lager Beer" of the Springfield Brewing Company, Springfield, Illinois. The bottles were capped with caps marked "B", which I am informed indicates its origin as the Blumer Brewing Company of Wisconsin, and contained beer brewed by the Blumer Brewing Company.
>
> "'At the time of the sale of the whole case the bottles were taken from a

Blumer case and placed in a Stadt case. Both of the above sales took place in the Ruskin Mercantile Company liquor Store, Mexico, Audrain County, Missouri.

"'The Secretary of State informs me that the Ruskin Mercantile Company was incorporated May 7, 1935, and that their records show Harry Ruskin as President, Sam Woll as Secretary and Treasurer, who with Ray Ruskin are the directors of the corporation, whose address is 3135 Troost Ave., Kansas City, Missouri.

"'Inasmuch as 30-b of the Intoxicating Liquor Laws of the State of Missouri, Laws of Missouri, 1935 (P.278) states: "Misrepresentation - No person holding a license or permit shall sell malt liquor, or any other intoxicating liquor in this state or shall offer for sale any such malt liquor, or other intoxicating liquor, whatsoever, brewed, manufactured, or distilled by one manufacturer in substitution for, or with the representation that any such malt liquor or other intoxicating liquor is the product of any other brewer, manufacturer, or distiller. Whosoever shall violate the provisions of this section shall be deemed guilty of a misdemeanor."

"'Inasmuch as Mr. Woodworth does not have a liquor license or permit would a prosecution under Section 30-b lie against him?

"'Also can the Ruskin Mercantile Company be charged with the crime, and if so on whom would the warrant be executed?

> "'We desire to file a criminal charge in addition to requesting your department to revoke the license of the Ruskin Mercantile Company.'
>
> "Inasmuch as Mr. Barnes desires to file criminal charges I will appreciate it very much if you will address to me or to him an opinion covering the questions presented in his letter.
>
> "The question as to who should be prosecuted for a violation of a criminal law where the permit holder was a corporation has frequently been presented to me. An opinion from your office on this subject will therefore be of considerable help."

The courts have often held that corporations as such can be charged and convicted of a crime. The question is quite thoroughly discussed in Fletcher Cyclopedia Corporations, Permanent Edition, Volume 10, Section 4942. This section reads as follows: (page 643)

> "While it was thought anciently, principally, perhaps, on the authority of a statement attributed to Lord Holt, that a corporation, as an entity, was not indictable under the common law, though its members were, there probably never was a time when a corporation was indictable in no case and under no circumstances. This doctrine of non-liability for crime arose from the theory that a corporation, being an intangible entity, could neither commit a crime nor be subjected to punishment, because any illegal act of a corporate agent was done without authority of the corporation and ultra vires.
>
> "While the criminal law cannot be

> extended to corporations in the same manner or as fully as to natural persons, it is held today, almost universally, that a corporation may be liable criminally for crimes which its agents are capable of committing on its behalf, but the authorities are not so uniform as to whether a corporation is capable of manifesting a specific criminal intent, or of committing crimes involving personal violence. And there are some cases which, apparently, still hold to the ancient rule.
>
> "Both domestic and foreign corporations doing business in the state are subject to criminal liability.
>
> "It is immaterial that the corporate officers and agents are themselves severally liable to indictment for the crime with which the corporation is charged. * * * * * * * * * * * * "

The type of crimes a corporation can be convicted of is discussed by Fletcher in Volume 10 of the same works, Section 4951, pages 670-674:

> "The application of the principles on which are based the views as to a corporation's liability to, or immunity from, criminal prosecution may be further illustrated by concrete examples. Thus it has been held that a corporation is liable to criminal prosecution for violation of a law regulating sales of intoxicating liquors; for permitting gaming on its fair grounds; for a violation of the federal statute which prohibits the depositing of obscene matter in the mail; for

keeping a disorderly house; for violating, in its capacity of federal contractor, the federal eight-hour labor law; for a violation of the Sabbath labor law; for violation of corrupt practices acts; for a violation of the usury laws of the state in which it is located; for issuing unstamped papers with intent to evade the revenue law; for a violation of the laws relative to the procuring of a license to do business; for failure to pay a license tax under an ordinance; for the giving of rebates; for offenses under the Bankruptcy Act; for practicing law; for taking more natural gas from a well than the maximum allowed; for obtaining from a carrier, by fraud and deception, the possession of property moving in interstate commerce; for violation of laws regulating the sale of agricultural seeds; for conspiracy, and hence may be counted in computing the number necessary to the commission of such crime. It has been held also that a corporation is liable criminally for violation of the Espionage Act, and under a statute prohibiting any person from advocating violence to gain political ends. Cutting down timber and thereby obstructing a river, in violation of a statute, is a crime for which an indictment will lie against a corporation. A corporation created for the purpose of constructing and maintaining a toll bridge, and required by its charter to keep the same at all times in good, safe and passable repair, may be indicted for failure to light the same at night when necessary for the safety and convenience of the public. And a railroad company may be indicted for disobeying

> an order by the proper authorities to construct arches or bridges to connect lands severed by the construction of its road, as required by its charter or by statute; but a railroad is not indictable under a statute forbidding obstruction of crossings where the approaches to the crossing are merely in a condition of disrepair; and it has been held that a statute holding employees in charge of a train to be guilty of a misdemeanor for wilfully obstructing a crossing longer than a certain period does not subject the railroad corporation to criminal liability. When the legislature has provided that the doing of an act prohibited by statute, no penalty for the violation of the statute being imposed, shall be a misdemeanor, a turnpike company, the special charter of which provides that its gates shall not be nearer together than five miles, may be indicted for collecting toll at two of its gates which were not such distance apart. * * * * * * * * * * "

In the case of Southern Express Co. v. State, 58 S. E. 67 (Court of Appeals of Ga.), a corporation was convicted of furnishing liquor to a minor through an agent. The court approved the following charge to the jury: (l. c. 70)

> "* * * * nor did the judge err in charging the jury in his recharge, as follows: 'It is the duty of the express company to ship liquor or anything else delivered to it to the point of destination. It is not the duty of the company to deliver liquor to minors. If the company does it through its agent, employes, or any person that they have in their employ

> about the building to deliver packages, if it is done by the agent or any person acting under the agent, by his direction or with his consent, delivering packages generally, if in doing that they deliver liquor to minors, then that is a violation of the law.'
> * * * * * * * * * * * * * * * * * * "

In the case of Stewart v. Waterloo Turn Verein, 32 N. W. 275, l. c. 276, the questions certified to the Supreme Court of Iowa for decision and the decision of the court is in the following language:

> "'(1) Whether the sale of beer by the members of said committee, at the entertainment aforesaid, to a person in the habit of becoming intoxicated, subjects the defendant to the penalty provided in section 1539 of the Code. (2) Is the defendant corporation a person within the meaning of said section 1539?'
>
> " * * * * * * * * * * * * * * * It is provided by subdivision 13 of section 45 of the Code that 'the word "person" may be extended to bodies corporate.' This is laid down as a rule to be observed in the construction of the statutes of this state. It is apparent, however, that this rule cannot be of universal application, especially in the construction of criminal statutes, for the reason that there are some crimes for which a corporation cannot be punished. For example, if all the members of a corporation should be guilty of a criminal homicide in pursuance of a resolution of the

corporation, the corporation would not be liable to indictment for the murder. The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute.' Wales v. City of Muscatine, 4 Iowa, 302; South Carolina R. Co. v. McDonald, 5 Ga. 531.

"Applying this rule to the case at bar, it is clear that a corporation is a person within the meaning of section 1539 of the Code. There in nothing therein which may not be applied as well to a corporation as to a natural person, and there is no more reason for claiming that a private corporation is not included within its provisions than there is in holding that such a corporation is a person within the meaning of the law authorizing attachment by garnishment, or any other provision of the statute equally applicable to natural and artificial persons.

"* * * * * * * * * * * * * * * * * *
It was not necessary to prove that the beer was ordered and sold by an order of the defendant made in its corporate capacity. When a railroad company is indicted for a nuisance in obstructing a public highway in this state, (a prosecution which is of frequent occurrence,) it has never been thought necessary to prove that the obstruction was placed in the highway in pursuance of some resolution of the board of directors of the corporation. The corporation is liable for the acts of its agents and employes in such cases.

"In regard to the liability of private corporations for violations of criminal laws, Mr. Morawetz, in his work on Private Corporations, employs this language, (volume 2, sections 732, 733): 'It follows, therefore, that a corporation cannot be charged criminally with a crime involving malice, or the intention of the offense. Even though the corporators themselves should unanimously join, with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company. There are, however, certain classes of crimes which do not depend upon the intention of the offender, and are not distinguishable from simple torts, except by the fact that in the one case an individual sues for damages on account of a private tort, and in the other case the state sues for a penalty on account of a public wrong. In these cases the crime consists of the act alone, without regard to the intention with which it was committed; and there is no difficulty in attributing an offense of this character to a corporation, since it may be committed entirely through the company's agents. Accordingly it has been held that a corporation may be indicted for causing a public nuisance, for not performing a duty cast upon it by law, or for doing any act which is made indictable, without regard to the intention of the offender.' The author cites many authorities in support of the text, and it appears to us the principles therein laid down are so plainly correct as to command the approval of every legal

mind.

> "Applying these principles to the case at bar, and the conclusion is inevitable that the defendant is liable. The persons who sold the beer, and the officers and members of the corporation who stood by and acquiesced in the sales, were not actuated by malice. They doubtless believed that the beer gave zest to the ball, and added to the enjoyment of the entertainment. They had 'malice towards none, but charity for all,' and thought it no crime to dispense to the festive throng that which they believed to be exhilarating but not intoxicating.
>
> "We think both of the questions certified should be answered in the affirmative."

In the case of State v. Delaware Saengerbund, 91 Atl. 290, (Court of General Sessions of Del.), a corporation was convicted of selling liquor without a license. As to the corporation the court said at l. c. 292:

> "It is not denied that the defendant corporation is a 'person' within the meaning of the statute. The word person is a generic term, and as such may extend to and include artificial as well as natural persons. The intention of the Legislature in the use of the word is manifest, and in construing the statute, we hold that when the Legislature by statute attempted to regulate the sale of liquor in all ways it intended its control to extend to all persons, and this embraced corporations as well as individuals. Rev.

> Code, c. 5, section 1, subd. 10; Germania v. State, 7 Md. 1; United States v. Amedy, 11 Wheat. 392, 6 L. Ed. 502; People v. Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.
> * * * * * * * * * * * * * * * "

The Legislature has said in the Liquor Control Act that the term "person" shall include corporations. Section 43a of the Act, Laws of Missouri, Extra Session 1933-34, page 91, defines the word "person" as follows:

> "The term 'person' as used in this act shall mean and include any individual, association, joint stock company, syndicate, co-partnership, corporation, receiver, trustee, conservator, or other officer appointed by any State or Federal Court."

In the case of State v. Worker's Socialist Pub. Co., 185 N. W. 931, the Supreme Court of Minnesota held that where a corporation was criminally liable under a statute prohibiting "any person" from advocating violence to gain political ends, the corporation could be convicted under a statute which expressly provided that the word "person" includes a corporation. The court said:

> "* * * * The statutes of this state expressly provide that in the construction of penal statutes the word 'person' includes a corporation save when otherwise plainly declared or clearly apparent from the context.
> * * * * * * * * * "

The Supreme Court of Missouri in the case of The State ex rel. v. The St. Louis Club, 125 Mo. 308, held that an incorporated club is not a person within the meaning of the dramshop regulating the sale of intoxicating liquors and requiring a person to take out a license as a dramshop keeper. In this particular connection the court said at l. c. 317-318:

> "* * * * * The definition of a dramshop keeper and the provision against the sale of liquors without license have remained practically the same since 1841. Acts, 1840-1, p. 82; R. S. 1845, p. 542; R. S. 1889, sec. 4569; Laws of Missouri, 1891, p. 128.
>
> "'A dramshop keeper is a person permitted by law, being licensed according to the provisions of this chapter, to sell intoxicating liquors in any quantity, either at retail or in the original package, not exceeding ten gallons.' Laws, 1891, p. 128, sec. 1.
>
> "The 'person' obtaining the license must satisfy the court that he is a law-abiding, assessed, taxpaying male citizen above twenty-one years of age.
>
> "We think it is obvious that the legislature never intended that a corporation should be licensed under this act as a dramshop keeper. 'Person' as used in this act does not include a corporation, because the whole context is repugnant to such a construction. R. S. 1889, sec. 6569. The criminal provisions of the statute also evidently point to a 'person,' who is amenable to the punishment under our criminal laws and the provisions therein for enforcing fines and penalties."

However, the dramshop laws did not contain a section which defined the word "person" to include also a corporation and, therefore, we believe that the St. Louis Club case can have no application to the present liquor laws. The legislative intent seems to be clear to the effect that corporations can be licensed, and consequently punished criminally for violations of the

liquor laws. Consequently, we are of the opinion that a corporation can be charged and convicted in criminal proceedings involving violations of the Liquor Control Act. Any such violations would necessarily have to be committed by an officer, agent, servant or employe because it is elemental that a corporation can act only through such officers and agents.

The Missouri courts have held that agents and servants of liquor licensees can also be held liable criminally for violating the laws governing the sale of intoxicating liquor. In the case of State v. Robinson, 163 Mo. App. 221, l. c. 224, the court said:

> "* * * * It is a familiar rule of law requiring no reference to authorities, that a person cannot escape punishment for an infraction of the criminal laws of the land on the plea that he was not acting for himself but as the agent of another. Therefore, if the transaction under consideration amounted to a sale of intoxicating liquor by the incorporated fraternal association (the lodge), defendant, as the agent by whose hand the law was violated, must suffer for the offense."

In the case of State v. Bales, 149 Mo. App. 351, the court said at l. c. 352:

> "The defense offered testimony tending to prove that the defendant was not conducting the place of business where the tonic was purchased, and that the same was being conducted by a man by the name of Criss; that the defendant had been previously convicted for the same offense, and that the 'Regal Tonic' was not an intoxicating liquor.
>
> "In as much as Mr. Stout testified

that he purchased the tonic directly from the defendant, it made no difference whether the defendant or Criss was conducting the business."

CONCLUSION.

Consequently, it is our opinion that an officer, agent, servant or employe of a corporation licensee is criminally liable for the violations of the liquor laws in which such officer, agent, servant or employe actively participates.

It is also our opinion that the corporation itself is likewise criminally liable for the same offenses, and that both the corporation and the officer, agent, servant and employe, who have actively participated in such violations, are criminally responsible.

Respectfully submitted

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:DA

CITIZENSHIP: Service in the United States military forces does not automatically create citizenship.

August 3, 1939

8-4

FILED
71

Honorable Walker Pierce
Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated August 1, 1939, and which reads as follows:

> "In reply to a question on our application for a permit to sell intoxicating liquor in which the applicant is asked, in case he is a naturalized citizen, to give date and place of naturalization, some of the applicants recite service in the United States Army.
>
> Does service in the United States Army by an unnaturalized person create citizenship for him?"

The Sections of the United States Code of Laws pertaining to naturalization and giving war veterans certain preferences in applying for naturalization are Sections 391, 392, 393, 394 and 395 of Title 8, Chapter 9, which are as follows:

> Section 391. "Any person who was serving in the military or naval forces of the United States at the termination of the World War, and

any person who before the termination of said war may have been honorably discharged from the military or naval services of the United States on account of disability incurred in line of duty, shall, if he applies to the proper court for admission as a citizen of the United States, be relieved from the necessity of proving that immediately preceding the date of his application he has resided continuously within the United States the time required by law of other aliens, or within the State, Territory, or the District of Columbia for the year immediately preceding the date of his petition for naturalization, but his petition for naturalization shall be supported by the affidavits of two credible witnesses, citizens of the United States, identifying the petitioner as the person named in the certificate of honorable discharge, which said certificate may be accepted as evidence of good moral character required by law, and he shall comply with the other requirements of the naturalization law.

Section 392. "Any alien who served in the military or naval service of the United States during the time this country was engaged in the World War, might file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States.

Section 393. "Any alien, or any person owing permanent allegiance to the United States embraced within sections 388 to 390, 392 to 394 of this title, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, notwithstanding

the limitation upon the jurisdiction of the courts specified in section 357 of this title, provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination hereby required before filing his petition for naturalization in the office of the clerk of the court, and in each case the record of this examination shall be offered in evidence by the representative of the Government from the Bureau of Naturalization and made a part of the record at the original and any subsequent hearings; and, except as otherwise herein provided, the honorable discharge certificate of such alien, or person owing permanent allegiance to the United States, or the certificate of service showing good conduct, signed by a duly authorized officer, or by the masters of said vessels, shall be deemed prima facie evidence to satisfy all of the requirements of residence within the United States and within the State, Territory, or the District of Columbia, and good moral character required by law, when supported by the affidavits of two witnesses, citizens of the United States, identifying the applicant as the person named in the certificate or (of) honorable discharge, and in those cases only where the alien is actually in the military or naval service of the United States, the certificate of arrival shall not be filed with the petition for naturalization in the manner prescribed. (May 9, 1918, c. 69, Sec. 1, 40 Stat. 543.)

Section 394. "Any petition for naturalization filed under the provisions of sections 388 to 390, 392 to 394 of this title, may be heard immediately, notwithstanding the law

> prohibits the hearing of a petition for naturalization during thirty days preceding any election in the jurisdiction of the court."
>
> Section 395. "As to all aliens who, prior to January 1, 1900, served in the armies of the United States, and who were honorably discharged therefrom, section 2166 of the Revised Statutes of the United States--which read as follows: 'Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the Regular or the Volunteer Forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States'--shall be and remain in full force and effect."

From a reading of the above, it is apparent that said sections do not require the customary residence and declaration of intention to become a citizen, which are required of persons who have not served in the military forces of the United States.

In any event, the veteran must make an application for naturalization as required by the general statute. The

only exception to the above is found in Section 3, Chapter 1 of Title 8, United States Code of Laws, which provides that an American Indian, who served in the American forces during the World War, may be granted full citizenship without such petition upon identification in a court of competent jurisdiction.

It is our conclusion, therefore, that service in the United States Army by an alien or unnaturalized person does not automatically make him a citizen of the United States.

Respectfully submitted,

ROBERT L. RYDER
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

RLH:RT

LIQUOR: In making the refunds authorized by Section 119 of House Bill No. 716, the Supervisor of Liquor Control must pay State Treasurer face amount of stamps out of the fund specifically appropriated for that purpose.

September 27, 1939

9-28

FILED
71

Hon. Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of September 19 which reads as follows:

> "Some question has arisen with reference to the proper construction to be placed upon Section 119 of House Bill 716. It has been suggested that the legislature in enacting this provision intended one of two things:
>
> "First, that the Supervisor of Liquor Control procure from the State Treasurer the stamps necessary to make the refunds set out in Section 119 and that he pay the State Treasurer out of the appropriation only the intrinsic value thereof.
>
> "Second, that the Supervisor of Liquor Control shall procure from the State Treasurer the necessary stamps and that he pay the State Treasurer the actual face value of the stamps as is done in the ordinary course of business as now conducted between this Department and the State Treasurer.
>
> "Will you please suggest the proper method of handling these funds."

Section 119 of House Bill No. 716, which you referred to in your letter and which is now contained in Laws of Missouri, 1939, page 167, reads in part as follows:

> "Liquor and Beer Stamp Refunds.--There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, to the use of the Director of Liquor Control, the sum of $47,972.37, or so much thereof as may be necessary for the purpose of purchasing liquor and beer stamps to be refunded to the following named companies or persons to replace stamps not used and cancelled upon the direction and under the supervision of the Director of Liquor Control."

The above quoted part of Section 119 is followed by a detailed list of sixty five companies entitled to refunds, together with the amounts due each company. By way of illustration, the first two names on this list, together with the amounts due, read as follows:

> "American Distilling Company, Pekin, Illinois $242.40
>
> Arrow Distilleries, Inc., Peoria, Illinois . . . . . 196.01."

The whole amounts due all of the companies in the list is then totaled at the end of said section, and this total is exactly $47,972.37, the amount appropriated for such purposes. Therefore, it is apparent that the Legislature intended that the total amount of $47,972.37 or "so much thereof as may be necessary" is to be used to "purchase liquor and beer stamps to be refunded to the following named companies or persons to replace stamps not used and cancelled" by the Supervisor of Liquor Control. This would indicate that the Legislature did not intend for the Supervisor to pay to the State Treasurer only the intrinsic value of the stamps, but rather that the Treasurer should be paid the face value thereof. If the intrinsic value only had been intended, the Legislature would only have appropriated perhaps $50.00 to pay the printer. The actual cost of the stamps would not approach the value of $47,972.37.

Furthermore, said Section 119 states that $47,972.37 is appropriated to the use of the "Director of Liquor Control", chargeable to the General Revenue Fund for the purpose of purchasing the liquor and beer stamps to be refunded. Read in the light of existing statutes showing how and from whom the Supervisor shall obtain the stamps, it is further apparent that these particular stamps are to be purchased at their face value from the State Treasurer.

Section 35 of the Liquor Laws, Laws of Missouri, Extra Session 1933-34, page 90, provides as follows:

> "It shall be the duty of the State Treasurer, upon the taking effect of this act, to provide suitable and inimitable state certificates and labels for this inspection, gauging and labeling, having on each proper places for countersigning by the State Treasurer and Supervisor of Liquor Control, and shall safely keep the same together with the plates used in making them, when not in actual use. The State Treasurer shall from time to time upon demand, deliver the aforesaid labels to the Supervisor of Liquor Control, taking therefor his receipt, and shall charge said Supervisor of Liquor Control with the same; and shall from time to time, as said Supervisor of Liquor Control makes returns of moneys collected in the course of his inspection, credit said Supervisor of Liquor Control's account with such sums, and shall keep a true and correct book account of his dealings with said Supervisor of Liquor Control."

It seems clear, therefore, that the Supervisor is charged the full face value for all stamps obtained from the State Treasurer, and as the stamps are sold, the money

so obtained is credited to the stamp account by the Treasurer. In other words, no provision is made anywhere to the effect that the Supervisor is to be charged only for the intrinsic value of any stamps which he obtains from the State Treasurer, and also, this has never been the practice. And, as we said above, there in no indication in said Section 119 that the general procedure as to obtaining the necessary stamps to accomplish these particular refunds is to be altered in any way from the usual procedure. In fact, Section 119, by its own wording, indicates otherwise.

CONCLUSION.

It is, therefore, our opinion that in order to accomplish the refunds authorized by Section 119 of House Bill No. 716, Laws of Missouri, 1939, page 167, that the Supervisor of Liquor Control must purchase the stamps from the State Treasurer at their face value, paying the State Treasurer for the same out of the appropriation authorized by the Legislature and given to the said Supervisor for that particular purpose.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

LIQUOR: Liquor dealers cannot sell wine in unstamped bottles.

September 28, 1939

9-28 FILED 71

Hon. Walker Pierce, Supervisor
Department of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your letter of September 15 which reads as follows:

> "The following situation now exists in Kansas City and I am of the opinion that it is a violation of law:
>
> "Many holders of by-the-drink permits are purchasing wine by the barrel and bottling it. Missouri excise stamps are affixed to the wine barrel and the tax thereon is paid. The saloon man, after he bottles it, places a label on the bottle stating that the wine therein was bottled from a tax paid barrel.
>
> "I am of the opinion that the liquor law contemplates only two types of sales of intoxicating liquor and they are sale by the drink and sale in the original package.
>
> "Will you please give me the benefit of your opinion as to whether or not the operation which I have outlined is a violation of the law."

Section 21a1 of the Liquor Laws, Laws of Missouri, 1937, page 531, provides that certain charges are to be

paid to the Supervisor of Liquor Control for the privilege of selling intoxicating liquors in the State of Missouri. Subsection (b) thereof provides for a 2¢ per gallon tax for the privilege of selling light wines and 10¢ per gallon on fortified wines. The term "light wines" is then defined as meaning any fermented wine containing not in excess of 14% of alcohol by weight and "fortified wines" meaning all other wines containing in excess of 14% of alcohol by weight. Subsection (c) of the same section then reads as follows:

> "The amounts required to be paid by this section shall be evidenced by stamps or labels purchased from the Supervisor of Liquor Control and affixed to the container of such spirituous liquor. The person who shall first sell such liquor in this state shall be liable for such payment and shall purchase, affix and cancel the stamps or labels required to be affixed to such container."

It, therefore, appears to be clear that the amount required to be paid by said Section 21a1 must be evidenced by stamps or labels purchased from the Supervisor of Liquor Control and that such stamps must be affixed to each of said containers. This is true if the intoxicating liquor is being sold as a package and not as a drink in a licensed by-the-drink place. In other words, package liquor when sold as a package and to be, perhaps, removed from the premises by the purchaser and consumed elsewhere, must have the stamps or labels affixed to said container before such a sale can legally be made.

Section 30f of the Liquor Laws, Laws of Missouri, 1935, page 278, reads as follows:

> "The sale of any intoxicating liquor except malt liquor, in the original package, in any quantity less than one-half pint shall be deemed sale by the drink, and may be made only by a holder of a retail liquor dealer's license and when so made, the container in every case shall be emptied and the contents thereof served as other intoxicating liquors sold by the drink are served."

From another communication from you, we understand that the dealers you have in mind have been rebottling the wine in pint and quart bottles and are selling the same in quart and pint quantities; that such sales are being made as package sales and in bottles which contain no state stamps whatsoever. Therefore, since the sales are being made in bottles containing more than one-half pint, each such sale constitutes a package liquor sale. Section 30f, by stating that sales of intoxicating liquor in the original package in any quantity less than one-half pint shall be deemed a sale by-the-drink, is likewise saying that all sales in quantities more than one-half pint are not sales by-the-drink. All sales in bottles containing more than one-half pint of intoxicating liquor must, therefore, be sales by the package and can be removed from the premises in such packages and consumed elsewhere. It is clear, than, that such packages must contain the stamps and that it is illegal to make such sales of wine in unstamped bottles, even though the tax might have been paid on the particular wine when it was contained in a larger container.

Furthermore, as a practical matter, if this were not the law, it would be difficult - if not impossible - for the Supervisor or his inspectors to ascertain whether the required tax had been paid on any package of wine so bottled. If the package itself should not show the stamps evidencing the payment of the tax, then nothing would as far as that particular quantity of wine was concerned. Anyway, as we have stated above, the law appears clear that each package of intoxicating liquor sold as a package must contain the required amount of stamps.

CONCLUSION.

We are of the opinion, therefore, that wine sold in a package and not by-the-drink cannot be legally sold unless the package in which the wine is contained is properly stamped and labeled by stamps purchased from the Supervisor of Liquor Control and affixed to such container; that the laws governing the sale of intoxicating liquor require that all packages containing intoxicating liquor must

be properly stamped before the same are eligible for sale.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

CIRCUIT CLERK:)
EX-OFFICIO RECORDER)
OF DEEDS:)

He shall make his report and pay all fees in monthly and the county court shall pay the clerk who is ex-officio Recorder of Deeds a salary at the end of each month. Both procedures are mandatory.

October 17, 1939

10-18

FILED
71

Mr. John W. Porter
Clerk of the Circuit Court
Ex-Officio Recorder of Deeds
Clinton County
Plattsburg, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of October 11, 1939, which reads as follows:

"I am writing to you for your opinion on the matter of my salary as Clerk of the Circuit Court and Ex-Officio Recorder of Deeds, as set out in Sections 11786-11812-11813-11814 and 11814a Laws Missouri 1937.

"I want specifically to know whether or not the County Court has a right, legally, to hold up the payment of my salary in the event that I am unable to get my monthly report in exactly on the last day of each month as provided by Section 11786 cited above.

"We have several firms that we carry on a monthly account and bill at the end of the month, and sometimes it is several days before we get all of the money in with which to make our settlement with the County Treasurer. This pertains to the office of Recorder of Deeds only."

Under Article 2, Chapter 84, R. S. Missouri, 1929,

the circuit clerk under sections 11811, 11813, and 11814 R. S. Missouri, 1929, was paid on a salary basis. In the Session Laws of Missouri, 1933, this method of payment was repealed and amended to the extent that he was paid on a fee basis, that is, he was limited to the amount that he may retain of the fees for his salary. The Session Laws of 1933 were amended changing the law back to the method as set out in the general statutes of Missouri, 1929, in that he was paid a flat salary.

Section 11786 R. S. Missouri, 1929, as re-enacted, which repealed the Laws of 1933, and now appears in Session Laws of 1937, at page 445, partially reads as follows:

> "* * * Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; * * "

This portion of Section 11786, supra, specifically states that it shall be the duty of the Circuit Clerk who is ex-officio Recorder of Deeds to make a report of all fees, in all cases, that he collects at the end of each month. This section is mandatory and repeals by implication the old section which provided that the report only be made each three months. It was specifically stated at the end of each month he should pay the money over to the County Treasurer. Since the statute is mandatory, it is the duty to pay at the end of each month, and if not paid, the Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him. There is also a criminal section which applies to the refusal of the Circuit Clerk to make his reports according to law.

Section 11830 of Article 2, Chapter 84, R. S. Missouri, 1929, which was not repealed, either by the Session Laws of 1933, or the Session Laws of 1937, reads as follows:

> "Every person violating the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined for each offense in any sum not less than fifty dollars nor more than one thousand dollars, and conviction thereunder shall work a forfeiture of his office."

Under the above authorities it is the opinion of this Department that it is mandatory upon the Circuit Clerk, who is ex-officio Recorder of Deeds, that he make his reports monthly and pay his fees into the office of the county Treasurer monthly, and if he fails to follow this mandatory provision he is liable to a civil suit upon his bond and also he is liable on a criminal action for the violation

of the provisions of Article 2, Chapter 84, R. S. Missouri, 1929.

Section 11813 R. S. Missouri, 1929, required that the salaries of the Circuit Clerk shall be paid out of the county treasury in monthly installments at the end of each month. This section was repealed in 1933 for the reason that the Circuit Clerk was allowed to retain his salary out of the fees of his office, but in the Session Laws of 1937, Section 11813, the original section of the Revised Statutes of Missouri, 1929, was re-enacted; it reads as follows:

> "The salary of the Clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. The accounts of all deputies and assistants shall be stated in their names, respectively, and the correctness thereof shall be certified by the officers, respectively, in whose employment they are. The Clerk and his deputies and assistants shall present their accounts to the County Court, and said court shall draw its warrant therefor upon the County Treasurer, to be paid out of any money available in the treasury."

Under the above section the salary of the Clerk shall be paid out of the county treasury in monthly installments at the end of each month. This statute is mandatory and there is no provision which gives the county court authority to withhold this salary at the end of each month on account of the Circuit Clerk, who is ex-officio Recorder of Deeds, not making his regular report and turning in the fees collected at the end of each month as required under Section 11786, Laws of Missouri, 1937.

Section 11813, supra, is still a part of Article 2, Chapter 84, of the general law, and any violation of the provisions of that chapter is subject to the same criminal action and the same civil action, as set out in that article, which applies to the violation

of the article by the Circuit Clerk who is ex-officio Recorder of Deeds.

WHEREFORE, it is the opinion of this Department that the county court cannot legally hold up the payment of your salary in the event that you are unable to get your monthly report in exactly on the last day of each month as provided by Section 11786 R. S. Missouri, 1929.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

LIQUOR: Boats operating on navigable streams within this state cannot be licensed to sell intoxicating liquor and, therefore, all such sales are illegal.

November 17, 1939

FILED
71

Honorable Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Dear Sir:

We have received your recent letter which reads as follows:

> "I am enclosing herewith copy of a letter I have recently received from Conn Withers, Prosecuting Attorney of Clay County.
>
> "Will you please give me your opinion with reference to the matters inquired about in Mr. Withers' letter."

The letter from Conn Withers, Prosecuting Attorney of Clay County, Missouri, a copy of which you attached, reads as follows:

> "As has been mentioned to you before there is a boat in the Missouri River operated by one Henry Katheter which is tied up to the bank on the Clay County side and which dispenses 5% beer under a license for that purpose.
>
> "Henry has sought advice from a great many persons, to my personal knowledge, concerning his rights to handle beer and liquor on the boat which is on a navigable stream under the general supervision of the War Department. I also know that he has been variously advised and he says he can sit six lawyers down at a table and get six different answers concerning what he should or should not do.

"I have always found that Henry complies when his position is made clear to him so he knows just what he is required to do.

"He has a copy of an opinion of the Attorney General addressed to Mr. Bowers to the effect that the Liquor Department has no right to issue licenses for the sale of intoxicating liquors of any form on a navigable stream, but Kansas City lawyers have advised that he has the right to sell strong beer and whiskey on the stream so long as he is free from the bank. Others have advised that he has a right to sell 5% beer under license issued to him even though tied at the bank. He has asked me to request a ruling as to just what his situation is to avoid any criminal liability.

"The questions are these:

"1. When tied to the bank, even though afloat in the stream, may he sell 5% beer on Sundays or after the usual hours?

"2. If he were to cast off from the bank to make excursion trips up and down the stream would he be free from criminal liability as:

"a. Should he sell 5% beer after usual hours?

"b. Sell spiritless liquor by the drink?

"His boats are licensed by the War Department and he is a licensed pilot and master and he has been advised that he could sell anything he wanted to if he were afloat in the stream without being tied to the bank."

On March 10, 1937, this office addressed an opinion to Wallace I. Bowers, Chief Clerk of the Department of Liquor Control on the question of whether or not the Liquor Department might issue either a 5% or 3.2% beer permit or license to owners of boats operating on navigable streams in this state. A copy of that opinion is attached hereto.

In said opinion of March 10, 1937, we arrived at the conclusion that the Legislature never contemplated the licensing of persons for the sale of either intoxicating liquor or non-intoxicating beer on boats or vessels operating on navigable streams in this state, and that it would, therefore, be a violation of law to issue such licenses. The reasoning in that opinion is based on the fact that there is no apparent legislative intention that boats operating on navigable streams can be so licensed. The Legislature provided that the premises of each applicant shall be described with particularity, that no person shall sell intoxicating liquor in any place other than where he is licensed and also that each licensee shall pay the county and incorporated areas certain fees. Further, that while the Legislature specifically provided that the cars of railway companies might be licensed to sell intoxicating liquor, no mention whatsoever was made as to the licensing of boats operating on navigable streams, and that, therefore, no such license could be issued.

The exact question presented here is whether the operator of a boat on a navigable stream may sell 5% beer on Sunday or after the hours prescribed by statute when any such boat is either tied to the bank or when it is cast off from the bank. In other words, the question is whether 5% beer can be sold between the hours of 1:30 a.m. and 6 a.m. on week days, and during all the hours of Sunday.

The attached opinion holds that the Supervisor of Liquor Control is without authority to license boats used in navigable streams and we believe the views therein expressed are correct.

Furthermore, it is illegal for any person to sell intoxicating liquor within the confines of the State of Missouri unless the person is properly licensed by the Supervisor of Liquor Control, as is also shown by the attached opinion. The Supreme Court of Missouri has, on a number of occasions, said that the liquor traffic is not a lawful business except as authorized by express legislation, and that the Legislature may lay down such restrictions as it might desire.

In the case of State v. Parker Distilling Company, 139 S.W. 453, 236 Mo. 219, the court said:

> " * * * The manner and extent of regulation rests on the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative will only. * * * *
>
> "Those authorities also establish the fact that the liquor traffic is not a lawful business, except as authorized by express legislation of the State; that no person has the natural or inherent right to engage therein; that the liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of law, and it is thereby differentiated from all other occupations, and is thereby separated or removed from the natural rights, privileges and immunities of the citizen."

In the case of Hann v. Fitzgerald, 119 S.W. (2nd) 808, l.c. 810, it is said:

> "The right to sell intoxicating liquor is not a natural right. The state may impose limitations, conditions, burdens and responsibilities upon those engaged in the traffic."

In the case of State v. Kennedy, 123 S.W. (2nd) 118, l.c. 122, the court said:

> "The question of the control and regulation of the liquor traffic is one that calls for and has received the careful consideration of the Legislature. Arguments as to the wisdom of the measures adopted address themselves to the law-making body, not to the courts."

Therefore, the state, through its Legislature, has the full right to regulate and control the liquor traffic, and no intoxicating liquor can be sold, under any conditions,unless done so pursuant to law, that is, during the times and in such manner as is by law allowed, and that only after the person selling is properly licensed to do so.

The only remaining question is whether the state laws apply to boats operating or situated upon navigable streams within this state.

In the case of Shannon v. Streckfus Streamers, 131 S.W. (2nd) 833, handed down by the Court of Appeals of Kentucky on June 13, 1939, rehearing denied on October 17, 1939, the question of the application of state laws to navigable streams was fully discussed. In that case, the Streckfus Steamers, Incorporated, a Delaware corporation with its principal office in St. Louis, Missouri, operated a number of excursion steamers on the Mississippi and Ohio Rivers. During the summer of 1936, it operated five boats carrying excursions from various towns in Kentucky on the Mississippi and Ohio Rivers and returning to the point of origin. The Kentucky statutes

provided a graduated excise tax to be imposed on the sale of admission to places of amusement and entertainment. Pursuant to this act, the company paid, under protest, the sum of $1,058.10 in such taxes and brought this suit to recover the same. It was alleged that the boats were licensed by and operated under permits and certificates of the United States and that they were engaged particularly in the coasting trade of the United States, and claimed that it was exempt from all license taxes because it interferred with commerce and traffic on navigable streams, the regulation of which is confided exclusively in Congress. In holding that the company was liable for the tax to the State of Kentucky, and in brushing aside all questions relating to the non-applicability of state laws to navigable streams, the court said:

> "Whether or not the use of the boats on the occasions involved is to be deemed as operating only 'floating dance halls' or as mere pleasure rides, as respectively argued, it is clearly embraced within the terms of the statute as 'places of amusement and/or entertainment.' The question is whether there is immunity by virtue of being interstate commerce or coastwise navigation under the exclusive dominion of the United States.
>
> "The sovereign power and jurisdiction of this commonwealth extends to and over the waters of the Ohio river to the low water mark on the northern side, except so far as Kentucky may have ceded or surrendered jurisdiction to the United States for national purposes. Sections 186m and 199, Kentucky Statutes; McFall v. Commonwealth, 59 Ky. 394, 2 Metc. 394; Handly's Lessee v. Anthony, 5 Wheat. 374, 375, 5 L. Ed.

113; Indiana v. Kentucky, 136 U.S. 479, 10 S. Ct. 1051, 34 L. Ed. 329. By the treaty between France, Spain and England in 1763, the middle of the Mississippi river was the boundary between the British and French territories and became the boundary between Missouri and Kentucky when the former state was admitted into the Union in 1820. State of Missouri v. State of Kentucky, 11 Wall. 385, 20 L. Ed. 116.

"The place of operations of these boats and the service rendered were within the territorial limits of Kentucky and under the protection of her laws and amenable thereto, subject always to the paramount powers of the United States to regulate commerce as embraced in the Constitution of the United States, U.S.C.A., Article 1, Section 8. But it must not be forgotten that the jurisdiction of the national government over a navigable stream is exclusive only so far as that jurisdicition or power extends and that it is not without some limitation - clear examples being the cognizance by the states of criminal offenses or torts on the stream. As 'subjects over which the sovereign power of a state extends are objects of taxation' (McCulloch v. Maryland, 4 Wheat. 316, 429, 4 L. Ed. 579), the tax sought to be recovered was legally collected unless restrained by provisions of the federal constitution as being a burden upon interstate or coastwise commerce, for the lack of state power so to do is undisputed.

"We do not conceive the character of the operations or service taxed to be interstate. There was no transportation from one point in Kentucky to a point out of the state, or vice versa,

or any disclosure that in the course of the trips the boats actually crossed a boundary line. City of Vicksburg v. Streckfus Steamers, Inc., 167 Miss. 856, 150 So. 215; Streckfus Steamers v. Fox, D.C., 14 F. Supp. 312; Willamette Iron Bridge Company v. Hatch, 125 U.S. 1, 7, 8 S. Ct. 811, 31 L. Ed. 629, 631. Nor does the fact that the appellee is a foreign corporation, having its boats registered in St. Louis, seem to have any bearing on the question. The power of a state to tax tangible property, or the exercise of a franchise of a corporation or person, may rest on the situs within the state. Commonwealth v. Lee Line Company, 159 Ky. 476, 167 S.W. 409. It is the character of service, and not the character of the carrier, that determines whether transporation is interstate or domestic. People ex rel. Pennsylvania R. Co. v. Knight, 171 N.Y. 354, 360, 64 N.E. 152; affirmed, 192 U.S. 21, 24 S. Ct. 202, 48 L. Ed. 325.

* * *

"We consider now the plea of immunity because the boats were operated in coastwise traffic. The power of Congress to regulate commerce includes the navigation of public waters in coasting trade without interference by state laws. Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. Coasting trade embraces commercial intercourse between places in the same district or state on a navigable river. Ravesies v. United States, C.C., 37 F. 447; North River Steamboat Company v. Livingston, 3 Cow. 713, 747; Title 46, Chap. 12, Section 251, United States Code, 46 U.S.C.A. para. 251. That the object may be to serve the pleasure of passengers and the journey from and to the same port would seem to make no difference in the classification. London Guarantee & Accident

Company v. Industrial Accident Commission, 279 U.S. 109, 49 S. Ct. 296, 73 L. Ed. 632. It has been said that the enrollment of a vessel ascertains her ownership and gives her national character while the licensing of a boat gives her the authority to carry on coasting trade, and together they entitle the owner to raise questions under the laws of the United States, and particularly the commerce clause of the constitution. Conway v. Taylor, 66 U.S. 603, 17 L. Ed. 191.

"The City of Vicksburg, Mississippi, collected from the appellee herein a daily privilege license tax upon each pleasure excursion boat on the Mississippi river taking passengers from the city and returning them thereto. There were two suits to recover money paid under the ordinances, which were in all respects like the case at bar. In the first case, City of Ficksburg v. Streckfus Steamers, Inc., 167 Miss. 856, 150 So. 215, 218, the court regarded the touching of the boat at a point on the Louisiana shore as a subterfuge to give the trip an interstate character, and held that the question was whether or not the excursion trips should be deemed interstate becuase of the fact that the boats were at times on the Louisiana side of the thread of the river. It was held: 'The term interstate commerce means, as its language imports, not only interstate movement, but interstate business. There was none here involved.'

"The court, therefore, held that there could be no recovery of the tax paid and, in effect, that the impsoition of the license was valid. The second case brought up an identical ordinance for a subsequent year. The Streckfus Steamers

pleaded, among other claims of immunity that it was authorized and empowered to operate its vessels in the coasting trade of the United States as passenger excursion boats, that it was carrying on business on a free navigable stream, and that the ordinances were, therefore, void as to it. But it offered no evidence upon the pleas and on the appeal it was held not entitled to raise any question of interference with the power of Congress over navigation and that the question could not be determined. Streckfus Steamers v. Kiersky, 174 Miss. 125, 163 So. 830. The same ordinances were attacked in a direct proceeding in the United States Court. The District Court and the Circuit Court of Appeals decided the case adversely to Streckfus Steamers upon procedural grounds. Streckfus Steamers v. Mayor & Board of Aldermen of City of Vicksburg, D.C., 10 F. Supp. 259; Id., 5 Cir., 81 F. 2d 298.

"The taxing authorities of the State of West Virginia undertook to collect from the appellee company licenses on refreshments and gaming devices operated on its boats, and a retail sales tax covering the sale of articles thereon, as well as a privilege or occupation tax, known as a 'gross sales tax' on the receipts of the company arising from excursions on the Ohio river within the territorial limits of the State of West Virginia, in all respects like those involved here. It includes the sale of excursion tickets. The boundary of West Virginia, like that of Kentucky, extends to the low water mark of the Ohio river on the opposite shore. Streckfus Steamers brought a suit in equity in a United

State court to restrain the collection of those taxes. A District Court of three judges, one of whom was a member of a Circuit Court of Appeals, who wrote the opinion, held that the plaintiff was liable for the payment of these taxes, excluding only the tax imposed upon the sale of excursion tickets in the towns and cities of Ohio. Streckfus Steamers v. Fox, D.C., 14 F. Supp. 312, 315. Said the court:

"'The taxes here sought to be levied by the state of West Virginia are in no sense a tax upon navigation nor tax, impost, or duty for navigation; they are business, license, and sales taxes imposed upon transactions conducted within the limits of the boundaries of the state of West Virginia, and we know of no reason why they cannot be imposed, whether the business taxed be conducted upon the land or upon a steamboat on a navigable stream within the boundaries of the state. Certainly there is nothing in the Northwest Ordinance, the declarations of either the state of Virginia or West Virginia, or the Constitution and laws of the United States that prohibits the levying of these taxes when they do not in any way affect the right of navigation or subject the exercise of the right to a condition. * * *

"'A tax upon the sale of beer upon a steamboat on a river is not a tax upon the right to navigate the river, and the various activities carried on by the boats while conducting the excursions are taxed incident to the entertainment and pleasure of the excursionists and not to the navigation of the boats. The waters of the

> Ohio river are none the less 'free' because a business conducted on a steamboat, while navigating the river, is taxed.'
>
> *
>
> "We think it safely may be said that unless it is clearly shown that there is some particular, direct and substantial - not merely incidental or fortuitous - interference with a federal right, a state is free to exercise its taxing power. Section 374, Cooley, Taxation. We are of the opinion that the excise tax under consideration did not burden the coastwise traffic in which these excursion boats were engaged. As held in Streckfus Steamers v. Fox, supra, the tax is not upon navigation but a sales tax upon the business of affording entertainment conducted within the state and enjoying the protection of state laws. It is an excise tax for revenue only. Hence, that the imposition and collection of the tax were authorized."

CONCLUSION

It follows, therefore, that the Liquor Control Act is as applicable to navigable streams within this state as are other state laws including the criminal statutes. No one would argue that a person could not be punished under the state laws for a murder committed on a boat on a navigable stream in this state, whether the boat was tied to the bank or afloat in the stream at the time the crime was committed. Since the Legislature has never said that a boat in a navigable stream can be licensed, it follows that no intoxicating liquor can be sold on such boats at any time, either during the hours designated by law or during such times when the sale thereof,

even by a fully licensed person, is prohibited. The Liquor Control Act and also the act governing the sale of 3.2% beer or non-intoxicating beer provides that every person selling such liquor must be licensed by the Supervisor of Liquor Control, and in the absence of the license, no such liquor can be legally sold in the State of Missouri.

Both this opinion and our opinion of March 10, 1937, a copy of which is attached hereto, deals only with boats on navigable streams which are being used as boats and as a means of conveyance. We have made no attempt to determine whether boats or structures resting on a navigable stream, but which are attached to the shore by some permanent means and which are not being used in river traffic, can be licensed by the Supervisor of Liquor Control.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

_____
W. J. BURKE
(Acting) Attorney General

LIQUOR: In city elections on question of whether intoxicating liquor containing more than 5% alcohol by weight can be sold by the drink, at least a majority of the qualified voters must vote. Then a majority of those voting controls the election.

November 18, 1939

11-20

FILED
71

Hon. Walker Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Att: Wallace I. Bowers, Chief Clerk

Dear Sir:

We have received your recent letter which reads as follows:

> "We are in receipt of an inquiry pertaining to by the drink elections.
>
> "Section 13-a states in brief that no license shall be issued for the sale of intoxicating liquor by the drink for retail for consumption on the premises where sold in any incorporated city having a population of less than 20,000 inhabitants, until the sale of such intoxicating liquor by the drink at retail for consumption on the premises where sold, shall have been authorized by a vote of the majority of the qualified voters of said city.
>
> "Section 44-a-4 states in brief that if a majority of the votes cast * * * .
>
> "The question, as we see it, is this; if there are 600 qualified voters in the community, would 301 of them be required to vote as the majority of the qualified voters, all 301 voting for the sale, or - if 100 votes were cast and 51 are for the sale, would that be a majority of the votes cast as stated in Section 44-a-4.

> "In repeating, the question is simply this: Shall an incorporated city require the majority of the qualified voters to vote, or is a majority of the votes cast sufficient."

Section 13-a of the Liquor Laws, Laws of Missouri, Extra Session, 1933-34, page 82, provides that no license shall be issued for the sale of intoxicating liquor, other than malt liquor containing alcohol not in excess of 5% by weight by the drink at retail for consumption on the premises in any incorporated city having a population of less than 20,000 inhabitants, until the sale of such intoxicating liquor by the drink has been "authorized by a vote of the majority of the qualified voters of said city".

Section 44-a-4 of the Liquor Laws, Laws of Missouri, Extra Session, 1933-34, page 93, in dealing with such elections, states in part:

> "If a majority of the votes cast at such election be 'For the sale of intoxicating liquor, containing alcohol in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold', such intoxicating liquors may be sold under the provisions of existing laws * * * * * ."

Section 44-a-5, Laws of Missouri, Extra Session, 1933-34, page 93, reads in part as follows:

> "If a majority of the votes cast at any election held under the provisions of this act shall be 'Against the sale of intoxicating liquor containing alcohol in excess of five (5%) per cent by weight, by the drink at retail for consumption on the premises where sold,' it shall not be lawful * * ."

It will be observed that the Legislature has made two requirements in such elections. First, it has prescribed that a majority of the qualified voters must vote on the question when it is submitted. Second, it has prescribed that "if a majority of the votes cast" are favorable, then intoxicating liquor containing alcohol in excess of 5% by weight may be sold by the drink in such incorporated areas. The Legislature has not required that a majority of the qualified voters shall vote either for or against the measure. It has merely required that a majority of the voters shall turn out at the polls and vote, either for or against the proposition, and then "if a majority of the votes cast" are favorable, the proposal will carry. On the other hand, if the majority of the qualified voters vote and if a majority of those actually voting cast their ballots against the proposition, then the matter will fail.

This appears to be the legislative intention.

CONCLUSION.

In elections held in cities and towns on the question of whether or not intoxicating liquor containing alcohol in excess of 5% by weight may be sold by the drink at retail for consumption on the premises where sold, it is the legislative requirement that at least a majority of the qualified voters of the city or town shall turn out and vote on the proposition. If a majority of those voting, that is, a majority of the majority, are favorable, then the proposition will carry. If a majority of those voting oppose, then the proposition will fail.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED By:

W.J. BURKE
(Acting) Attorney General

JFA:VAC

LIQUOR: Liquor licensees authorized to sell intoxicating liquor by the drink may also sell 3.2% beer under the same license.

December 28, 1939

12-28

FILED
71

Honorable Walter Pierce
Supervisor of Liquor Control
Jefferson City, Missouri

Attention: Mr. Wallace I. Bowers
Chief Clerk

Dear Sir:

We have received your recent request for an opinion which reads as follows:

> "We respectfully request an opinion on the following question:
>
> 'May a person licensed to sell all kinds of intoxicating liquor by the drink also sell 3.2% beer under his liquor by drink permit? Section 22 of the Liquor Control Act specificially states that a 5% beer licensee may sell non-intoxicating beer without an additional permit, provided, of course, that said non-intoxicating beer is not sold on Sunday or Election Day.'
>
> "For your information, we have assumed that the liquor by drink licensee had this privilege, but there has never been an official ruling on it."

Section 22 of the Liquor Laws, Laws of Missouri, 1935, p. 274 provides in part as follows:

> "* * * Provided, however, that no licensee holding a license to sell malt liquor containing alcohol in excess of three

> and two-tenths per cent (3.2%) by weight or any other kind or character of intoxicating liquor, shall sell, give away or otherwise dispose of, or suffer the same to be done in, upon or about his premises any non-intoxicating beer in any quantity, either in the original package or by the drink, on the first day of the week commonly called Sunday. * * * * * "

Paraphrasing the above, the legislature has said that no licensee holding a license to sell 5% beer or any other kind of intoxicating liquor whatsoever, shall sell, give away or otherwise dispose of on his premises any 3.2% beer in any quantity, either in the original package or by the drink on the first day of the week, commonly called Sunday.

Therefore it appears that the legislature has at least implied that dealers in intoxicating liquor may sell and handle 3.2% beer, otherwise it would never have prescribed a day of the week when such dealers could not sell non-intoxicating beer. It is a rule that that which is clearly implied by a statute is as much a part of the statute as if the same were expressed in words. In the case of Bowers v. Missouri Mut. Ass'n, 62 S. W. (2d), 1058, the Supreme Court of Missouri announced this rule as follows, l. c. 1063:

> "* * * In Coonce v. Munday, 3 Mo. 373, 375, it is said: 'It is a rule that that which is clearly implied by a statute, is as much a part of the statute as if the same were expressed in words'. In that case it was held that a provision that no execution should issue from the circuit clerk's office on a transcript of the judgment of a justice of the peace until one had been issued by the justice implied that it could then issue. See, also, State ex rel. McCaffery v. Mason, 155 Mo. 486, 500, 55 S. W. 636; State ex rel. Johnston v. Caulfield et al., 245 Mo. 676, 150 S. W. 1047."

Therefore the implication in Section 22 that dealers licensed to sell intoxicating liquor may also sell 3.2% beer by providing against such sales on Sundays constitutes a direct statutory authorization to sell non-intoxicating beer

"as if the same were expressed in words".

This right was specifically recognized by the Supreme Court in the case of Hann v. Fitzgerald, 119 S. W. (2d) 808. The action in that case was instituted by 300 saloonkeepers of St. Louis, all of them licensed to sell all kinds of intoxicating liquor by the drink, to enjoin the State Supervisor of Liquor Control, the Board of Police Commissioners, the Chief of Police, Chief of Dectives of the City of St. Louis and their subordinates from enforcing the Sunday provisions of the Intoxicating Liquor Act, and thereby prohibiting such saloonkeepers from selling 3.2% beer on Sunday. The saloonkeepers admitted they had no right to sell intoxicating liquor on Sunday, but insisted they had the legal right to sell 3.2% or non-intoxicating beer on that day of the week. The court said at l. c. 810:

> "It is argued that the act undertakes to regulate both the sale of intoxicating liquor and the sale of non-intoxicating beer on Sunday, and for that reason the act contains more than one subject. We do not think so. The legislature intended by Sec. 22 of the act to prohibit the saloonkeeper from selling intoxicating liquor on Sunday while pretending to sell only non-intoxicating beer on said day. In other words, said section is not a regulation of the sale of non-intoxicating beer. It is a regulation of the conduct of those licensed to sell intoxicating liquor and does not violate Sec. 28, Art. 4 of the constitution, Mo. St. Ann. Const. art 4, Section 28."

We note also from your request that the Department of Liquor Control has always assumed that the liquor by the drink licensees had this privilege. Departmental construction of statutes are always entitled to a great weight. The Supreme Court of Missouri recently restated this rule in the Case of In Re Bernays' Estate, 126 S. W. (2d), 209, l.c. 217 as follows:

> "It is true that the construction of a statute by those charged with its execution, especially when it has long pre-

> vailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

CONCLUSION

We conclude therefore, that liquor licensees licensed to sell all kinds of intoxicating liquor by the drink are also authorized to sell 3.2% beer under such permits.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney-General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

JFA/ww

OFFICERS: Police Commissioner at St. Joseph is not city officer but a state officer as far as city counsel contracts for material be concerned.

May 12, 1939

5-15

FILED
75

Honorable H. G. Rix
Police Commissioner
President of Hesse-Rix Company
St. Joseph, Missouri

Dear Sir:

We acknowledge your request for an opinion dated May 3, 1939, which reads as follows:

"I am President of the Board of Police Commissioners of St. Joseph, Missouri, also an officer of the Hesse-Rix Company, who deal in building materials and supplies.

"There are a number of contracts let, and to be let, for the construction of public improvements under the P. W. A., for which bonds have been voted. Under the rulings of the P. W. A., no employee of the city can, either directly or indirectly, enter into any contracts for the sale of materials to be used in the construction of the improvements under the P. W. A. program.

"O. W. Watkins of Groves & Watkins, our attorneys furnished the following opinion.

"It is our opinion that Mr. Rix is an employee of the State of Missouri and not of the City of St. Joseph. Under our city charter any office of the city is prohibited from having any interest in any contract, either directly or indirectly, with the city, or to furnish supplies for the city. I refer to Section 6154 R.S.Mo. 1929.

"Sections 6360, 6361, and 6369, provide for the appointment of Police Commissioners and their duties. It is our opinion that under these sections of the statutes each of the Police Commissioners is an officer of the State of Missouri and are not in any wise officers of the City of St. Joseph.

"Section 6372 provides that members of the police force of such city organization appointed by the Commissioners are declared officers of the city under the charter and ordinances of the city, and also officers of the State of Missouri, but it does not provide that the Commissioners themselves shall be officers of the city.

"P. W. A. has requested that I get a ruling from your office in this matter this week. I will appreciate it very much if it is at all possible for you to send me your opinion with reference to this matter, so that it will reach me this week."

Section 6154 R. S. Mo. 1929 provides:

"If any city officer shall be directly or indirectly interested in any contract under the city, or any work doen by the city, or in furnishing supplies for the city or any of its institutions, he shall be deemed guilty of a misdemeanor; and any appointive officer becoming so interested shall be dismissed from office immediately by the mayor; and upon the mayor becoming satisfied that any elective officer is so interested, he shall immediately suspend such officer and report the facts to the common council, whereupon the common council, as soon as practicable, shall be convened to hear and determine the same; and if, by a four-fifths vote of the common council, he be found to be so interested, he shall be immediately dismissed from such office. No officer shall hold two appointments under the city government at the same time."

Whether a Police Commissioner of St. Joseph is or is not a "city officer", as identified in the above statute as not being legally able to contract supplies to the city, depends upon the sense upon which the term "city officer" is used in the statute, and also upon the particular circumstances involved in the contractual relationship.

Section 6154, supra, was not passed to restrain reasonable individual business enterprise on the part of a Police Commissioner who happens to be an officer and owns stock in a mercantile company. It is true that the duty of a Police Commissioner makes his office a public trust which he cannot administer by using the office so as to conflict with his duty to serve at best interest of the public.

46 Corpus Juris, page 1037, Section 308 sets out the principles of law which should be applied in construing Section 6154, supra, and reads:

> "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public. * * * * * "

You, as Police Commissioner have no statutory power to execute city contracts for material to be used on projects of Public Works Administration. In such contracts the city council through city ordinances are the contracting parties who must come to an agreement with third persons.

Sections 6360, 6361, & 6362, provide for the appointment of Police Commissioners in St. Joseph, Missouri, and also the Commissioner's duties.

Among other things these statutes require the Commissioners to be citizens of the State of Missouri, that they receive $500.00 per year salary, that they take oath to support the constitution of the State of Missouri, that the treasurer give bond to the State of Missouri, that vacancies be filled by the Governor of the State of Missouri, and that the Governor of Missouri may remove them for official misconduct, and that the Governor issue commissions to them.

Section 6362 R. S. Mo. 1929 provides:

> "The duties of the board of police hereby created shall be as follows: They shall at all times of the day and night, within the boundaries of any city of the first class, as well on water as on land, preserve the public peace, prevent crime and arrest offenders, protect the rights of person or property and guard the public health, preserve order at every public election and at all the public meetings and places, and on all public occasions, prevent and remove nuisances on all streets, alleys, highways, waters and other places, provide a proper police force at every fire for the protection of firemen and property, protect immigrants and travelers at steamboat landings and railway stations, see that all laws relating to elections and to observance of Sunday, and relating to pawnbrokers, intemperance, lotteries and lottery policies, vagrants, disorderly persons, are enforced; and suppress gambling and bawdy houses, and every other manner and kind of disorder and offense against law and the public health. They shall also enforce all laws and ordinances passed, or which may hereafter be passed by the common council of such city, not inconsistent with the provisions of this article or any other law of the state which may be properly enforceable by a police force, In case they shall have reason to believe that any person within said city intends to commit any breach of the peace or violation of law or order beyond the city limits, or any person charged with the commission of crime in such city, and against whom criminal process shall have been issued, such person may be arrested upon the same in any part of this state by the police force created or authorized herein: * * * * * * * * * * * * * * * * "

In the case of Britton v. Steber, et al, 62 Mo. 374, the court says:

> "* * * * There is a recognized distinction between State officers, whose duties concern the State at large, or the general public, although exercised within defined territorial limits, and municipal officers, whose functions relate exclusively to the particular municipality. * * * * * * A State officer may be connected with some of the municipal functions but he must derive his powers from a State statute and execute his powers in obedience to a State law. * * * * * * * * * * * * "

In re Police Com'rs, 49 Atl. Rep. 36 l.c. 38, 22 R. I. 654, that court held police commissioners of New Port, R. I. to be state officers and the court said:

> "While their jurisdiction and their duties are territorially limited to the city of Newport, those duties are clearly of general concern, and they discharge a state function, rather than a municipal function. * * * * * * * * * * * We are accordingly of the opinion that this board of police commissioners is a state board, within the spirit as well as within the letter of the act."

CONCLUSION

We believe the conclusion in the Rhode Island case, supra, should be the conclusion to your problem. We are of the opinion that since your office is by legislative act, the appointment to which is by the Governor with confirmation of the Senate, the office being held subject to removal by the Governor, the bond being given to the State of Missouri, the official oath being to support the constitution of Missouri, and the duties pertaining to the administration of justice and the preservation of peace, (essential matters of public state wide concern), it follows that the office is a state office and not a city office as the term "city officer" is used in Section 6154, supra.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

WOS/ww

OFFICERS:
PAYMENT OF SALARIES IN ADVANCE:

The court has no authority to advance the salary of any county officer.

November 7, 1939

11-8

FILED
75

Honorable Amos Rinaman
Presiding Judge
Lincoln County Court
Troy, Missouri

Dear Sir:

This is in reply to yours of the 4th wherein you request an opinion from this department on the following question:

> "Will you please give me an opinion on the following question: Has the County Court a legal right to advance the salary of any County Officer? Please render an opinion as soon as possible, and send direct to me at Troy, Missouri."

I do not know whether or not you refer in your request to any particular officer, but from my research on this question we find that the same rule applies to all officers. As a general proposition an officer must look to the statutes for his authority for drawing a salary or a fee and if the statutes does not provide for such salary or fee, then he is not entitled to the same.

By referring to Article V, chapter 9 of the Revised Statutes of Missouri 1929, it will be seen that it is the duty of the county court to attend to the county business and pass upon claims against the county which maybe presented to the court. No claim could be presented to the court before the services are performed. We find that the rule, as applicable to your question, is stated in Volume 12 Corpus Juris at page 1020, Section 646, in the following language:

> "While a public officer has no rights of any sort to compensation for his services before he has earned it, even if prevented from performing such services by legislative action, * * * * "

Section 11813, Laws of Missouri, 1937, page 447, provides as follows:

> "The salary of the Clerk, and that of his deputies, and assistants, shall be paid out of the county treasury, in monthly installments, at the end of each month. * * * * * * * * * * "

And Section 11811, Laws of Missouri, 1937, page 441, provides as follows:

> "The clerks of the county courts of this State and their deputies and assistants shall receive for their services annually, to be paid out of the county treasury in monthly installments at the end of each month by warrant drawn by the county court upon the county treasury, the following sums: * * * * * * * * * "

Section 11774, R. S. Missouri 1929, provides that the payment of the salary of a judge shall be made in the following manner:

> "Such payments shall be made to such circuit judge and prosecuting attorney by the county treasurer of such county at the end of each and every month upon the accounts presented by such judge and prosecuting attorney, and shall be paid out of the general revenue fund of such county; and such monthly account, when presented and paid, shall be duly receipted for by such officers and retained as proper vouchers by the

county treasurer of such county."

It will be noted that this section contemplates that the salary shall not be paid until the service is rendered.

Section 11769, R. S. Missouri 1929, provides that the state officers shall present their accounts to the auditor and shall be paid at the end of each month.

By a reading of all of the sections of the statutes which apply to payment of salaries of officers, it will be seen that the idea exists throughout such statutes that the lawmakers intended that the salary of the officer should be paid at the end of the month in which the services are rendered.

CONCLUSION.

From the foregoing it is the opinion of this department that the county court has no authority to advance the salary of any county officer or to pay it, or any part of it, before the services are rendered.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

COUNTY CONTRACTS: Officers cannot be interested in contracts of the county.

August 2, 1939

8-3

FILED
76

Mr. G. W. Rogers
Prosecuting Attorney
Ozark County
Gainesville, Missouri

Dear Sir:

We have your request of recent date for an opinion as to the construction of Section 2089, R. S. Mo. 1929. The questions raised by you are as follows:

"1. The County Court in session makes an order directing the publishing of certain notices, designating that they be published in the Ozark County Times. Another paper is published at Bakersfield, Missouri, in this county. If the Presiding Judge, as Editor, publishes these notices, is it a violation of the statute?

"2. The Ozark County Times prints the envelopes, stationery, and other supplies for the County offices. The bills are made out to the County officers. The County Court issues a warrant to the County officers and then require the county officers to endorse the warrants and turn them over to the Presiding Judge in payment for the printing and other supplies. Is this a violation of the statute?

"3. The law requires publication of notices by the collector in selling land for delinquent taxes. Is this a violation

of the law if the notices are published in the paper belonging to the Presiding Judge when there is another newspaper in the County?

"4. The law requires certain publications in regard to holding elections, and requires that these notices be published in two papers in the county. Would the publication of this matter in the paper belonging to the Presiding Judge be a violation of the statute?"

Since Section 2089 prohibits county judges from becoming a party to any contract in which the county is directly or indirectly interested, it would appear that a reasonable construction of this statute makes all of the above acts set out in the four paragraphs illegal. The simple matter of a contract merely calls for an agreement between the county judges on one side and some person on the other, wherein certain services are to be performed for the benefit of the county, or supplies furnished to the county, in return for the consideration of the county court transferring portions of the county revenue under such contract to the persons performing the service or selling the supplies to the county.

There appear to be no cases interpreting this section in this state, but under the general law of contracts, this office is of the opinion that a county judge cannot be a party to any contract which involves the transfer of county funds directly or indirectly to him personally.

Respectfully submitted

FRANKLIN E. REAGAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

FER:HR

PUBLIC SERVICE COMMISSION: Can not exact motor carrier's license from trucker transporting livestock from farm to market and on the return trip hauling his (the truckers) own property.

December 8, 1939

12-17

Daniel C. Rogers

Public Service Commission
Jefferson City
Missouri

FILED
76

Gentlemen:

This will acknowledge receipt of your letter of November 15, 1939, requesting us to supplement our opinion of August 15, 1939, to Honorable Jack H. Denny, in which we held a contract hauler could transport livestock for a person for hire from the farm to the original market and on the return trip transport for hire stocker and feeder livestock or transport his (the truckers) own property of any description, and not be required to have a license as a contract hauler. You ask us if this ruling also applies to motor carriers.

Section 5267, Laws 1931, p. 306, provides:

> "(a) The public service commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state * * * ."

Section 5264 (b), Laws 1931, p. 304, provides:

> "The term 'motor carrier', when used in this act, means any person, firm, etc., operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service for hire as a common carrier. * * * * * ."

Section 5268(a), Laws 1931, p. 307, provides:

> "It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation."

Section 5268(b), Laws 1931, p. 308, provides:

> "It is hereby declared unlawful for any motor carrier except as provided in section 5265 of this act to use any of the highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit to do so."

It is clear that under the terms of these statutes, motor carriers operating in intrastate and interstate commerce must obtain a permit from the Public Service Commission, when engaged in hauling livestock to the market and in hauling any other property to or from any place, unless there is some provision in the law that provides an exception, or unless the act does not cover the activity.

It will be noted the legislature, when dealing with interstate carriers, made specific reference to the exception statute, while it did not do so when dealing with intrastate carriers. However, this makes no difference to the question because of the broad terms employed in the exception statute. The section is number 5265, Laws 1937, p. 439, and provides:

> "The provisions of this act shall not apply * * * to motor vehicles used exclusively in t ransporting farm and dairy products from

> the farm or dairy to a creamery, warehouse, or other original storage or market, and transporting stocker and feeder livestock from market to farm or from farm to farm * * * * *."

The term motor vehicle used in this section is broad enough to and does include motor carriers, exempting them from the operation of the act if the vehicle is used exclusively to haul the exempted products.

The question that now confronts us is this: Does the use of the motor vehicle to haul the truckers own property on the return trip after hauling livestock to the market cause the exception not to apply?

In Section 5264 (b), supra, it is to be noted a motor carrier is defined as one who transports for <u>hire</u> as a common carrier. On this return trip, the motor carrier is not transporting for <u>hire</u>. He is transporting his own property and the Public Service Commission has no control over such activity.

The <u>exclusive</u> transportation required by Section 5265, supra, in order for the motor carrier to be entitled to the exception has reference to transporting only the products named therein in the manner specified for hire. In other words, if the motor carrier transports for hire any other property in any other manner, than is specified in Section 5265, he then must obtain a permit.

<u>CONCLUSION</u>

Therefore, it is our opinion that a motor carrier transporting farm products for a person for hire from the farm to the original market, and then purchasing property as his (the truckers) own, and transporting it on his return trip, is not required to be licensed as a motor carrier. Neither is he required to be so licensed if on his return trip he •

is transporting for hire stocker and feeder livestock from the market to the farm.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

LLB:RT

Recipient of Blind Pension
may request his name stricken
from the Blind Pension Roll

3-17

March 17th, 1939.

FILED
17

Mrs. Mary E. Ryder,
Executive Director,
Missouri Commission For The Blind,
3630 Grandel Square,
St. Louis, Missouri.

Dear Mrs. Ryder:

This will acknowledge receipt of your request for an opinion under date of March 13th, 1939.

You state that many persons on the blind pension roll that were 70 years of age or over, and who were able to qualify under the State Social Security Act, were placed on the old age assistance roll, when during the last quarter of 1938 the blind pension funds were exhausted. Now, some of these persons desire to remain on the old age assistance roll, and by written request to the Missouri Commission for the Blind, they instruct the Commission to strike their names from the roll. You inquire if this may be done.

The Blind Pension Act was created for the purpose of aiding the deserving blind. Pensions are mainly designed to assist the pensioner in providing for his daily wants. A pension is not a matter of contract and is not founded upon any legal liability. No person has a legal vested right to a pension, it is merely a gratuity. It is not complusory that a person on the roll receive a pension if he chooses to refuse same. Anyone may, at any time, for any reason, withdraw his name from the roll.

In reply to your request, it is the opinion of this department that if the Commission is in receipt of a written request from any person on the Blind Pension Roll, requesting their name be stricken from the roll, that said request is sufficient to strike his name from the Blind Pension Roll.

Very truly yours,

AUBREY R. HAMMETT, JR.,
Assistant Attorney General.

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

ARH Jr/RV

OFFICERS: Circuit Judges can not lawfully hold office of school director.

4-13

April 13th, 1939.

FILED 77

Judge V. C. Rose,
Circuit Judge,
Unionville, Missouri.

Dear Judge:

We have received an inquiry from you which is as follows:

> "For a number of years I have been and now am a member of the Board of Education of the Unionville School District. My present term will expire in April, 1941.
>
> At the general election Nov. 8th, 1938, I was elected Circuit Judge of the Third Judicial District and will take office as such the first Monday in January, 1939.
>
> It is my opinion that the offices of School Director and Circuit Judge are not incompatible, and that therefore I can hold both, however, I should like to have your opinion on this question and if in your judgment I should resign as a School Board member I will do so."

Replying thereto, 46 C. J. page 941, paragraph 46 states:

> "At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other."

By Section 22 of the Constitution of Missouri Circuit Courts are invested with general jurisdiction.

In State ex rel. against Ausk, 48 Mo. 242, the Supreme Court held that one person could at the same time occupy the office of the clerk of the Circuit Court and also clerk of the County Court, saying that the incompatibility of the two offices was not recognized in a legal sense:

> "Inasmuch as in one or even in both of the courts, the clerk may appear by deputy. Were the duties necessarily personal, the deduction of counsel would be sound, but as it is we have no right to pronounce the offices incompatible."

In State ex rel. against Bus, 135 Mo. 325, (en banc), the court held that a person may hold the office of school director and constable at the same time in the City of St. Louis, and said at page 338:

> "The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

At page 339, the court, quoting from another case, said:

> "The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."
>
> * * * * * * * * * * * * * * * * *
>
> "We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possiblity come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incom-

> patibility. The functions of the two offices should be inherently inconsistent and repugnant."

In State ex rel. Langford, against Kansas City, 261 S. W. 115, the court considered the question of whether the acceptance by a clerk of the board of public works of Kansas City, while wrongfully ousted from his office, as deputy sheriff was incompatible with his former position and did not vacate it as a matter of law, said at page 117:

> "But by holding this appointment as deputy sheriff, while he was wrongfully ousted of his lawful office as clerk of said board, and was not permitted to discharge its duties, we hold that he did not thereby vacate as a matter of law his office as such clerk * *."

In the latter case the court summarized the holdings in various cases on the general question of incompatibility of offices and states at page 116:

> "In State ex rel. v. Draper, 45 Mo. 355, it was held that the office of circuit judge and a member of the Legislature could not be held at the same time, because the two offices were incompatible at common law * * * * * * *."

Under the statutes of Missouri a member of the school board has various duties cast upon him. Section 9200, Revised Statutes of Missouri, 1929, empowers the board to issue funding and refunding bonds for the district. Section 9201, Revised Statutes of Missouri, 1929, empowers the board to exchange such bonds. Section 9203, Revised

Statutes of Missouri, 1929, authorizes the board to make an estimate for the levy of a tax and sets forth certain other authorized powers. Likewise, Section 9204, Revised Statutes of Missouri, 1929, and Section 9205, Revised Statutes of Missouri, 1929, declare that the board shall have the care and keeping of all property belonging to the district and invests the board with certain other powers. Section 9206, Revised Statutes of Missouri, 1929, authorizes the board to enter into certain contracts. Section 9207, Revised Statutes of Missouri, 1929, authorizes the board to make rules for the organization, grading and government of school districts. Section 9209 authorizes the board to enter into contracts with and to employ teachers for the districts. Section 9215, authorizes the board of directors to condemn land. We do not set out in further detail the statutory authority conferred upon the board of directors of the school districts, but the above sufficiently illustrates the duties of the board of directors as showing there might be an inconsistency in the performance of the duties of a school board with the performance of the duties of the Circuit Judge. Litigation might arise with reference to the action of the school board in performing any of the duties set forth hereinabove.

If a contest exists as to the validity of a tax levy, of course that contest must come before the circuit judge for determination. If the district and the school teacher, who claims to have entered into a valid contract, get into a dispute as to whether such be the fact, it shows that to determine the status of the controversy must come before the circuit judge. It is not merely the duty of performing a ministerial act, but the person occupying the position as a member of the school board must exercise his judgment, likewise, of course, the person occupying the position of circuit judge must exercise his judgment.

While we recognize the high caliber of manhood and the public spirit and efficiency of the circuit judges and further recognize that in most instances school boards would function more efficiently when they have as members thereof circuit judges, yet it appears to us that the adjudicated duties on the question of incompatibility of offices indicate that the circuit judge should not occupy a position as another officer, in which capacity he would be subject to his action in his former capacity. Perhaps the outlying feature of the law justifying this conclusion is that in the frailty of human nature there may be someone somewhere in the history of the state who would let their actions as members of school boards be influenced by the fact that if a controversy arose as to the validity of such action, it would be determined by that same person thereafter, sitting as Circuit Judge.

We have in mind that of course, the circuit judge would usually disqualify himself in such a proceeding, nevertheless, if the test of incompatibility or inconsistency of duties is that in the exercise of judgment a person occupying one office might have before him as the incumbent of another office the regularity of his action as the former officer, then the two offices are inconsistent, and the acceptance of the latter vacates the former.

While we again recognize the high caliber of the individual in certain lines, yet it appears to us sound public policy that the public welfare be preserved by the officials being as "Caesar's wife, above suspicion." Out of the great body of citizens in each community, there ought to be available for the public service as school director individuals who do not hold another public office, the exercise of the duties of which latter office might be supervisory over the former.

CONCLUSION

It is our opinion that the office of circuit judge and that of school director are incompatible, and that sound public policy and the adjudged cases make inappropriate the holding of both of said offices at the same time by the same individual.

Yours very truly,

DRAKE WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DW:RV

RAILROADS:
SAFETY DEVICES AND
INTERSTATE COMMERCE
COMMISSION:

Safety devices for engines of railroads should be required and ordered by the Interstate Commerce Commission.

May 22, 1939

5-73

FILED
77

Honorable George A. Rozier
State Senator
Jefferson City, Missouri

Dear Senator Rozier:

This is in reply to yours of recent date requesting an official opinion from this department based upon the following letter:

> "In 1913 the State Legislature enacted what is usually referred to as the 'Engine Equipment Law' covered in Sections 4834 to 4844 inclusive; Chapter 32, Article 2, R. S. Mo. 1929.
>
> "In the 1929 Revision Session these sections were not disturbed, however, in the present Revision Session as proposed in Senate Bill No. 112, it is proposed to repeal this whole code. Under the terms of the famous Napier case (Attorney General George N. Napier, appellant vs Atlantic Coast Line R. R. Co., et. al.) which is an appeal from the District Court of the United States for the Northern District of Georgia, it is apparent the jurisdiction of States to pass such regulatory measures pertaining to Locomotive equipment is somewhat restricted either by quasi judicial Commissions and Boards or by the Legislature.

"It does not seem plain however, that the State may not retain and enforce existing statutes of long standing, covering safety appliances and/or equipment such as set out in the first paragraph of Section 4840 or in Section 4841, R. S. 1929, where such provisions or requirements have not been made or the field invaded by the Interstate Commerce Commission or the Bureau of Locomotive Inspection thereof, in their regulations and rules.

"It is very plainly set out in the rules of the Commission and Bureau before referred to, that every section in this code has been covered in the rules of the Bureau of Locomotive Inspection except the provisions in Section 4840 and 4841, before referred to.

"I have before me a letter dated March 22, 1939 over the signature of Mr. John M. Hall, Chief Inspector of the Bureau of Locomotive Inspection wherein he says, in part: 'You are respectfully advised that the Federal rules for the inspection of Locomotives do not contain a requirement relative to foot-warmers or steam radiation in locomotive cabs or spring seats, and therefore the Federal Government has not covered that field, and it seems to me that if the Legislature does not include that provision (in their repeal) it would still be effective in your state.'

"In view of the fact that the previous Revision Session did not see fit to drop the Sections hereinbefore referred to from the Statutes, and in view of the further fact that it is plain that the provisions before referred to in

> Section 4840 (first provision) and Section 4841 have not been covered by rules and requirements of the Interstate Commerce Commission or the Bureau of Locomotive Inspection thereof, and as there is a divergence of opinion upon the matter, I will appreciate an opinion from your Department at an early date, in which I hope you will set out whether or not the Sections referred to should be retained in the Missouri Statutes."

As stated in your request the two sections of the statute applicable to the question which you have submitted are being proposed to be repealed by Senate Bill No. 112 are Sections 4840 and 4841, R. S. Missouri 1929. The first clause of Section 4840, supra, provides as follows:

> "It shall be unlawful for any person, firm or corporation, operating a line of steam railroad in this state, to use or permit to be used within the state of Missouri, any steam locomotive engine, between the first day of October and the first day of April of the next succeeding year, unless the inside of the cab on such locomotive engine shall be supplied and equipped with not less than sixteen square feet of heating radiation on each side thereof; * * * * * * * "

Section 4841, supra, provides as follows:

> "It shall be unlawful for any person, firm or corporation, operating a steam railroad within the state, after the first day of August, nineteen hundred and thirteen, to use or permit to be used any locomotive engine within the state of Missouri, unless such loco-

> motive engine shall be equipped with a seat on each side of the cab thereof, which seats shall consist of a series of spiral, coil or elastic springs, on the top of which shall be constructed a padding or cushion consisting of leather or a suitable substitute thereof, stuffed or packed with hair, moss or other suitable material commonly used for such purpose, which said seat, including the springs thereof, shall not be greater than six nor less than four inches in thickness."

The last clause of Section 4840, supra, has been covered by a rule of the Interstate Commerce Commission but the other portion of these two sections has not been covered by any rule of the Commission or any Federal Legislation. The provisions of these two sections are for the purpose of protecting the health and safety of the railroad employees. It seems from your request that the provisions of these two sections might be no longer enforcible for the reason that the federal regulations have entered into this field, and, therefore, the state is ousted. We think the history of the safety appliance legislation, as it applies to railroads, is fairly well set out in the case of Napier v. Atlantic Coast Line R. Co., 71 Law Ed., 433, l.c. 437 and 272 U. S. 608. Since this subject is quite fully treated in the Napier case, supra, we will quote from it quite extensively. At l.c. 437 the court said:

> "Prior to the passage of the Boiler Inspection Act, Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce. It had required a power driving-wheel brake, automotic couplers, grabirons or handholds, drawbars, safety ash pans, and sill steps. Acts of March 2, 1893, chap. 196, 27 Stat. at L. 531, Comp. Stat. Section 8605, 8 Fed. Stat. Anno.

2d ed. p. 1155; March 2, 1903, chap. 976, 32 Stat. at L. 943, Comp. Stat. Section 8613, 8 Fed. Stat. Anno. 2d ed. p. 1183; May 30, 1908, chap. 225, 35 Stat. at L. 476, Comp. Stat. Section 8624, 8 Fed. Stat. Anno. 2d ed. p. 1199; April 14, 1910, chap. 160, 36 Stat. at L. 298, Comp. Stat. Section 8617, 8 Fed. Stat. Anno. 2d ed. p. 1189. Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment in 1911. The original act applied only to the boiler. It is entitled: 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Locomotives with Safe and Suitable Boilers and Appurtenances Thereto.' The provisions of that act were extended in 1915 to 'include the entire locomotive and tender and all parts and appurtenances thereof.' In 1924, section 2 of the original act was amended to read as follows:

"'That it shall be unlawful for any carrier to use or permit to be used on its lines any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this

> act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.'
>
> "Other sections confer upon inspectors and the commission power to prescribe requirements and establish rules to secure compliance with the provisions of section 2. From time to time since the passage of the original act, the commission has required that locomotives used in interstate commerce be equipped with various devices. But it has made no order requiring either a particular type of fire box door or a cab curtain. Nor has Congress legislated specifically in respect to either device."

It will be seen that by this act not only is the safety of employees and travellers of railroads protected by legislation but Congress has granted the power to the Interstate Commerce Commission to prescribe requirements and establish rules to secure compliance with the provisions of the act. As stated in the Napier case, supra, the Commission has made certain rules and regulations as to the equipment used by the railroads. In the Napier case, supra, the question was up whether or not a state regulation was enforcible which provided for a certain type of fire box door and a cab curtain could be enforced. In that case the Commission had made no order pertaining to such equipment nor was there any federal legislation pertaining to that sort of equipment. In that case because the Commission had made no order nor was there any federal legislation relating to such equipment, then the state claimed that its acts were enforcible because Congress had not entered into that field of equipment. Quoting again from the Napier case at l.c. 438:

> "Each device was prescribed by the state primarily to promote the health and comfort of engineers and firemen.

> Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the commerce clause. It may be assumed, also, that there is no physical conflict between the devices required by the state and those specifically prescribed by Congress or the Interstate Commerce Commission; and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude states from exerting their police power must be clearly manifested. * * * * * * * * * * "

In speaking of that class of legislation relating to fire box and cab curtains, the court further said at l.c. 438:

> "* * * * Does the legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280, 58 L. ed. 1312, 34 Sup. Ct. Rep. 829. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all the appurtenances.
>
> "The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic fire door and an

> effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. * * * * * * * * * * * * *"

In the Napier case, supra, the court said it thought the power was conferred upon the Interstate Commerce Commission to specify the equipment to be used on locomotives. Quoting again from the Napier case, supra, at l.c. 439:

> "The argument mainly urged by the states in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that here might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?
>
> "The federal and the state statutes are directed to the same subject-- the equipment of locomotives. They

> operate upon the same object. It is suggested that the power delegated to the commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the commission has power to prescribe an automotic fire box door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. * * * * * ** * * * "

We note from your request and the letter enclosed with it that it does not seem that the Commission has seen fit to make any rule or regulation pertaining to the subjects which are covered in said Sections 4840 and 4841, but as stated in the Napier case, supra, that would not determine the question of whether Congress intended to cover that field.

Quoting again from the Napier case, supra, at l.c. 439, the court said:

> "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. * * * * * * "

It seems from the Napier case that the state regulation providing for the fire box door and the cab curtains was not enforcible because it was within the field that Congress had entered into in regard to such equipment. It was argued in that case that this equipment was for the health and safety of the employees. So it might be argued in support of the provisions of Sections 4840 and 4841, supra, that they are for the health and safety of the employees,

but in the Napier case the court held that such state legislation was not enforcible and for the same reason we do not think that Sections 4840 and 4841, supra, would be enforcible.

We note in your request that the previous Revision Sessions did not see fit to drop these sections. We hardly think that that would be controlling on the question of whether or not they would be enforcible. Even though it is our opinion that these sections would not be enforcible, yet it might be the best policy for the lawmakers to leave them in the statutes until it was determined by some court whether or not their provisions can be enforced.

CONCLUSION.

From the foregoing it is the opinion of this department that Congress has covered the field of legislation which is attempted to be covered by Sections 4840 and 4841, R. S. Missouri 1929, and that the railroads should be required to install the equipment mentioned in said sections by a rule of the Interstate Commerce Commission instead of by an attempt to enforce the provisions of said sections through the state courts.

As to the advisability of repealing the foregoing sections it is the opinion of this department that since there is a question of whether or not these sections are enforcible that it might be the best policy of the Missouri Legislators to leave these sections in the statutes until it was determined by some court of competent jurisdiction whether or not there provisions are enforcible.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

TWB:DA

TAXATION AND REVENUE: Succeeding Collector should give credit for payment of delinquent taxes on real estate when the county court finds, by its written order of record, that such taxes were paid and a valid recept was given by the former Collector for such payment, absent fraud or mistake.

October 3, 1939.

10-5 FILED 80

Mr. James Scrimsher
Collector of Revenue
Lewis County
Monticello, Missouri

Dear Mr. Scrimsher:

I desire to acknowledge your letter of September 22, 1939 in which you enclosed a request for an opinion which said request is as follows:

> "John Doe presents his canceled check carrying the endorsement of E. W. LILLARD JR., a former collector of Lewis County, as evidence of his partially paying on a $90.00 tax bill, which was due last year.
>
> "The Current tax receipt of that year, which was made out to John Doe shows a penciled calculation that $90.00 had been the orriginal amount of the bill and $75.00 had been t aken from it, leaving a balance due of 15.00. The Consolidated back tax book at the time that John Doe came to our office to pay the balance due showed the entire $90.00, that is the tracts that went to make up the $90.00 bill, as delinquent.
>
> "After John Doe presented his evidence to the County Court of Lewis County they made an order of record ordering James Scrimsher, the present Collector to give John Doe credit on the unpaid taxes, to the amount of his partial payment.
>
> "Is the Collectors office in the clear to comply with this order of the County Court, or would the Collectors office

be held responsible for this partial payment, if he follows the order of the County Court.

"Is it your opinion that under the Statutes of the State of Missouri, that the Collector of any County is compelled to accept any partial payment for taxes?

"Please suggest a correct method of handling a situation as in the above facts stated."

In an opinion rendered by this department on September 8, 1939 to Honorable D. M. Githens, Judge of the County Court of Butler County, Missouri, this department held that the county court is the only body which is authorized to compromise taxes on real estate and that they could do so only under the provisions of Section 9950, Laws of Missouri 1933 at page 426; that such court could make such compromise only when it found that the same would not sell for the amount of taxes, penalty, interest and costs. A copy of the above opinion is enclosed herein.

This department rendered an opinion to Mr. Alfred F. Moeller, Prosecuting Attorney of Ste. Genevieve, Missouri on December 15, 1937 holding, that a collector can not collect partial payment of state, county and school taxes when the same is not delinquent. A copy of which is enclosed herein.

This department rendered an opinion to Mr. Bryan A. Williams, Prosecuting Attorney of Bollinger County on September 3, 1937 providing, that the collector had the right to accept payment for less than all the taxes, when delinquent, interest, penalty and costs due and postpone sale for the balance of the taxes, if the remaining years would not come within the statute of limitations. A copy of said opinion is enclosed herein.

On November 29, 1938 this department rendered an opinion to Senator J. C. McDowell at Charleston, Missouri, holding:

"Lands sold under Senate Bill No. 94 for taxes for several years should be sold at one time for all the taxes charged against the land, which are delinquent, at the time of such sale."

A copy of the above opinion is enclosed herein.

This leaves the following question of your opinion request unanswered:

> MUST THE COUNTY COLLECTOR COMPLY WITH THE RECORD ORDER OF THE COUNTY COURT IN GIVING CREDIT FOR PAYMENT OF DELINQUENT TAXES ON REAL ESTATE TO A FORMER COLLECTOR FOR WHICH SUCH FORMER COLLECTOR GAVE A RECEIPT BUT DID NOT GIVE CREDIT ON THE "BACK TAX BOOK". IF HE DOES COMPLY WITH SUCH ORDER IS THE COLLECTOR LIABLE.

Section 9952a of the Laws of Missouri at page 430 is, in part, as follows:

> " * * * Provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Article 6, Section 36 of the Constitution of Missouri, is as follows:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. The court shall consist of one or more judges, not exceeding three, of whom the probate judge may be one, as may be provided by law."

Section 12111 R. S. Mo. 1929, is as follows:

> "In the settlements required by law to be made by the county court with treasurers and other officers holding county funds, whether quarterly, yearly or otherwise, it shall be the duty of the court, or some judge thereof, to ascertain by actual examination and county the amount of balances and funds in the hands of such officers, and to what particular fund it appertains, and such examination and count shall include all funds on hand up to the day on which such settlement is made."

Section 12162 R. S. Mo. 1929 is, in part, as follows:

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; * * * ".

A taxpayer paying taxes on real estate to the collector and taking a receipt therefor, must, under the provisions of Section 9952a, supra, be given credit for such payment if such receipt be valid.

By our constitution, county courts are created and given jurisdiction to transact all county business. Under the provisions of the above statutes such courts are given the right to settle all accounts to which the county should be a party.

The courts have consistently held that the county courts have the above rights and duties, but their duties on such matters are not res adjudicata.

In the case of State ex rel. vs. Diemer, 255 Mo. 336, 351, the court held:

> "In the allowance of claims against a county or in settling with county officers, county courts do not act so strictly as

> a court, or in the performance of a judicial function, that their allowance or disallowance of a claim is res adjudicata. Something of substance might be said in favor of the contary theory, but at an early date this court considered our statutes and announced the doctrine, on the reason of the thing and because of a good public policy, that county courts in the allowance of claims, as in settling with officers, acted as a mere public board of audit, as ministerial, administrative or fiscal agents for the county and not strictly as a court, hence we have uniformly refused to apply the doctrine of res adjudicata to their orders allowing or disallowing claims against the county, or to their settlements with county officers. That doctrine has always been adhered to and must be accepted as settled."

The same principle was stated by the court in State vs. Thompson, 337 Mo. 328, 335:

> " * * * The cited cases relate to settlements made between county officers and county courts. The unanimous holdings in these cases are exemplified in the following excerpt from Holt v. Rea, Supra, l. c. 1241:
>
> "'It is settled law that settlements made between a county collector and the county court do not have the force and effect of a judgment and are not res adjudicata. In making such settlements the county court acts as a public accountant or financial agent of the county, and settlements so made amount to no more than an account-

> ing between the principal and agent, or a settlement between individuals, and may be inquired into and corrected or set aside on the ground of fraud or mistake of fact. (State ex rel. Scotland County v Ewing, 116 Mo. 129, 136, 22 S. W. 476; State ex rel. Lawrence County v. Shipman, 125 Mo. 436, 28 S. W. 842.)'"

The court in the above decision further ruled:

> " * * * In a suit by a county over a double charge made by a county officer in effecting a settlement with the court, it was held that any mistake in the settlement clearly proved is open to correction, in the same manner as though it were made with an individual. (Marion County v. Phillips, 45 Mo. 75.)"

The duties and liabilities of county ministerial officers are construed in the case of County of Jackson vs. Fayman, 329 Mo. 423, 441 as follows:

> "Much is also said as to the heavy penalties imposed on county treasurers as ministerial officers in refusing to pay county warrants regularly issued by the county and presented for payment. It is true that such ministerial officers are not and should not be required to investigate and determine for himself the legality or validity of such warrants and should ordinarily pay same without question. Here, however, the constituted authority which had cause this warrant to be issued, and whose order gave it birth and vitality, had taken on itself the responsibility of annulling its action and stamping out its life. The

> whole trouble here arises from the fact that this ministerial officer undertook to decide for himself that the action of the county court in issuing this warrant was a judicial act and a finality and that such court did not have the judicial power to set aside or modify its judgment after the term. That ministerial officers are not generally visited with penalties or held personally responsible when acting in good faith is held in State ex rel. v. Diemer, 255 Mo. 336. That they must at times assume some risk in the performance of judicial duties is unavoidable, and we commend defendant's action in taking a bond for his own protection on paying this warrant."

A failure, by the collector, to give credit for paid taxes on real estate and a sale of such real estate for the payment of such paid taxes makes the collector liable for damages under the provision of Section 9963a, Laws of Missouri 1933 at page 447 which is, in part, as follows:

> " * * * or whenever any tract, parcel or lot of land shall have been assessed to two or more different persons and the entire tax shall have been paid by either of them, and the collector shall sell such land as delinquent on account of the non-payment by the other party of the taxes assessed against him thereon, the party damaged by such sale, or his legal representatives, may, in an action against the officer by whose act or omission such damages have been caused, or upon his official bond, recover a judgment for the amount of all the damages, costs and charges to which such owner may have been subjected in consequence of such failure or such dereliction of duty, and in addition a ten per cent penalty thereon."

CONCLUSION

Therefore, it is the opinion of this department that payment made to a collector, of taxes on real estate, and evidenced by a tax receipt given by such collector and later found to be valid, by a written order of the county court during the term of a succeeding collector, should be credited by such succeeding collector. That no liability would ensue, absent fraud or mistake.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

PROSECUTING ATTORNEYS: Duties imposed on other administrative officials to direct prosecutions do not relieve prosecuting attorneys of their duties in regard to same.

November 30, 1939

12-2

FILED
80

Honorable Louis H. Schult, Judge
38th Judicial Circuit
Caruthersville, Missouri

Dear Judge Schult:

We are in receipt of your request for an opinion dated November 17, 1939, which is as follows:

> "I would like an opinion from your office on Sections 13210 and 13212, relating to the employment of females in laundries, etc., and the hours of employment.
>
> The Prosecuting Attorney of this county has filed an information charging the operator of a local laundry with having employed a certain female to do physical and manual labor in said laundry more than nine hours in one day and more than fifty-four hours during one week.
>
> The attorney representing the defendant contends that Section 13213 controls and that it is the duty of the Commissioner of Labor to file complaints, since under this section the Commissioner is charged with the enforcement of Sections 13210 and 13212 and the prosecutions of all violations, and further that the Prosecuting Attorney would not have the right to file a complaint or institute prosecution - that is, that the Commissioner would have to file the complaint before the Prosecuting Attorney would be authorized to act."

Section 13213, R. S. Mo. 1929, referred to by you, follows those sections setting out the hours which females may work during any one week in certain establishments, and is as follows:

> "The commissioner of labor and industrial inspection shall be charged with the enforcement of the provisions of sections 13210 and 13212 and the prosecution of all violations thereof. It shall be the duty of the commissioner of labor and industrial inspection, his assistants, or deputies, to make at least two inspections each year of all shops, establishments and places described in said section 13210, and he shall be entitled to demand and receive for each such inspection the schedule of fees provided in section 13219, R. S. 1929, and amendments thereto."

The statute setting out the duties of prosecuting attorneys is Section 11316, R. S. Mo. 1929, which is, in part, as follows:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; * * * * *"

A search of the decided cases in this state fails to reveal any direct decision on the question raised by you, but an indication of the decision of the courts in case such question should be presented, is found in the following paragraph in State of Missouri ex inf. Roy McKittrick v. Carl Wymore, not yet reported.

> "The people of this state are not idiots. They know that a prosecuting attorney cannot, under his oath of office, hide behind Sec. 3505, R. S. 1929, which authorizes private persons to file complaints with the clerk of the circuit court or with the prosecuting attorney. If he could do so, the law-abiding citizens of the state

> would be helpless and at the mercy of the "underworld". It is well known that private persons rarely file complaints. They may subject themselves to costs and the hazard of an action for malicious prosecution. If a private person files a complaint, the prosecuting attorney is not compelled, for that reason, to file an information. However, it is his duty to make a reasonable investigation and then determine if an information should be filed."

18 C. J., p. 1312, Section 38, sets out the general rule, as follows:

> "But his (referring to district and prosecuting attorneys) duty to institute proceedings on behalf of the state is not dependent upon authority from any public officer required to report violations of the law and direct prosecution in certain cases."

Several authorities are cited thereunder.

In Bartley v. State, 53 Neb. 310, 73 N. W. 744, the exact question presented here was decided by the court in the following language, l. c. 748:

> "Section 4, art. 3, c. 83, Comp. St., declares that 'it shall be the duty of the auditor: * * * Seventh. To direct prosecutions in the name of the state for all official delinquencies, in relation to the assessment, collection, and payment of the revenue, against all persons who by any means become possessed of public money or property, due or belonging to the state, and fail to pay over or deliver the same, and against all debtors of the state.' The proposition is advanced that this information is bad because it does not allege that the prosecution was instituted under the direction of the auditor of public accounts. To this we cannot agree. The statute makes it the duty of a

> county attorney to prosecute all criminal actions in his county, as well as to file in the district court all informations for crimes; and he may institute criminal proceedings against a public officer who is guilty of some official delinquency relating to payment of the revenues, whether directed by the auditor to do so or not. It will not do to say that the county attorney cannot institute such a prosecution until he has been directed by the auditor. The most that can be claimed for the provision of the statutes already quoted is that it is the duty of the county attorney to institute and prosecute a criminal action against a public officer who has made default in the assessment, collection, or payment of the public revenues, and not that the county attorney is powerless to take any steps towards instituting criminal prosecution against a defaulting state treasurer until after the auditor has given him instructions to act. The state was not required to prove that this prosecution was brought by direction of the auditor; hence it was wholly unnecessary for the information to aver such fact."

This position is sustained by other authorities. State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, confines the rule to criminal cases and refused to permit the prosecuting attorney to institute suits where other officials were required by statute to commence and direct proceedings as to civil matters.

From the foregoing authorities, it appears that a statutory duty imposed upon an administrative official to direct prosecutions in certain cases is concurrent with or supplemental to the powers of the prosecuting attorney to institute all criminal proceedings in the name of the state.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
RLH:WC

TAXATION: Allocation clause of House Bill No. 14 is unconstitutional on account of class legislation.

February 23, 1939

2-23 FILED 81

Hon. L.N. Searcy
State Senator
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "We would appreciate it very much if we could receive an opinion from your office on House Bill #14 as to the constitutionality of Sec. 7794 pertaining to allocation of the moneys received."

House Bill No. 14 of the 60th General Assembly, partially reads as follows:

> "All moneys collected from the motor vehicle fuel tax and the motor vehicle registration fees as herein provided shall be allocated and expended by the highway commission of Missouri in the following manner: Fifty per cent of all moneys so collected shall be expended for construction and maintenance of primary and secondary roads; twenty per cent of all moneys collected shall be expended for the construction and maintenance of supplementary roads; twenty per cent of all moneys collected shall be expended in the construction of highways and traffic diversions in and through the cities of this state having a population of more than 2,500 and ten per cent of the money so collected shall be expended under the direction of the state highway commission."

The above paragraph, of course, is subject to Article X, Section 19 of the Constitution of Missouri, which reads as follows:

> "No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made, or a warrant shall have issued therefor, within two years after the passage of such appropriation act; and every such law, making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such sum or object. A regular statement and account of the receipts and expenditures of all public money shall be published from time to time."

Although this house bill gives the authority to the Highway Commission of Missouri to allocate the money paid in under this tax provision to different road systems, it is yet under the supervision of the Legislature that the money must be appropriated out of the general fund to the State Highway Commission. This paragraph is a violation of Article IV, Section 53, paragraph 33 of the Constitution of the State of Missouri, which reads as follows:

> "Nor shall the General Assembly indirectly enact such special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed."

That part of the above paragraph underlined of House Bill No. 14 is class legislation according to the holding of the Supreme Court of this state, and should read as follows:

> " * * * cities of this state now having or which may hereafter have a population of more than 2,500."

In the case of State ex inf. Barker, Atty. Gen. v. Southern et al, 177 S.W. 640, l.c. 643, the court said:

> "It has been repeatedly decided in this state that classification according to population was sufficient to render an act containing such a classification a general law. State ex inf. Crow Attorney General v. Continental Tobacco Co. et al., 177 Mo. 1, 75 S.W. 737; State ex rel. v. County Court, 128 Mo. loc. cit. 442, 30 S.W. 103, 31 S.W. 23; State ex rel. v. Bell, 119 Mo. 70, 24 S.W. 765. Nor has the rule as to such a standard been altered by the fact that such an act has been found applicable only to one city. State ex inf. Crow, Attorney General, et al. v. Fleming et al., 147 Mo. 1, 44 S.W. 758; State ex rel. v. Mason, 155 Mo. 486, 55 S.W. 636; State v. Edward J. Keating, 202 Mo. 197, 100 S.W. 648; State ex rel. Attorney General v. Speed, 183 Mo. 186, 81 S.W. 1260; Ex parte Lucas, 160 Mo. 219, 61 S.W. 218. The evident motive of the Legislature in the enactment of the clause under consideration was to classify the counties of the state as they then or in the future might have a population exceeding 50,000 and taxable property exceeding $45,000,000, for the reason that the counties which should fall within such a class would naturally have different and greater needs, corresponding to the differences between their condition and other counties of less population and less wealth. Neither did the Legislature lose sight of this object in the disjunctive part of the sentence which provided that counties adjoining or containing then or in the future a city of more than 100,000 inhabitants should belong to the same class. The purpose in each clause of the sentence was tocreate a distinction based upon

> differences in population and in wealth; for if, as the Legislature rightfully assumed, counties of 50,000 inhabitants would acquire coincidentally a taxable wealth of $45,000,000, it might be well assumed that such counties would not have less wealth when they should embrace or adjoin cities containing 100,000 inhabitants."

Also, in the case of State ex inf. Gentry, v. Armstrong, et al., 286 S.W. 705, l.c. 708, the court said:

> "The doctrine of classification by population in the enactment of laws is being much overworked. We have ruled, however, that population may be made the basis of classification, provided that the law covers an existing class, a part of which may come into existence by natural growth after the act, provided the legislative classification expressly so provides, by using the term "counties now having, or hereafter having" the stated population."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the paragraph of House Bill No. 14, as above set out, would be considered by the court as unconstitutional, for the reason that it is class legislation, and if this paragraph should be considered unconstitutional, not withstanding Section 2 of House Bill No. 14, it would affect the whole act.

Respectfully submitted,

W.J. BURKE
Assistant Attorney General

APPROVED By:

J.W. BUFFINGTON
(Acting) Attorney General

WJB:VAC

RECORDER OF DEEDS: FEES: Fees of recorder of deeds for making certified copies.

June 6, 1939

613

FILED
81

Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to yours wherein you request an opinion from this department on whether or not you should account for the collections you make for making certified copies of deeds or marriage licenses or other instruments on record in your office. In connection with this you give the following facts:

On various occasions you have requests for certified copies of deeds, marriage licenses and other records from your office. Pursuant to such requests you make up these copies and attach your official seal to same. These copies are made up by some deputy in your office and the county stationery is used. You make a charge for this service and at the present time you are not accounting to the county treasurer for this money as official fees earned and collected by you, however, you state that you are holding these funds in a separate account pending the determination of whether or not you should account for them as receipts of the office.

We note from the enclosures with your request, from the opinion of the county counsellor that you should account to the county for any supplies which you may use in making up these copies. We agree with Mr. Pew and will suggest the other points hereafter.

The making of the copy of the record may be done by any person and not necessarily the recorder. The records

in the recorder's office are public records and the general public not only has authority to inspect these records but to make copies of them.

This rule is announced in Volume 53 C. J., page 625 in the following language:

> "A statute which provides for inspection of public records grants the right to inspect with all of its common-law incidents, including the right to make copies. The right to copy has been held a necessary incident of the right to inspect granted by the statute. Thus the right to inspect under the statutes includes the right to make memoranda or copies. * * * * "

On thequestion of the recorder of deeds performing extra official duties and retaining the charges made therefor, we find in Volume 53 C. J. at page 1074, Section 16, the rule is stated as follows:

> "Under a statute providing that a register shall pay over all fees received by him after deducting his salary, all moneys received for duties performed in his official capacity must be accounted for and paid over by the register, as soon as the correct amount is shown by a duly approved accounting or settlement, notwithstanding the duties were performed outside of regular office hours; and it makes no difference whether a statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the register and the person for whom he performed the duties. But no duty rests upon a register of deeds to account for and pay over moneys received by him for extra official services."

As authority for this rule the case of State v. Holm, 97 N. W. 821 (Neb.) is cited. At l.c. 822 the court said:

> "It may be stated at the outset that, if the services for which respondent received the money in question were any part of the duties of his office, he would be required to account for and pay the same over to the relator; and it would make no difference whether the statute prescribing such duties fixed the amount of compensation therefor, or whether the amount was fixed by the agreement of the respondent and the person for whom he performed the service. * * * * * * * * "

And speaking of extra official duties of officer, the court further said at l. c. 823:

> "* * * In the case at bar it cannot be contended that the respondent was obliged to perform the services in question as a part of his official duties. The rule of the excise board of the city of Lincoln was in no manner binding upon him. He could not be compelled to perform any duties or services except such as the statute enjoined upon him. As a strict matter of law, there seems to be no reason why he could not contract with the persons applying for saloon licenses to search the records for them, and receive such compensation therefor as might be agreed upon. The fact that such services were performed by his deputies, who had received payment from the county for their services, or that they were performed by himself personally, we are not at liberty

> to consider, because no competent offer to prove that fact was made by the relator. While the conduct of the respondent may be of doubtful propriety, and while, perhaps, from an equitable standpoint, the money in question ought to be paid to the relator, yet these matters cannot be taken into consideration by us in deciding this case. The question presented is whether or not, as a matter of law, the respondent can be compelled to account for and pay over the money in controversy herein. It appearing that the services rendered by respondent were no part of the duties of his office, we are constrained to hold that the money paid him therefor under private contract or agreement cannot be recovered by the relator, and therefore the district court did not err in denying the writ and dismissing the action."

In our search through the statutes we find some sections which require the recorder to furnish copies of the records, but there is no provision made for a fee for such services except the charge for the certificate and seal. We particularly have in mind Sections 3253, 11556 and 11557, R. S. Missouri 1929. There may be other sections which impose a similar duty on the officer. While under these sections it seems that it would be the duty of the recorder to furnish the copy of the record, yet under the ruling in the case hereinafter cited we doubt the authority of the officer to make a charge for such copy except his certificate and seal which he attaches thereto. We have in mind the case of Gammon v. Lafayette County, 76 Mo. 675, 676, wherein this rule is stated:

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such

> officer, unless the statute gives it. When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the State for compensation for such service. * * * * * * * * * "

In connection with the performance of services such as you have mentioned in your request, we refer you to Section 11570, R. S. Missouri 1929, which is as follows:

> "Every recorder of deeds or the deputy of any such officer, who shall engage in the business of making abstracts of instruments of record in his office affecting the title to lands, for profit or hire, or who shall furnish to any person or persons any written extract, excerpt, memoranda or copy of any such instrument of record, for profit or hire, otherwise than under and in pursuance of the statutes defining his duties as such officer and in his official capacity, duly authenticating each extract, excerpt, memoranda or copy of every such instrument so furnished under the seal of his office, shall be deemed guilty of a misdemeanor and shall, upon conviction, be punished by a fine of not less than twenty nor more than fifty dollars."

In this opinion we do not want to hold that a recorder is not authorized to perform some extra official services, yet we have cited the foregoing section for the purpose of you keeping in mind that in performing such services you are bound by the provisions of that section. The making of a copy of the record which is not required to be made under the statute and which is not prohibited by Section 11570, supra, would be classed as an extra official matter, and under the rulings hereinbefore cited

it seems that you would be authorized to retain whatever charge you make therefor and not account for it as your official collections, except that part of the charge which is made for the certificate and seal which you attach to the copy. Of course, as Mr. Pew states in his opinion, if you use any of the county's stationery or other supplies in connection with the making of such copies, you should account to the county for those items.

As to the duty of the deputy to perform such work for you, we do not find where the statute would require him to do this, but if it does not interfere with his duties to the office and he is willing to do it as a personal favor to you, we can see no objection to him doing that. We wish to also call your attention to the fact that if the performing of these extra official duties were to interfere with you in performing your official duties, then under those circumstances we do not think you would be authorized to make such copies.

CONCLUSION.

From the foregoing it is the opinion of this department that while the recorder of deeds is not required to make certified copies of certain records, yet he may make such copies, but if there is no fee authorized by the statute he should not make an official charge therefor. Of course, in all cases where the copy is a certified copy his official charge for that part of the service would be the fifty cents (50¢) for the certificate and seal.

We are also of the opinion, under the Nebraska case, supra, that the officer is not required to report the collections which he makes for extra official duties, that is, in making copies of records which he is not required to make under the statute, except the charge for the certificate and seal as hereinbefore stated.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

TAXATION:
COLLECTION OF DELINQUENT TAXES IN CITIES UNDER A SPECIAL CHARTER:

Cities operating under a special charter should certify their delinquent taxes to the county collector unless the charter provides for such collection.

June 16, 1939

6-17

FILED
81

Honorable Otto P. Shanks
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Mr. Shanks:

This is in reply to yours of recent date wherein you request an opinion from this department on whether or not under the Jones-Munger Act the County Collector of Lewis County, Missouri, should advertise and sell real estate for delinquent town taxes of the town of Canton, Missouri, which have been duly certified to him by the board of directors and trustees of that town.

You state in your request that the town of Canton is existing and operating under a special charter declared to be a public act which is found in Laws of Missouri of 1873 at page 208.

It is a general proposition of law that cities, towns and villages, being creatures of the statute, that the officers of such municipalities must look to the statute or the charter for their powers and authority. It is also a general proposition of law that statutes which relate to taxation of property and the sale of property for taxes must be strictly construed in favor of the owner of the property and unless the official follows the procedure set out in the statute the sale of such property for taxes is void. The city charter of the city of Canton provides in part as follows (Section 1, Article VI, Laws of Missouri 1873, at page 208):

"The board of trustees shall have power and authority to levy and

> collect taxes upon all property, real, personal and mixed, within the limits of the town, not exceeding one-half of one per cent, for any one year upon the assessed value thereof, for general purposes; * * "

Section 15 of the charter also provides:

> "The board of trustees shall have power and authority to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to nor inconsistent with the constitution of the United States or of this state."

From an examination of the charter of the city of Canton it will be noted that there is no provision made in the charter for that city to sell lands for delinquent taxes. Looking to the general statute on this question we find that Section 9970, Laws of 1933 at page 450, provides as follows:

> "The collectors of all cities and incorporated towns having authority to levy and collect taxes under their respective charters or under any law of this state shall, on or before the first day of May, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid. The county collector shall receipt for the aggregate amount of such delinquent taxes, which receipt shall be held by the treasurer of the city or town, and shall stand as evidence of indebtedness upon the part of

> the county collector and his bondsmen to such city or town, until settlement in full has been made by payment to said treasurer or his successor of all taxes thus receipted for, or by a return of such part as is uncollectible."

In order to arrive at the construction to be placed upon this statute we think we should refer to the history of the legislation provided in this section. This act amended Section 9970, R. S. Missouri 1929, by changing the date of the annual returns made by collectors. This law was originally enacted in 1872, Laws of 1872 at page 118 and provided as follows:

> "The collectors of all cities and incorporated towns, having authority to levy and collect taxes under their respective charters, or under any law of this state, shall on or before the first day of May, annually, return to the county collector a list of lands and lots on which the taxes or special assessments levied by such city or incorporated town remain due and unpaid; * * * * * * * * * * * * * * "

There may be some confusion on this question caused by the provisions of Section 9948, R. S. Missouri 1929, which is as follows:

> "Within thirty days after the settlement of the collector, in the odd numbered years, the several county clerks in each county in this state, and in such cities, the register, city clerk or other proper officer, shall make, in a book to be called the 'back tax book,' a correct list, in numerical order, of all tracts of

land and town lots on which back taxes shall be due in such county or city, setting forth opposite each tract of land or town lot the name of the owner, if known, and if the owner thereof be not known, then to whom the same was last assessed, the description thereof, the year or years for which such tract of land or town lot is delinquent or forfeited, and the amount of the original tax due each fund on said real estate (and the interest due on the whole of said tax at the time of making said back tax book, together with the clerk's fees then due), in appropriate columns arranged therefor, and the aggregate amount of taxes, interest and clerk's fees charged against each tract of land or town lot for all the years for which the same is delinquent or forfeited; said back tax book, when completed, shall be delivered by said clerk or other proper officer to the proper collector of the county or such city, for which he shall take duplicate receipts, one of which he shall file in his office and the other with the state auditor, and the clerk or other proper officer shall charge such collector with the aggregate amount of taxes, interest and clerk's fees contained in said 'back tax book.' In all such cities the said 'back tax book' shall be made out, in alphabetical order, in the name of the owner, if known; and if the owner be not known, then in the name of the person to whom such tract or lot was last assessed. All taxes, interest and clerk's fees hereafter contained in the 'back tax book' herein described

> shall bear interest from the time of the making out of said 'back tax book' at the rate of ten per cent. per annum until paid. In computing interest under this article, a fraction of a month shall be counted as a whole month."

This confusion is caused by the reference to certain cities. The cities mentioned in this section are cities of a population of over five thousand. The history of this section shows that it comes down from an act of the General Assembly of Missouri of 1879, Laws of Missouri 1879 at page 187, Section 1, and it provides in part as follows:

> "* * * That immediately after the taking effect of this act, the collector of each county, and the collector of all cities having a population of five thousand inhabitants or more, shall return to the clerk of the county court of his county, or in such cities to the register, city clerk or other proper officer, all delinquent and forfeited lists or tax bills of real estate in his hands, except taxes due prior to the year 1865, * * * * * * * * * * * * "

We note in the footnote to Section 9948 which was inserted by the 1929 Revised Laws that the term "such cities" set out in that section refers to cities described in Section 9970. We think that this is erroneous for the reason that cities referred to in Section 9970 are cities under five thousand population.

The Supreme Court in State to use Begeman v. Robyn, 93 Mo. 395, l. c. 398, in distinguishing the Act of 1879, supra, which is the forerunner of Section 9948, R. S. Missouri 1929, and the act of 1872, supra, which is the forerunner of Section 9970 and the 1933 Act, supra, made this statement in reference to delinquent tax procedure for the town of Hermann which

was operating by virtue of a special charter issued to it by the legislature:

> "The act of 1872 did then create a lien for these delinquent taxes assessed by the town of Hermann, and that lien must, according to that act, be enforced by the county collector. This duty of enforcing the lien still remained with the collector under the act of April 12, 1877. Laws, 1877, p. 385. The first section of the amendatory act of April 24, 1879 (Laws, 1879, p. 187), makes it the duty of the city collectors, in cities having a population of five thousand or more inhabitants, to return to the city register the delinquent lists; and other sections of that act provide that, in all such cities, the delinquent taxes are to be collected by the city officers, and not by the county collector. By section 9, the lien is, in express terms, declared in favor of such cities. But as to state and county taxes, and delinquent taxes of cities and towns having less than five thousand inhabitants, the collection thereof remained with the county collector, as before the passage of the act of 1879. As to towns and cities having less than five thousand inhabitants, sections 177 to 182, of the act of 1872, remained in full force. These sections are the same as sections 6827-8-9-30-31, of Revised Statutes of 1879. The amendments of these sections by the act of April, 1883 (Laws, 1883, p. 151), do not

> affect the question under consideration. The town of Hermann having less than five thousand inhabitants, this suit was, therefore, properly brought in the name of the state at the relation and to the use of the county collector. The lien for the delinquent tax could not be enforced in any other way."

You state in your request that the city of Canton has a population of two thousand and is operating under a special charter. That being the case it seems that it would fall within the same class as the town of Hermann insofar as the enforcement of delinquent taxes for such town are concerned unless there are other sections of the statute which would change that provision. By a search through the statutes it will be found that cities of the second and third class have special provisions for the collection of their delinquent taxes. We particularly refer to the provisions of Sections 6781 which pertain to third class cities and 6696 which pertain to fourth class cities and it provides that:

> "* * * the land and lot delinquent list (1) to be returned to the city collector * * * who shall proceed to collect the same in the same manner and under the same regulations as are or may be provided by law for the collection of delinquent lists of real and personal taxes for state and county purposes: * * * * * * * * "

The courts of this state have held that such a provision authorized such cities or towns to collect their own delinquent taxes regardless of the general provision of the tax law, that is, Section 9970 or any other section in conflict thereto. City of Aurora ex rel. v. Lindsay, 146 Mo. 509; State ex rel. Duble, Collector of the City of Princeton v. Lewis et al., 256 Mo. 121. However, it will be noted that these were cases in which a special provision had been made for cities of that class to collect their own delinquent

tax. Absent such a provision, however, the cases seem to hold that the procedure in collecting such taxes is set out in the general section which is the 1933 act, supra.

In State ex rel. Van Brown v. Van Every, 75 Mo. 530, the delinquent taxes due the City of Hannibal were involved. In that case the suit for the taxes was brought in the name of the state of Missouri at the relation of and to the use of the collector of the city. The suit for the taxes was brought under the general law authorizing cities to certify to the county collector the delinquent list. It was insisted by the owner of the property that the general law did not apply because the charter of the city of Hannibal provided a special lien for city taxes and divested the state of any lien. In this case it was held that the suit was properly brought in the name of the state of Missouri under the general statute. The court reviewed the tax sections and at l. c. 534, said:

> "Section 178 of the act of 1872, referred to in the foregoing section of the act of 1879, required the collectors of all cities and incorporated towns having authority to levy and collect taxes, on or before the 1st day of May annually to return to the county collector a list of lands and lots on which taxes levied by such city or town remained due and unpaid, and made it the duty of such collector to obtain judgment and sell the real estate. These various provisions leave no escape from the conclusion, that the city of Hannibal has no right of action in her own name, to enforce the lien for delinquent taxes levied by her. The lien given her by her charter of 1870, was taken from the city, and given to the State, by the act of 1872, and was continued

in the State by the subsequent acts.

"It must be admitted that the revenue law contains many provisions which are apparently repugnant to each other, and it is no easy task to place such a construction upon them as one may confidently rely upon. * * * * * * * "

CONCLUSION.

Since we find no special provisions relating to the collection of delinquent taxes by the city of Canton it is the opinion of this department that the provisions of Section 9970 of the Laws of Missouri, 1933, at page 450 would prevail, and that it would be the duty of the city collector to certify to the county collector the list of lands and lots on which taxes or special assessments of such city remain due and unpaid and that it would be the duty of the county collector then to proceed to collect such taxes as is provided for under the Jones-Munger Act.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

UNEMPLOYMENT
COMPENSATION: "Notice of Lien" need not be acknowledged for filing in the office of the Recorder of Deeds.

September 5, 1939

9-6

FILED
81

Mr. Oliver Senti
Associate City Counselor
Law Department
St. Louis, Missouri

Dear Sir:

We are in receipt of your request dated August 24, 1939, which reads as follows:

> "The Recorder of Deeds has submitted an inquiry to this department as to whether notice that an assessment has been made under Section 15-g of the Compensation Law of the State, effective July 1, 1939, against an employer for non-payment of contributions due and the lien thereby created under the Act must be acknowledged before it is recorded.
>
> "As the question involves the construction of a State statute, we feel that the matter should be passed upon by your office, and I would thank you to give us your opinion whether in view of the provisions of Section 11543, R. S. Mo. 1929, any instrument affecting title to real estate and not proved or acknowledged according to law can lawfully be recorded."

In answer to your above request, I am herein enclosing copy of an opinion rendered by this office on

August 28th, 1939, to the Honorable Alfred H. Douglas, Prosecuting Attorney of Newton County, Missouri. This opinion does not fully answer your request, so we are supplementing it with the following.

We realize that conveyances and other written instruments affecting real estate should be acknowledged and proven according to law before being recorded in the office of the Recorder of Deeds. In our opinion above described, we held that "Notice of Lien" may be filed and not recorded by the Commission. In view of that holding, the question of recording a "Notice of Lien" is not at issue. The filing of a "Notice of Lien" is analogous with the filing of a chattel mortgage, or a true copy of a chattel mortgage. The method is set out in the statutes as to the filing of a copy of the chattel mortgage, and does not require that it be acknowledged as in deeds of real estate.

Section 3021 R. S. Missouri, 1929, partially reads as follows:

> "The proof or acknowledgment of every conveyance or instrument in writing affecting real estate in law or equity, including deeds of married women, shall be taken by some one of the following courts or officers: * * *. "

This section sets out the specific manner in which certain instruments should be acknowledged.

Section 11543 R. S. Missouri, 1929, partially reads as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be record-

ed in their offices; * * *. "

This section provided that it was the duty of the Recorder to file certain instruments which were properly proved or acknowledged.

Section 15, par.(g), Senate Bill 346, of the Sixtieth General Assembly, reads as follows:

> "If any case in which any contribution, interest or penalty imposed under this Act is not paid when due, the Commission may file for record in the Recorder's Office of the county in which the employer owing said contribution, interest or penalty, resides, or has his place of business or any other county in which he has property, a notice of lien specifying the amount of the contribution, interest or penalty due and the name of the employer liable for the same. From the time of filing any such notice, the amount of the contribution specified in such notice shall have the force and effect of a lien of a judgment against the employer named in said notice of lien for the amount specified in such notice. Such lien may be released by filing for record in the office of the county recorder a release thereof executed by the Commission upon payment of the contribution, interest and penalties or upon receipt by the Commission of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously imposed." (Underscoring ours.)

This Section 15, par. (g) in a way amends Section 11543, supra, in that it does not specify that the lien should

contain a description of the real estate, but only states that the lien should specify the amount of the contribution, interest or penalty due, and the name of the employer liable for the same. It does not specify that the Commission should acknowledge the "Notice of Lien" before filing. It has always been the law that a later and special statute takes precedence over a general act and was so held in State v. Brown, 68 S. W. 2d 55, l.c. 59.

In our opinion to Herbert H. Douglas, prosecuting attorney, we held that all that was necessary was the filing, and not the recording, of the "Notice of Lien". This means the filing and leaving of the "Notice of Lien" in the office of the recorder of deeds. The fact that we held it was the leaving of the instrument to be considered as filing was upheld in the case of Dawson v. Cross, 88 Mo. App. l.c. 299. Section 15, par. (g), supra, also upholds us in this opinion, for the reason that at the latter part of the paragraph the following appears:

> "* * * * * * * * * * * *
> "Such lien may be released by filing for record in the office of the county recorder a release thereof executed by the Commission upon payment of the contribution, interest and penalties or upon receipt by the Commission of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously imposed."

By that clause the release could be executed by the Commission filing for record a proper release, where, if the "Notice of Lien" had been recorded all that would have been necessary would have been the stamping of the release on the margin of the record in which the "Notice of Lien" was recorded.

CONCLUSION

In view of the above authorities, and also under our

opinion to Herbert H. Douglas, prosecuting attorney, which we have enclosed to you, this department is of the opinion that a "Notice of Lien" under the Unemployment Compensation Law, as amended by the Senate Bill 346, of the last General Assembly, does not require recording, as the term is generally used, but all that is necessary for the Unemployment Commission to do, is to file and leave with the Recorder of Deeds the"Notice of Lien" containing all the statutory information required under paragraph (g).

We are further of the opinion that it is not necessary for the "Notice of Lien" to be acknowledged or proven in any other manner except as set out in paragraph (g) of Section 15, Senate Bill 346.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

RECORDER OF DEEDS: Under the statutes no fee is allowed a recorder of deeds for the filing of a "Notice of Lien" under Unemployment Compensation Act.

September 22, 1939

9-27

FILED
81

Hon. Oliver Senti
Associate City Counselor
Law Department
St. Louis, Missouri

Dear Sir:

We are in receipt of your request for an opinion dated September 21, 1939, which reads as follows:

"Thanks for your opinion of September 5th in reference to the filing for record of the 'Notice of Lien' under the Unemployment Compensation Law, together with a copy of your opinion to the Prosecuting Attorney of Newton County, both of which have been forwarded to the Recorder of Deeds for his guidance, and he has had an index made, ruled so as to show the matters set out in your opinion.

"The Statute is silent as to the Recorder's fee and he will like your opinion as to what fee he can lawfully demand for filing these notices; also what his procedure shall be when a release executed by the Commission is filed for record, as provided by Section 15 of the Act.

"I have suggested that until you rule on the questions submitted, he make the same charge that is now made for filing chattel mortgages, and when a release is presented, to cancel the notice by perforation and retain in his file both the release and the cancelled notice, and have the Deputy Record-

er by whom the notice was cancelled note the cancellation on the margin of the record and the date thereof.

"Will you kindly rule on these two questions so that the Recorder of the City of St. Louis may be governed accordingly, and oblige."

Paragraph (g) of Section 15, Laws of 1939, page 925, reads as follows:

"If any case in which any contribution, interest or penalty imposed under this Act is not paid when due, the Commission may file for record in the Recorder's Office of the county in which the employer owing said contribution, interest or penalty resides, or has his place of business or any other county in which he has property, a notice of lien specifying the amount of the contribution, interest or penalty due and the name of the employer liable for the same. From the time of filing any such notice, the amount of the contribution specified in such notice shall have the force and effect of a lien of a judgment against the employer named in said notice of lien for the amount specified in such notice. Such lien may be released by filing for record in the office of the county recorder a release thereof executed by the Commission upon payment of the contribution, interest and penalties or upon receipt by the Commission of security sufficient to secure payment thereof, or by final judgment holding such lien to have been erroneously imposed."

It will be noticed under the above section that the legislature did not see fit to allow any fee to the recorder of deeds for the filing of a "Lien of Judgment." This office has ruled that the filing of a "Notice of Lien" means the leaving of the "Notice of Lien" in the office of the recorder of deeds in the same manner as a chattel mortgage is filed for record. We have also ruled that the "Notice of Lien" need not be recorded, but only filed.

We have checked all of the fees that are allowed by statute to the recorder of deeds and find no allowance of fees to the recorder of deeds for the filing of"Notices of Lien." We have checked Section 3099 as set out in Laws of Missouri, 1935, page 209, which applies to the filing of chattel mortgages. We have also checked Section 11804 R. S. Missouri, 1929. The only allowance of fee for the filing of instruments is in Section 11804, supra, which reads as follows:

> "For recording every deed of instrument, for every hundred words.....$.10
> In addition to the above fee for recording deeds, they shall be allowed for recording every such instrument, relating to real estate, a fee of ten cents, as a compensation for making and preserving direct and inverted indexes to every book containing deeds affecting real estate."

We do not believe the above is applicable for the allowance of a fee for the filing and indexing of a "Notice of Lien" under the unemployment act, for the reason that it only applies to real estate and to instruments recorded and not filed for record.

In order that a public officer should be allowed fees it must be specifically set out by the statutes and all fee statutes should be strictly construed.

In the case of Gammon v. Lafayette County, 76 Mo. 675, l.c. 676, the court said:

> "The right of a public officer to fees is derived from the statute. He is entitled to no fees for services he may perform, as such officer, unless the statute gives it. When the statute fails to provide a fee for service he is required to perform as a public officer, he has no claim upon the State for compensation for such service."

Under the above case it is held that when a statute fails to provide a fee for service still the officer must perform his

duties as it is part of the requirements of his office.

Also, in the case of State ex rel v. Patterson et al., 152 Mo. App. 264, l. c. 268, the court said:

> " * * The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed. (Shed v. Railway, 67 Mo. 687; Gammon v. LaFayette Co., 76 Mo. 675; State v. Wofford, 116 Mo. 220; State ex rel. v. Walbridge, 153 Mo. 194; Sanderson v. Pike Co., 195 Mo. 598.
>
> "At common law the rule was that 'where the law imposes a duty upon an officer, he cannot claim a remuneration for fulfilling it unless the law has expressly conferred such right.' (Crofut v. Brandt, 58 N. Y. 106.) The most recent recognition in this state of this rule thus is expressed in Sanderson v. Pike County, supra: 'It is well-settled law in this state that the right to compensation for the discharge of official duties is purely a creature of the statute, and that the statute which is claimed to confer that right must be strictly construed. The right of a public officer to compensation is derived from the statute and he is entitled to none, for services he may perform as such officer unless the statute gives it. . . . Such compensation is not the creature of contract nor dependent upon the fact, or value of services actually rendered, and cannot be recovered upon quantum meruit.'"

Also in the case of Williams v. Chariton County, 85 Mo. 645, l. c. 646, the court said:

> "Under the authority of the case of Shed v. Ry. Co., 67 Mo. 687, no fees are allowed an officer except where expressly given and allowed by law. Moreover the compensation of assessors, except in St. Louis county, is fixed at a certain sum, and this sum includes all personal property

assessed to one owner. Dogs being assessed in the list of personal property makes no increase in the emoluments of the assessor. See section 69, W. S. 1872, p. 1172. Therefore, judgment affirmed."

Also, in the case of Scott v. Endicott, 38 S. W. (2d) 67, l. c. 68, the court said:

"There can be no doubt that a deputy sheriff appointed by the sheriff, as provided by section 11513, R.S. Mo. 1929, is a public officer. State ex rel. Walker v. Bus, 135 Mo. 325, 36 S. W. 636, 33 L. R. A. 616. That being true, he is subject to the same general limitations as any other public officer in the matter of salary and fees. There is no provision in the law providing a salary for deputy sheriffs in counties such as Ozark county. * * * "

CONCLUSION.

In view of the above authorities it is the opinion of this department that the recorder of deeds of any county is not entitled to a fee for the filing of a "Notice of Lien" under the present Unemployment Compensation Law, which is paragraph (g) of Section 15.

Paragraph (g), supra, is as silent on the method of handling a release, as it is on the allowance of a fee to the recorder's office. It only states that the lien may be released by filing a release from the Commission upon the payment of the contribution, or by the Commission receiving security sufficient to secure the payment of the contribution, or by a final judgment holding such lien to have been erroneously imposed. All that we can say in the matter is, that the statute is strictly followed either by the filing of a release by the Commission upon the defendant or employer complying with the order of the Commission, or by the filing of a certified copy of a final judgment by a court of competent jurisdiction. In view of paragraph (g) not specifically setting out the procedure, the recorder of deeds should re-

tain the "Notice of Lien" and the cancellation notice, to be held as other papers filed in the office of the recorder of deeds.

When a chattel mortgage is released, the index is stamped "paid" and the owner of the chattel mortgage receivies the original chattel mortgage, or a true copy of the chattel mortgage. Nothing is filed in the release of a chattel mortgage. When a "Notice of Lien" is released another paper is also filed which would be either a release by the Commission by payment of the employer or by the filing of a certified copy of a final judgment by a court of competent jurisdiction. In view of the leaving of the release with the recorder of deeds, it would be impossible for the recorder of deeds to return the "Notice of Lien" to the Unemployment Compensation Commission.

I would suggest that whan a "Notice of Lien" is lawfully released, the"Notice of Lien" itself should be stamped "released" and at the same time the word "released" should be placed opposite the serial number on the index book, which is described in the opinion rendered to Herbert H. Douglas, Prosecuting Attorney of Newton County, Missouri, dated August 28th, 1939, a copy of which was furnished you.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

LABOR COMMISSIONER: Labor and Industrial Inspection Department must retain reports indefinitely.

October 12, 1939

10-14

FILED
81

Mr. Earl H. Shackelford
Commissioner of Labor
Labor and Industrial Inspection Department
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of October 10, 1939, which reads as follows:

"Under Section 13176 of the Revised Statutes of Missouri, 1929, 'the title, control and management of all personal property, books, records, documents, office equipment, and files of the Bureau of Labor Statistics, the Industrial Inspection Department, are hereby transferred to and vested in the Department of Labor and Industrial Inspection.' Section 13177 also refers to the same subject.

"During the course of years we accumulate quite a file of inspector's daily cash reports, duplicate copies of inspection certificates and compliance orders. These forms are used by the auditors in checking the records of the department but after such an audit has been made and the records cleared neither the department or anyone else has any use for them. Have we the authority to destroy such inspector's daily reports, duplicate copies of inspection certificates and compliance orders, or should they be retained in our files indefinitely?"

Section 4073 R. S. Mo. 1929, reads as follows:

> "Every officer or other person having the custody of any record, paper, document or proceedings, or any will, deed or other writing, specified in either of the last two sections, who shall fraudulently take away, withdraw or destroy any such record, paper, document, proceeding, will, deed or instrument of writing filed or deposited with him, or left in his custody, shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding five years."

The case of People v. Peck, 138 N. Y. 386 involved a prosecution, under an act very similar to the above. It was held there that the fact that the commissioner of statistics of labor had prepared his report did not authorize him to destroy papers giving statistical information which were filed in his office and used in preparing his report. It is our understanding that these files which you mention in your request are used, at least in a small part, in the preparation of your annual report to the Governor. That the office of the Labor and Industrial Inspection Department is a public office within the meaning of Section 4073, supra, does not admit of doubt. In People v. Peck, supra, it was said:

> "There can be no doubt that the Commissioner is a public officer. He has a fixed term of office, a salary, and discharges duties for the public, * * * * . So here was a public officer, and a public office officially occupied by him."

In closing, the court, in People v. Peck, supra, said:

> " * * * * the indictment was found against

them under section 94 of the Penal Code, which provides as follows: 'A person who willfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is punishable by imprisonment for not more than five years, or by a fine of not more than five hundred dollars, or by both.' We can perceive no defect in this indictment. The facts alleged therein show the commission of a crime. As we have shown, the circulars and answers written thereon were public papers or documents. They were deposited, and also, according to the general and common understanding of the term, 'filed,' with a public officer, by authority of law, and the indictment alleges that the defendants feloniously, willfully, and unlawfully detroyed them. It matters not, as we have shown, whether this destruction took place before or after the commissioner had prepared his report.
* * * * * * * * * * * * "

CONCLUSION

It is therefore the opinion of this Department, in view of the fact that there is no statute authorizing the destruction of such papers after a specified length of time, that such should be retained in your files indefinitely.

APPROVED:

Respectfully submitted,

TYRE W. BURTON
(Acting) Attorney-General

W. J. BURKE
Assistant Attorney-General

RPCW:RW

COMMISSIONER OF LABOR AND INDUSTRIAL INSPECTION:

Has the right to inspect and collect inspection fees from gasoline filling stations and bulk stations.

October 13, 1939

10-17

FILED
81

Mr. Earl H. Shackelford
Commissioner of Labor
Jefferson City, Missouri

Dear Sir:

We received your letter dated September 20, 1939, in which, in the following terms, you request our opinion:

> "Enclosed is a copy of a letter from their Mr. J. P. Greve, which is self-explanatory.
>
> Please let me have your opinion as to whether or not this department has a right to inspect and collect an inspection fee from gasoline filling stations and bulk plants."

The provisions of Section 13218, R. S. 1929, Mo. Stat. Ann., page 4779, are the following:

> "The state commissioner of labor and industrial inspection may divide the state into districts, assign one or more deputy inspectors to each district, and may, at his discretion, change or transfer them from one district to another. It shall be the duty of the commissioner, his assistants or deputy inspectors, to make not less than two inspections during each year of all factories, warehouses, office buildings, freight depots, machine

> shops, garages, laundries, tenement workshops, bake shops, restaurants, bowling alleys, pool halls, theaters, concert halls, moving picture houses, or places of public amusement, and all other manufacturing, mechanical and mercantile establishments and workshops. The last inspection shall be completed on or before the first day of October of each year, and the commissioner shall enforçe all laws relating to the inspection of the establishments enumerated heretofore in this section, and prosecute all persons for violating the same. Any municipal ordinance relating tos aid establishments or their inspection shall be enforced by the commissioner. The commissioner, his assistants and deputy inspectors, may administer oaths and take affidavits in matters concerning the enforcement of the various inspection laws relating to these establishments: Provided, that the provision of this section shall not apply to mercantile establishments that employ less than ten persons that are located in towns and cities that have three thousand inhabitants or less."

This opinion is concerned solely with statutory construction in which the intention of the legislature governs.

I. The rule recognized in City of Ozark v. Hammond is not applicable to Section 13218, R. S. Mo. 1929.

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "As has been pointed out in correspondence with your department and with the Attorney General, the Missouri courts have repeatedly held, as is held in City of Ozark v. Hammond, 49 S. W. (2d) 129, that in construing taxing statutes general words, such as 'all other mercantile establishments'

or similar language following statutory enumerations of occupations taxable by cities, do not authorize the taxation of businesses or occupations not specifically named in the statute. In otherwords, general language will not extend taxing authority to include businesses or occupations not specifically named or mentioned in a statute. Of course, the statute under consideration is enacted pursuant to police power and is not a taxing statute, but the same rule of construction is undoubtedly applicable to both types of statutes."

In City of Ozark v. Hammond, 49 S. W. (2nd) l.c. 131, 329 Mo. 1118, a city of the fourth class sought to apply to a certain bakery business its ordinance imposing a license tax. Section 7287, R. S. 1929, Mo. Stat. Ann. page 5871, provides, in the following terms, that said city can not impose a license tax upon a business unless it is specially (not in general words) named as taxable in the city charter, or by statute:

> "No municipal corporation in this state shall have the power to impose a license tax upon any business avocation, pursuit or calling, unless such business avocation, pursuit or calling is specially named as taxable in the charter of such municipal corporation, or unless such power be conferred by statute."

The City of Ozark had no charter, and such power as it had to impose a license tax was granted by Section 7046, R. S. 1929, Mo. Stat. Ann. page 5762, of which the court said, at l.c. 131:

> "That business, as described and set forth in the agreed statement of facts, is nowhere specially named in said section 7046. It is true that the long enumeration therein of the specific occupations which it authorizes cities of the fourth class to tax is followed by the words, 'and all other business, trade and avocations whatever,' but those words cannot be construed to in-

> clude the business avocation of the baking co pany; the rule ejusdem generis cannot be invoked in the face of said section 7287. (See cases last referred to.)" (Emphasis ours)

The case of City of Ozark v. Hammond, supra, has no application to said Section 13218, because in that case the right (to tax) in question was by said Section 7287 limited to special words in Section 7046; and, because the right (to inspect) here considered, is not limited to special words in Section 13218 by any statute or decision. The rule recognized in City of Ozark v. Hammond, supra, that a municipal taxing ordinance can not be broader than the specific grant by charter or statute, is applicable only to the taxing power of municipalities; it is a statutory rule and not one of interpretation. It was so ruled in Fischbach Brewing Company v. City of St. Louis, 95 S. W. (2nd) 335, 340, 231 Mo. App. 793.

II. A filling station is included in the term "mercantile establishment", and is included in the term "garage".

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "Section 13218 enumerates a long list of buildings which the Commissioner of Labor has the duty to inspect, and after such enumeration the statute recites that it shall inspect 'all other manufacturing, mechanical and mercantile establishments and workshops.' It is our contention that under the above mentioned line of authorities the language last quoted does not authorize or impose upon the Commissioner the duty of inspecting any buildings or establishments other than those specifically enumerated in the statute."

By an opinion dated July 10, 1933, this office advised you as follows:

> "In your 7th inquiry you ask regarding your right to inspect gasoline filling stations. 'Gasoline filling stations'

> are mercantile establishments under Section 13218. They, therefore, may be inspected by your Department where they are located in cities of over 3,000, if they employ at least one employee, but they may not be inspected in cities under 3,000 population excepting where such filling station employs ten or more persons."

We adhere to that opinion, and to the opinion of this office to the same effect, dated March 22, 1937. The ejusdem generis rule referred to in City of Ozark v. Hammond, supra, was stated as follows by the Supreme Court of Missouri in State ex rel Goodloe et al v. Wurdeman, 227 S. W. 64, 67, 286 Mo. 153:

> "It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind."

A mercantile establishment is defined as "any place where goods, wares and merchandise are offered for sale." Ballentine Law Dict. page 810, citing 16 A.L.R. 542.

Affirming a decree enjoining the violation of restrictions in a deed, the Supreme Court of Massachusetts, said: "The sale of oil, tires and other automobile accessories in the building was plainly a use for a mercantile purpose." Abbott et al Steigman 161 N. E. 596, 597, 263 Mass. 585.

Said Section 13218 specifically includes "garages". Within the above definitions, the selling of automobile parts, accessories, gasoline, oil, tires, equipment and many other related articles by garages, or by filling stations, regardless of their other functions, brings them within the classification of the general words "mercantile establishment" in said Section 13218. We believe the legislature intended the general words "mercantile establishment" to refer to and include garages and things of the same kind. A filling station is manifestly the same kind of

thing as a garage, a part of the functions of which are the same as those of a filling station. That they are things of the same kind is illustrated by cases which hold that the term "garage" includes a filling station.

The Supreme Court of New Jersey, in Northern New Jersey Oil Company v. Board of Adjustment, 142 Atl. 557, 558, 6 N. J. Misc. 698, (1928) said:

> "The contention of the prosecutor is that the prohibition against garages does not apply to a gasoline service station. The word 'garage' has been adopted into the English language from the French. It means 'a station in which motor cars can be sheltered, stored, repaired, and made ready for use.' Until a few years ago, the gasoline service station was not known. The service now rendered by it was to be found only at garages. There are different kinds of garages. At some machines can be furnished with gas and oil. At others repairs are made. At others cars can be stored or hired. All those places are referred to as garages. In view of the fact that gasoline would be furnished at the building which the prosecutor desires to erect, we deem that it is a garage within the meaning of the ordinance. Upon this ground we think that the action of the board of adjustment should be affirmed."

The same court held that a filling station is within the meaning of the word "garage", in Wilinski et al v. Haddon Twp. 153 Atl. 97, 9 N. J. Misc. R. 140 (1931).

The two cases last mentioned construed zoning ordinances, and are analogous to the situation here considered because both involved construction of a statute enacted under the police power.

As to the nature of the business of a filling station establishment, in some cases it may appear that the owner bought crude products to sell again at said establishment after processing. Regarding a transaction parallel in principle, the Supreme Court of Missouri said:

> "It is immaterial that the defendant, by his labor, changed the form of the goods sold. If he dealt in selling them at a store, stand or place occupied for that purpose, he is a merchant (for the purpose of this act); and it is also immaterial that the store, stand or place may have been also occupied for some other purpose."

State vs. Whittaker, 33 Mo. 457, l.c. 459.

> "If he keeps at a store, stand or other place, in stock articles manufactured by him for sale in the ordinary course of trade, he is a merchant."

Kansas City v. Brewing Co., 98 Mo. App. 590, l.c. 594, 73 S. W. 302.

> "The manufacturer of a patented article, who also sells it in the usual course of business in his store or factory, would probably come within the exception of sec. 4 (exempting merchants)".

Ozan Lumber Co. v. Bank, 207 U. S. 251, 28 Sup. Ct. 89, 52 L. Ed. 195.

The business of a merchant is mercantile, and the place where it is conducted is a mercantile establishment.

From all the foregoing, it is clear that a filling station is included in the term "mercantile establishment".

But irrespective of the general words "mercantile establishment", in said Section 13218, upon the authority of Northern N. J. Oil Company v. Board of Adjustment, supra, and Wilinski et al v. Haddon Twp., supra, the Commissioner of Labor and Industrial Inspection has the right to inspect filling stations, because they are included in the term "garages", which is one of the specific words in said Section 13218.

III. The duty of inspection imposed upon the Commissioner of Labor and Industrial Inspection by Section 13218 is not affected by Section 13399, R. S. 1929, which imposes a different duty of inspection upon the State Oil Inspector.

The letter of Mr. J. P. Greve, dated September 18, 1939, states: "The foregoing construction is supported by the fact that the Missouri legislature enacted a specific statute, namely, Section 13399, relative to the inspection of premises at or on which gasoline and motor vehicle fuels are kept and sold at retail. There certainly was no occasion for the enactment of said Section 13399 if Section 13218 authorized the inspection of filling stations. Certainly, the legislature did not intend to impose upon two separate departments of the state government the same duty of inspection."

Section 13218, R. S. 1929, Mo. Stat. Ann. page 4779, has already been quoted.

Section 13179, R. S. 1929, Mo. Stat. Ann. page 4765, provides:

> "The object of this department shall be to collect, assort, systematize and present in annual report to the governor, to be by him transmitted biennially to the general assembly, statistical details and information relating to all departments of labor in the state, especially in its relations

> to the commercial, industrial social, educational and sanitary condition of the laboring classes and to the permanent prosperity of the productive industries of the state."

The provisions of Section 13399, R. S. 1929, Mo. Stat. Ann. page 4324 are:

> "It is hereby made the duty of the inspector of oils, in addition to his other duties, either in person or by deputy or special agent, at least once in every six months, to minutely and carefully inspect and examine all premises in this state at or on which gasoline and motor vehicle fuels are kept and sold at retail: Provided, such sales at such premises shall aggregate on an average, more than two hundred gallons monthly. And it is hereby made the duty of said inspector, his deputies and special agents, to examine the surroundings, environments and construction of said premises and see the same are kept in such condition as to be reasonably safe from fire and explosion, and not likely to cause injury to adjoining property or to the traveling public."

From said Sections 13179 and 13218, we gather the opinion that the duty of inspection there imposed has reference chiefly to the welfare of the "laboring classes". Section 13399 is chiefly concerned with prevention of "injury to adjoining property or to the traveling public". Any reference therein to the welfare of the "laboring classes" is only by remote inference. While it is true that under Sections 13218 and 13399, the same premises may be inspected by two different departments, the two inspections are of a distinctly different nature and purpose. We believe the legislature did not intend to

substitute the remote inferential protection to the "laboring classes" provided by Section 13399 for the salutary benefits which accrue to them under the administration of the Commissioner of Labor and Industrial Inspection, and which are safeguarded by the inspection required by Section 13218.

"There is no express repeal of the prior existing law, and I do not think the language is sufficient to produce that result by implication. * * The settled rule of construction is that if by any fair interpretation all the sections can stand together, then there is no repeal by implication. * * * The law does not favor repeals by implication." McVey v. McVey 51 Mo. 406, l.c. 420. The propositions applicable to filling stations are applicable to bulk stations, because they are part of the same ultimate transaction. Having the right to inspect, the Department of Labor and Industrial Inspection has a right to collect an inspection fee, under Section 13219, R. S. 1929, Mo. Stat. Ann. page 4779.

CONCLUSION

It is our opinion that the Department of Labor and Industrial Inspection has a right to inspect and collect an inspection fee from gasoline filling stations and bulk plants.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
EH:RT

MOTOR VEHICLES: Certification of the description of the chattel mortgage on a motor vehicle can only be placed upon the certificate of title.

October 13, 1939

10-14

FILED
81

Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of October 12, 1939, which reads as follows:

> "With further reference to House Bill No. 546, which provides certification of chattel mort ages on automobile titles, I find we are receiving a number of inquiries from lenders as to whether we will make the certification on the chattel mortgage or a copy thereof when presented prior to their receipt of the title.
>
> "To make this a bit more lucid; a bank may approve a loan today on a new car; the old title which is in the possession of the purchaser is forwarded to Jefferson City in exchange for a new title, and there will, undoubtedly, occur a lapse of several days at this point until return of the title to the lending company.
>
> "I have ruled that there is no provision for making any record of certification upon the chattel mortgage,

and that the purpose designated by the statute is only accomplished through the act of certifying on the title itself.

"Will you kindly advise me as to whether I have ruled correctly."

House Bill No. 546, as passed by the last General Assembly and known as Section 3097A, Laws of Missouri, 1939, reads as follows:

"It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. For services herein provided the recorder shall receive a fee of twenty cents (20 cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided, however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles."

It will be noticed in the above Section 3097A that it specifically says "to certify on the certificate of title to the mortgaged motor vehicle".

This phrase is unambiguous and it is not necessary that it be construed. When a statute is in plain common English words it is not subject to construction. The purpose and intent of the Legislature was that notice to the whole world would be given if the description of the chattel mortgage would be placed upon the certificate of title, which is an instrument separate and apart from the chattel mortgage itself.

Section 3097A further provides that the certification of the recorder of deeds should be placed on the certificate of title showing "that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee". Surely it was not the intent of the Legislature that this information be placed on the chattel mortgage for the reason that the chattel mortgage has been filed by the recorder of deeds and the instrument itself would give the information that Section 3097A required to be placed on the certificate of title as requested by the mortgagee.

The purpose of the certification of the certificate of title was to prevent resale of a mortgaged automobile by use of a certificate of title that did not show a mortgage, and for the protection of the mortgagee. The stamping of such a notice on the certificate of title would be notice to the whole world that the car in question was subject to that lien if not released. In many cases the mortgagor is permitted to retain the certificate of title for the purpose of obtaining licenses, etc. By the stamping of the certificate of title as set out in Section 3097A, no fraud could be committed upon an innocent purchaser and it would also protect the mortgagee in the chattel mortgage.

In 59 C. J., page 952, it is said:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their inter-

> pretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning," citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2nd) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Grier v. Kansas City C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

In Betz v. Columbia Telephone Co., (App.) 24 S. W. (2d) 224, the Court said:

> "To get at the true meaning of the language of the statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made."

CONCLUSION.

In view of the above authorities, it is the opinion of this department that there is no provision for making any record of certification as to mortgages on automobiles upon the chattel mortgage itself, and the certification can only be made upon the certificate of title.

For your further information we are enclosing opinions which partially touch upon your request as follows:

an opinion dated September 19, 1939, addressed to Hon. Roy Coyne, Prosecuting Attorney, Joplin, Missouri; an opinion dated September 1, 1939, addressed to Mr. John P. English, Recorder of Deeds, St. Louis, Missouri; an opinion dated September 1, 1939, addressed to Hon. Roy Coyne, Prosecuting Attorney, Joplin, Missouri, and an opinion dated September 28, 1939, addressed to Mr. E. T. Hardy, Circuit Clerk, Shelbyville, Missouri.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

Encls.

COMMISSIONER OF LABOR: Has power to administer oaths or affirmations, to examine witnesses where he finds them and to take and preserve evidence, all provided Commissioner request information relative to his duties. Such evidence inadmissible in criminal prosecution except as admission.

October 24, 1939

11-3

FILED
81

Mr. Earl H. Shackelford
Commissioner of Labor and
Industrial Inspection
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for our opinion dated September 21, 1939, which is in the following terms:

> "The question does the Commissioner under the provisions of this section have the power to hold hearings and examine witnesses in an effort to ascertain or secure definite information as to whether or not there has been a violation of the provisions of the labor laws of Missouri, and may such evidence be used in the prosecution of violations?"

There are two statutory methods by which the Commissioner of Labor and Industrial Inspection, hereinafter referred to as the Commissioner, can obtain information.

One is provided by Sections 13184, 13185 and 13186, Article II, Chapter 95, R. S. Missouri, 1929, Mo. Sta Ann., pages 4766 and 4767. Section 13184 in part provides:

"The commissioner * * * is hereby directed to collect information * * * * to carry out the objects of the department as set forth in section 13179, and is hereby authorized to furnish suitable blanks * * * *."

Section 13185, in part provides:

"It shall be the duty of every owner, * * * of any factory, foundry or machine shop or other manufacturing establishment * * * to report annually, * * * to the commissioner * * *."

Section 13186, in part provides:

"The commissioner * * * is hereby authorized to furnish suitable blanks to the owner, * * * to enable said owner, * * * to intelligently comply with the provisions of Section 13185 of this article, and any such owner * * * who shall neglect or refuse to comply with the provisions of this article, or shall untruthfully answer any question or questions put to him by the Commissioner, in a circular or otherwise in furtherance of the provisions of sections 13184 and 13185, shall be deemed guilty of a misdemeanor, * * * *." (Underscoring ours)

Section 13186 by its terms is in aid of Sections 13184 and 13185.

The other method by which the Commissioner can obtain information, and which is the subject of this opinion, is provided by Sections 13181 and 13183, Article I, Chapter 95, R. S. Missouri, 1929, Mo. St. Ann., pages 4765 and 4766.

Section 13181, in part provides:

"The commissioner shall have power to administer oaths or affirmations, to examine witnesses and to take and preserve evidence; * * *."

The extent of the power given by Section 13181 is measured by the extent to which it can be enforced. The power of subpoena to compel the attendance of witnesses is an inherent power of courts (State ex rel. Rudolph v. Ryan, 327 Mo. 728, 38 S. W. (2d) 717), and not an inherent power by the common law of said commissioner. It follows that the only way in which the Commissioner can be given the power of subpoena to compel attendance of witnesses is by statute. Section 13181 does not do so.

The power of subpoena in Article III of the same chapter 95 containing the labor laws was by Sections 13199 and 13200, Mo. St. Ann., pages 4772 and 4773, expressly given to the Board of Mediation and Arbitration. A statute directing a thing to be done by a specific officer or body (said Board) implies that it shall not be done by a different officer or body (said Commission). 25 R.C.L. page 229 and cases cited; 59 C. J. page 984 and cases cited.

We believe that if the Legislature had intended for the Commissioner to have the power to subpoena witnesses, it would have made an express grant of said power to him also, as it did in the case of the Board of Mediation and Arbitration (See in Re Klein, 245 N Y S 486, 487, 138 Misc. 282).

Moreover, the grant of specific powers and methods in Section 13181 implies the intent of the Legislature toward the exclusion of other powers and methods, and that is particularly so because said section 13181 is creative, introducing a new rule. 2 Sutherland Statutory Construction (2d Ed.) pages 919, 920, Section 492; page 916, section 491.

Upon the foregoing authority, in our view, the Commissioner can administer oaths, examine witnesses and take and preserve evidence, but, in the sense of compelling the attendance of witnesses he cannot "hold hearings".

However, Section 13183, R. S. Missouri, 1929, Mo. St. Ann. page 4766, provides:

> "Any owner, operator, manager or lessee of any mine, factory, workshop, warehouse, elevator, foundry, machine shop or other manufacturing establishment, or any other employer of labor, or agent or employe of such owner, operator, manager or lessee, who shall refuse to said commissioner, when requested by him, any statistical or other information relative to his duties which may be in their possession or under their control, shall, for every such neglect or refusal, be deemed guilty of a misdemeanor, and shall, on conviction, be fined in a sum not less than twenty-five nor more than one hundred dollars." (Underscoring ours).

The location of said section 13183 in the law, being but one section removed from Section 13181, is one circumstance showing it referred to Section 13181 and is intended by the Legislature to aid the Commissioner in taking evidence under the authority of Section 13181. Unless this is true, Section 13183 would be unnecessary and virtually meaningless, because the other authority of the Commissioner to obtain information, in said Section 13184, by furnishing blanks, is aided by Section 13186, which particularly refers to information obtained in circulars, in blanks (by Section 13184) or in reports (by Section 13185). It is not presumed that the Legislature intended any part of a statute to be without meaning. 2 Sutherland Statutory Construction (2d) page 919, Section 491. It is to be presumed that

the Legislature intended every section of the act to have a meaning and to be effective. State v. Daues (1929), 14 S. W. (2d) 990, 1002, 321 Mo. 1126. In the light of the foregoing principles, we believe Section 13183 has the effect of aiding the Commissioner in enforcing the rights granted by Section 13181.

Said Section 13183 does not grant the power of subpoena to compel attendence of witnesses at a hearing. Lacking that power the Commissioner in order to exercise his rights under both Sections 13181 and 13183, has no alternative but to go where the witness is. There, the Commissioner can hold a hearing. There, witnesses "who shall refuse to said Commissioner, when requested by him, any statistical or other information relative to his duties which may be in their possession or under their control," (Section 13183) are guilty of a misdemeanor. The refusal of a witness properly before the Commissioner to take an oath or affirmation, that being an essential part of the examination, or to be examined by the Commissioner, or to answer questions by him, would constitute such refusal as would be a misdemeanor under Section 13183, subject to the three following qualifications.

First. The power of the Commissioner granted by Section 13181, can be enforced only against persons, witnesses, within the enumerations in Section 13183. It is not possible in this opinion to say who might fall within those enumerations. It may be stated generally, that the general words in Section 13183 include persons and things of the same general kind or nature or class as those specifically enumerated. This is in keeping with the ejusdem generis rule, which is especially applicable to the penal statutes (59 C. J. page 982), and which was stated in the following terms by the Supreme Court of Missouri in State ex rel. Goodloe, et al. against Wurdeman, 227 S. W. 64, l. c. 67, 286 Mo. 153:

> "It is a familiar rule of statutory construction that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase should be construed to refer to things of the same kind."

Second. The power of the Commissioner, granted by Section 13181, can be enforced only in connection with requests by him for the kind of information described in Section 13183; and that is "information relative to his duties." That kind of information is only information of violations (of the labor laws) which it is the duty of the Commissioner to prosecute or to cause to be prosecuted. This would seem to answer the question whether the Commissioner by holding a hearing may seek information as to whether there has been a violation of the labor laws of Missouri. Violations which it is the duty of the Commissioner to prosecute or cause to be prosecuted are too numerous to discuss here. They will be found in the following places.

Section 13191, R. S. Missouri, 1929, Mo. St. Ann. page 4769 requires the Commissioner to prosecute violations of three other sections, all in Article III, Chapter 95.

Section 13213, R. S. Missouri, 1929, Mo. St. Ann. page 4777, requires the Commissioner to prosecute violations of two other sections, all in Article IV, Chapter 95.

Section 13263, R. S. Missouri, 1929, Article VI, Chapter 95, Mo. St. Ann. page 4808, requires the Commissioner to prosecute all violations of the provisions of that article, which are misdemeanors. Said article VI contains 47 sections.

Section 13246, R. S. Missouri, 1929, Mo. St. Ann. page 4802, Article VI, Chapter 95, requires the Commissioner to prosecute violations of other laws for the protection of employees.

Section 13306, Article XII, Chapter 95, R. S. Missouri, 1929, Mo. St. Ann. page 4823, requires the Commissioner to prosecute or to cause the prosecution of all violations of the provisions of that article, which are misdemeanors. Said Article XII contains six other sections with numerous provisions.

Third. A witness may refuse to answer on the constitutional ground that his answer may tend to incriminate him, under Article II, Section 23 of the Missouri Constitution which in part provides:

> "That no person shall be compelled to testify against himself in a criminal cause, * * * * *."

> "The immunity afforded by the constitution is broad enough to protect him against self crimination before any tribunal, in any proceeding." State v. Jacob Adam Young, 119 Mo. 495, l. c. 520, 24 S. W. 1038.

The request for opinion asks whether evidence adduced at a Commissioner's hearing is admissible in a criminal proceeding for violation of the labor laws.

> "The admissions which are received against defendant in a criminal prosecution include those which are made by him in civil actions or proceedings, such as those contained in his testimony, verified pleadings and bankruptcy schedules; * * * * *" 16 C. J. and cases cited.

Statements made voluntarily and under oath, by a party on a motion for a continuance, may be given in evidence against him if pertinent to the issue. State v. Chris Young, 12 S. W. 879, 99 Mo. 666.

On the strength of that analogous authority, one's voluntary testimony at the Commissioner's hearing may be given in evidence as an admission against him in a criminal prosecution for violation of the labor laws.

Other evidence adduced at the Commissioner's hearing would be inadmissible in a criminal prosecution, because Article II, Section 22 of the Constitution of Missouri provides that the accused shall have the right "to meet the witnesses against him face to face."

Generally, the evidence here considered would not be within any of the exceptions to the above constitutional provision, of which a dying declaration or testimony of a witness since deceased are examples.

The fundamental propositions embodied in the above quoted section of the Missouri Constitution, and the exceptions thereto, are fully discussed in State v. McO'Blenis, 24 Mo. 402.

CONCLUSION.

The Commissioner of Labor and Industrial Inspection has the power to hold hearings where he finds the witnesses and to examine witnesses in an effort to ascertain or secure definite information as to whether or not there has been a violation of the provisions of the labor laws of Missouri, provided it is the duty of the Commissioner to prose-

cute or to cause a prosecution of such violations. Such evidence may not be used in a criminal prosecution except as an admission.

Respectfully submitted

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

EH:RV

STATUTES:
REPEAL OF STATUTES:
EFFECT OF REPEAL:

The effect of the repeal of a statute is to revoke or recall the provisions of same.

December 5, 1939

12-17

FILED
81

Mr. John P. Sherrod
Recorder of Deeds
Jackson County
Kansas City, Missouri

Dear Sir:

This is in reply to your request for an official opinion from this department based on the following statement:

> "On page 840 Revised Statutes of Missouri, under subject 'Taxation and Revenue', will you kindly refer to the act repealing section 9784, and advise me whether my interpretation is correct, namely, that this Recorder's Office cease the use of the Land List:"

The section of the statute to which you refer as being repealed is 9784, R. S. Missouri 1929, which provides as follows:

> "On or before the first day of June, 1883, the county court of each county in the state, except in the city of St. Louis, shall furnish the county recorders of the respective counties with a book, to be known as and denominated the 'land list,' which shall contain all lands in the county, arranged as nearly as may be in numerical order of range, township, sections and parts of sections, by the least legal subdivisions, lots or parcels, when sections or subdivisions thereof

are subdivided into lots or parcels; and all lots or parcels of land in cities, towns or villages, according to the number of block, lot or parcel, and all lands designated by numbered surveys or parts of surveys, and all lands that can be described in numerical order, shall be placed in the 'land list,' with the owner's name, if known, and if not known, then the name of the original patentee, grantee or purchaser from the federal government, state or county, as the case may be, opposite thereto--the lowest numbered range, township, section, block or survey always to be placed first in the list in making up the book. In making up this book, if there be any land in any section or block that cannot be described as set forth above, it shall be otherwise briefly described, indicating the quantity and location thereof, with the owner's name, if known, alphabetically arranged opposite thereto, and be placed at the foot of the descriptions of the lands in the section or block of which it forms a part. The book shall be arranged in tabular form with suitable captions. It shall contain twelve ruled columns, ten of which shall be left blank; the first column shall contain the name of the owner; the second column shall contain an accurate description of the land. The recorder shall, whenever any deed conveying the title to real estate in the county is left with him for record, before recording the same, enter in the blank space in the 'land list,' opposite

> and next to the description of the land so conveyed, the name of the purchaser and date of purchase, and if there be any change in the description of the land from that already entered in the 'land list', he shall also note that variance by stating what part or parcel of the original has been so conveyed. As compensation for the compliance with the requirements of this section the recorder shall receive the sum of ten cents for each peice so transferred, to be paid by the party presenting the deed for record. Upon failure to comply with the requirements of this section, the recorder so neglecting shall be liable on his bond in any sum not less than twenty-five dollars or more than one hundred dollars for each neglect to enter said transfers. If, in making up the 'real estate book,' the assessor finds that the recorder has failed, as above stated, he shall at once notify the county attorney, who shall forthwith commence suit against the recorder and his bondsmen in the name of the state of Missouri, and for the use and benefit of the school fund."

By Senate Bill number 134, Laws of Missouri, 1939, page 840, an act was passed by the General Assembly to repeal said Section 9784. This act was approved on May 22, 1939, and your question is as to whether or not this repealing act relieves you from performing the duties imposed on your office by virtue of the provisions of said Section 9784.

In Volume 59 Corpus Juris, page 899, paragraph 498, the term "repeal" as it applies to statutes, is defined as:

> "The primary meaning of the word 'repeal,' as used in speaking of the repeal of a statute, is, as

> its etymology imports, the recalling or revoking of the statute."

This term is plain and does not need any further definition.

It appears from your request that you are in doubt of whether or not you continue to make up a record known as the "land list." You will note that Section 9787, R. S. Missouri 1929, provides as follows:

> "Nothing in the preceding five sections shall be construed to apply to counties which have already adopted a method of plats and abstracts to facilitate the assessment and collection of the revenue; nor shall the provisions of the preceding five sections apply to counties having a less population than forty thousand, unless a majority of the voters in any such county shall elect to adopt its provisions at a general election, upon the question being ordered to be submitted by the county court: Provided, that in counties having a population of over forty thousand the county court may, in addition to the foregoing provisions for securing a full and accurate assessment of all property therein liable to taxation, or in lieu thereof, by order entered of record, adopt for the whole or any designated part of such county any other suitable and efficient means or method to the same end, whether by procuring maps, plats or abstracts of titles of the lands in such county or designated part thereof or otherwise, and may require the assessor, or any other officer, agent or employe of the county to carry out the same, and may provide the means for paying

therefor out of the county treasury."

And, of course, if the county court of your county has adopted a method of plats and abstracts to facilitate assessments and collection of revenue, then the repealing of Section 9784 would not affect you and you would still have to continue the plan adopted by your county. However, if you are affected by the repeal of said Section 9784, we think that you are still required, under Section 11546, to make and keep a record which is very similar as required in the repealed Section 9784. Said Section 11546, provides as follows:

> "The recorder of each county in this state shall keep in his office a well-bound book or books, to be known as the 'abstract and index of deeds,' which shall have appropriate columns properly ruled and headed for each of the following items, namely: Names of grantors and grantees, date of instrument, date of filing instrument for record, nature of instrument, book and page where recorded, description of land conveyed or affected; said books shall be divided into two equal parts, the front part to be alphabetically arranged for the names of grantors, and the back part to be alphabetically arranged for the names of grantees."

By comparing Sections 9784 and 11546, it seems that almost the same information is required to be kept by the recorder. Since Section 11546 is not repealed, then, of course, you would have to continue your duties as prescribed by that section.

CONCLUSION.

It is, therefore, the opinion of this department if your county has not already adopted a method of plats and abstracts to facilitate assessments and collection of

revenue other than that which was provided under Sections 9782 to 9786, inclusive, then since said Section 9784 is repealed, of course, you would not be required to perform the duties imposed by that section which included the making and keeping of the "land list."

We are further of the opinion, however, that under said Section 11546, you are required to make and keep a record indexed directly and indirectly, the grantors and grantees, showing practically the same information which is required to be shown in the "land list book."

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

LABOR: Person remaking bedding consisting of sterilized feathers not required to obtain a permit or pay fee.

December 21, 1939

FILED
81

Honorable Earl H. Shackelford
Commissioner of Labor
Labor and Industrial Inspection Dept.
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

> "A question has arisen with reference to the authority of this department in the issuance of bedding permits as required under section 13307 of the Revised Statutes of Missouri, 1929. Section 13300 Revised Statutes of Missouri, 1929 defining 'mattresses' excepts bedding 'where the filling consists exclusively of sterilized feathers.' The question: Is an individual firm or corporation accepting feather bedding, pillows, etc., from the owner for the purpose of renovating, remaking and sterilizing required to pay a fee and secure a permit under the provisions of the bedding act of Missouri?"

Chapter 95, R. S. Missouri 1929, deals with the Department of Labor and Industrial Inspection and Article 12 of such chapter relates to the jurisdiction and the duties of such department in regard to the manufacturing or renovating of mattresses. Section 13300, R. S. Missouri 1929, which is a part of Article 12, provides in part as follows:

"(1) The term, 'bedding,' as used in this article shall be construed to mean any mattress, upholstered spring, comforter, pad, cushion or pillow designed and made for use in sleeping or reclining purposes, except where the filling consists exclusively of sterilized feathers."

Section 13307, R. S. Missouri 1929, provides as follows:

"When the state commissioner of labor and industrial inspection has inspected any factory in the state of Missouri where bedding is being made or is to be made, remade or renovated, and has found that the factory conforms to the sanitary conditions prescribed by the state commissioner of labor and industrial inspection, then it shall be the duty of said commissioner to issue to the person operating such factory a permit showing that it has been inspected and declared a proper place in which to make, remake or renovate bedding; and assign it a registry number by which said factory shall thereafter be known and designated in applying and enforcing the labeling and inspection provisions of this article. Said permit shall be posted by the person to whom it is so issued in a conspicuous place in said factory or office thereof."

Section 13308, R. S. Missouri 1929, provides:

"No person shall make, remake or renovate bedding, except a person

> making, remaking or renovating bedding for his own use, until he has secured a permit from the state commissioner of labor and industrial inspection and has paid to the state commissioner of labor and industrial inspection an inspection and permit fee of twenty dollars, which such payment or charge shall constitute a factory inspection charge for the purpose of enforcing this article. The permit so issued by the state commissioner of labor and industrial inspection shall remain in force and effect until the end of the calendar year in which it was issued or until voided by the state commissioner of labor and industrial inspection for failure to maintain the required sanitary conditions in and around a factory in which bedding is made, remade or renovated or for failure to sterilize and disinfect properly all previously used materials used in making, remaking or renovating bedding."

From a reading of the above statutes, it will be seen that only a person who makes, remakes or renovates "bedding" is required to obtain a permit and pay an inspection fee.

Section 13300, supra, explicitly excepts from the term, "bedding," a filling consisting exclusively of sterilized feathers.

It is a rule of statutory construction that where the language of a statute is plain and admits of but one meaning, there is no room for construction. Cummins v. Kansas City Public Service Co., 66 S. W. (2d) 920, 324 Mo. 672. As was said in State v. Shain, 106 S. W. (2d) 898, 341 Mo. 19:

"* * * * if the intention is clearly

> expressed, and the language used is without ambiguity, all technical rules of interpretation should be rejected.'"

While we are unable to see the reason for excepting a filling consisting of sterilized feather, from the purview of the statute, still the Legislature in its wisdom has seen fit to do so, and to quote the words of Shakespeare--"It is not fit to ask the reason why."

CONCLUSION.

It is, therefore, the opinion of this department that an individual, firm or corporation accepting bedding whose filling consists exclusively of sterilized feathers for the purpose of remaking or renovating the same are not required to obtain the permit nor to pay the fee mentioned in Sections 13307 and 13308, R. S. Missouri 1929.

Respectfully submitted,

ARTHUR O'KEEFE
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

AO'K:DA

CLERKS OF COURTS -
COSTS -

Circuit Clerk in issuing fee bills for costs should include therein all costs of case including jurors' and witness' fees, sheriffs' costs etc. If plaintiff deposits an amount for security of costs and the same is not sufficient to include all costs of case the plaintiff if he is losing party can be required to pay the difference. Fee bills, and executions thereon can be issued up to or during such time thereafter as judgment for costs might be revived.

May 22, 1939

FILED
82

Hon. John E. Short
Circuit Clerk
Ray County
Richmond, Missouri

Dear Sir:

We have received your letter of May 2nd, which reads as follows:

"In the matter of issuing fee bills for costs in civil cases, there seems to be a question as to whether the Circuit Clerk can issue the fee bill for his costs or include the costs of the case in the fee bill, that is the witnesses, sheriff's costs or any that might accrue.

"Under section 11785 R. S. 1929, it mentions that 'The remedy of officers for their fees is by fee bill.' Does that mean that the clerk in issuing a fee bill for costs in a case shall include another cost other than his costs?

"Another question is, where the filing fee of $5.00 is paid the clerk and after the case is in court there is by order of court a $50.00 fee for security for costs paid the clerk by the Plaintiff and the Plaintiff looses

his case, and in case the costs or more than the $55.00, can the clerk collect more than the $55.00 or is the amount of $55.00 all he can get because the security was put up for costs. Can a fee bill be issued for the rest of the costs against the plaintiff.

"Can a clerk issue a fee bill for costs after three years have elapsed since the judgment was rendered.

* * * * * * * * * * * *

"P.S. Where the Clerk prorates the amount that he has and cannot collect the full amount should the proration include all parties who are entitled to a fee or use the amount collected for officers of the court only."

The first question you ask is whether a clerk of a Circuit Court can or shall include costs other than his own in a fee bill such as witness' fees and sheriff's costs.

Section 11776 R. S. Missouri, 1929, makes such a requirement of circuit clerk's, This section reads in part as follows:

"The several officers hereinafter named, and jurors and witnesses, shall be allowed such fees for their services rendered in

> discharging the duties imposed upon them by law as are hereinafter provided, and the clerks of the courts of record and the presiding officers of courts of inferior jurisdiction shall strictly examine the accounts of all fees accruing during the progress of any civil suit pending in their said courts, and shall correct the same if wrong in any manner, and shall thereupon enter the amount thereof upon their fee books, and the said clerk and the other officers before mentioned shall after the term of the court at or before which the services were rendered, if required by the party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same; and if the person or persons and their sureties for costs properly chargeable with such fees shall neglect or refuse to pay the amount thereof, and costs for issuing and serving the same, within thirty days after demand of said sheriff or other officer aforesaid, the same shall be levied of the goods and chattels, moneys and effects of such persons or their sureties, in the same manner and with like effect as on an execution; * "

Section 11789, R. S. Mo. 1929 and contained in the same article as is 11776, supra, provides what

fees sheriffs shall be allowed for their services. Consequently the fees of sheriffs are included within the meaning of section 11,776, supra, and are to be included by the Circuit Clerk in making up his fee books.

All of the fees and costs mentioned in section 11776 are to be entered on the Circuit Clerk's books and as stated in said statute each Circuit Clerk shall " if required by the party entitled to the fees certify a fee bill of such services " and deliver the same to the sheriff or officers for collection.

Therefore, in answer to this question it is quite apparent that the Circuit Clerk should include witness' fees and sheriff costs together with his own allowable costs in making up fee bills.

Your second question can be stated in this form: Suppose a plaintiff pays a five dollar filing fee and deposits an additional fifty dollars for security of costs, making a total of fifty-five dollars paid to the Clerk. If the total costs for which the plaintiff might become liable should amount to sixty-five dollars, can the ten dollars be collected from the plaintiff.

Section 1238 R. S. Mo. 1929 provides that under certain circumstances a plaintiff may be required to give a cost bond or make a deposit, this section reads as follows:

> "If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court

> with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined."

It will be observed that after the original deposit is made the plaintiff may be required to increase the amount if the court deem it proper to so order. Whether or not the amount of the bond is to be increased, however, is a discretionary matter with the court.

The statute says that "whenever the court may deem proper and by its order require" the amount of deposit shall be increased. In other words, the intent seems to be that the plaintiff shall pay all costs that might be adjudged against him whether the original deposit is large enough to cover the same or not.

Neither this statute nor any other states that the plaintiff shall be liable only to the extent of the deposit, whatever it should happen to be. The effect of this statute is that the original deposit required might be too low, in which event the court may increase it. The only purpose in increasing it would be to insure the payment of all the costs which might be assessed against the plaintiff and not that the plaintiff should be liable only for any amount which he might deposit as security for costs.

We also call your attention to section 1242 R. S. Mo. 1929, which reads as follows:

> "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

This section states that in all civil actions the party prevailing shall "recover his costs from the other party." This section does not say a part of the costs, or the amount of any deposit the court might require, but says "his costs". This necessarily means all of the costs. We conclude then that the plaintiff is liable for the payment of the ten dollars and costs which is over and above the amount deposited by the plaintiff and that the same can be collected from the plaintiff.

You state your next question in the following language: "Can a clerk issue a fee bill for costs after three years have elapsed since the judgment was rendered?"

Section 11776, supra, states that the civil officers and jurors, and witnesses, shall be allowed such fees for their services rendered as provided by law, and the clerks of the courts of record shall strictly examine

the accounts of all such fees accruing during the progress of any civil suit pending in their said courts and such clerks "shall thereupon enter the amount thereof upon their fee books". This section further provides that said clerk "shall, after the term of the court at or before which the services were rendered, if required by the party entitled to fees, certify a fee bill of such services and deliver the same to the sheriff or other officer of the proper county charged by law with the service of executions, who shall proceed forthwith to collect the same."

In this connection we again quote section 1242, supra, regarding the liability for costs in civil suit. This section is as follows:

> "In all civil actions, or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law."

The effect of the above section is that when one party to a suit is successful, a judgment for the costs is rendered in his favor at the same time against the losing party to the suit. In the case of McCrary v. Michael, 109 S. W. (2d) 50, the St. Louis Court of Appeals reversed a judgment for costs and said: (l.c. 53)

> "It follows, therefore, that the judgment of the trial court in so far as it taxes the costs against the estate should be reversed and the cause remanded to the circuit court, with directions to tax the costs against the unsuccessful contestants, and it is so ordered."

Since a judgment for costs is rendered against the losing party and the prevailing party is entitled to recover such costs by execution after requesting the issuance of a fee bill by the Circuit Clerk, we believe that section 886 R. S. Mo. 1929, is the applicable statute with reference to the time during which a fee bill and execution thereon might issue. Section 886 R. S. Mo. 1929, reads as follows:

> "Every judgment, order or decree of any court of record of the United States, or of this or any other state, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever."

It follows, therefore, that since the judgment for costs rendered the prevailing party in a civil action

is a judgment, order or decree of a court of record that the same shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof or after any period during which the same might have been revived and that the issuance of a fee bill and execution thereon can be accomplished during such period the same as in connection with any other judgment. The fact that there is a judgment for costs rendered which is in the nature of a judgment is further brought out by the case of Garner v. Hays, 3 Mo. 436. In that case the plaintiff had recovered a judgment against the defendant for his debt and costs. The defendant paid the debt recovered but refused to pay the costs. After the expiration of a year and a day from the rendition of the judgment the plaintiff caused a scire facias to be issued out to revive the judgment for costs and the court held that the judgment for costs could be so revived. The court said:

> "Only such costs as were legal and proper could have been recovered under the original judgment, and such only are recoverable by execution on the judgment as revived. * * A judgment for costs generally is good.
> *
> Upon the whole, therefore, the circuit court did right in refusing to quash the scire facias, and giving judgment as to the costs recovered in the original suit, and its judgment is therefore affirmed, with costs."

In your next question you ask whether a clerk when he cannot collect the full amount of costs should pro rate the amount he does have on hand with all of the parties entitled to fees. It is our opinion that the clerk should pro rate such funds among all parties entitled to fees, including yourself, the sheriff, witnesses and jurors. There is no statute in this state

which gives any of these persons a prior claim to any of the deposits on hand or amounts collected for the payment of costs. None of the appellate courts, as far as we have been able to determine have ever passed on this question, but since the law does not give any prior claim to any of such parties, it is only equitable and fair that the same should be pro rated.

Respectfully submitted,

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

JFA:RW

CRIMINAL COSTS. State Highway Patrolmen are entitled to witness fees when the trial is held more than five miles from their place of residence and are entitled to the same fees for the transportation of prisoner as allowed the sheriff or any other officer.

February 10, 1939

P

2-20

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of February 8th, 1939, which reads as follows:

> "We are in receipt of a Cost bill from Clinton County in the case, State vs. Pope, in which a number of Highway Patrolmen were used as witnesses and charged mileage and their witness fees from Jefferson City. This fellow, Pope was charged with robbing a bank which had nothing at all to do with enforcing the highways.
>
> "I am enclosing a letter from the Deputy Circuit Clerk of Clinton County showing the comment of Judge Bridgman, Circuit Judge questioning the right of Highway Patrolmen to charge mileage and witness fees in testifying as state witnesses.
>
> "I would like an opinion from your department as to whether Highway Patrolmen can legally charge witness fees and mileage in criminal cases."

Section 13, Session Laws of Missouri, 1931, page 235, states as follows:

> * * "The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. * "

Section 11, Session Laws of Missouri, 1931, page 234, states as follows:

> * * "All fees for the arrest and transportation of persons arrested and witnesses' fees for members of the patrol shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law. * * *"

The fees allowed the sheriff are set out in sections 11791-2, R.S. Missouri, 1929, and are too lengthy to set out in this opinion.

State Highway Patrolmen, when acting as witnesses, only are allowed the same fee as a witness.

Section 11798, R. S. Missouri, 1929, reads as follows:

> "Witnesses shall be allowed fees for their services as follows: For attending any court of record, reference, arbitrators, commissioner, clerk or coroner, at any inquest or inquiry of damages, within the county where the witness resides, each day, $1.50. For like attendance out of the county where witness resides, each day, $2.00. For traveling each mile in going to and returning from the place of trial, .05."

Section 3837 R. S. Missouri, 1929, which prohibits an officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen, from claim-

fees in criminal cases, is also governed by the provision that reads as follows:

> * * *"Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session: *"

By this provision which covers state officers, which would be a highway patrolman, the provision of this section would not apply where the officer is a witness in any case where the residence of such officer is five miles from the place of the trial. This section should be construed that mileage in the case of police officers should be computed from the place of residence to the place of trial and return to the place of residence.

It will be also noticed that under section 11, Session Laws of 1931, page 234, that the necessary expenses of the members of the patrol in the performance of their duties shall be paid by the state when such members are away from their places of residence or from the district to which they are assigned, subject to the approval of the Commission.

In reading the two sections together, that is section 11, Session Laws of Missouri, 1931, page 234, and section 3837 R. S. Missouri, 1929, the patrol officers should only be allowed mileage in the case from their place of residence to the place of trial and their return and not from any other place in the state.

The duties of the Prosecuting Attorney, and the Judge of the trial court in certifying a fee bill is set out in section 3844, R. S. Missouri, 1929, which reads as follows:

> "When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

In that section it will be noticed the certificate of the judge and prosecuting attorney shall contain a statement showing that the fees charged are expressly authorized by law, and that the fees of no more than three witnesses to prove any one fact are allowed. It is discretionary with the judge of the trial court to limit the payment of the costs of more than three witnesses to prove any fact, but more than three witnesses may be used in the proving of any one fact but only the witness fees of three witnesses should be allowed as costs in the fee bill for the proving of any one fact.

It was so held in the case of State vs. Mahan, 267 S. W. 866, l. c. 867, where the court said:

> "It is claimed the court erred in refusing to allow the defendant to introduce more than three witnesses as to the reputation of Melton for being a dangerous character. It is true the court has no right to limit the number of witnesses which the defendant may summon in his behalf. State ex rel. v. Gideon, 119 Mo. 94, 24 S. W. 748, 41 Am. St. Rep. 634. Section 4193, R. S. 1919, does not limit the number of witnesses which may be produced in proof of any specific facts, but simply limits the assessment of costs in such case."

CONCLUSION

In view of the above authorities, and especially the Highway Patrol Act, which states that the "members of the patrol shall have the powers now or hereafter vested by law in peace officers, except the serving or execution of civil process"; and, also, since the Highway Patrol Act states, "all fees for the arrest and transportation of persons arrested and witness fees for members of the patrol, shall be the same as provided by law for sheriffs and shall be taxed and collected as costs and paid into the state treasury as provided by law", the State Highway Patrol would be entitled to the same fee as the sheriff while acting as an officer and also the same fees as a witness.

It is further the opinion of this department that mileage should only be computed by the State Highway Patrol as a peace officer, from the place of apprehension of the defendant without a warrant to the place of trial, and if the State Highway Patrol is acting merely as witnesses they are only entitled to mileage from the place of residence of the witness to the place of trial

and return to the place of residence, where the trial is held more than five miles from the place of residence, and regular witness fees.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RW

CIRCUIT CLERKS: Interested parties desiring papers recorded in office of circuit clerks may obtain same by paying fee provided in Section 11678, R. S. Mo. 1929.

February 20, 1939

4-3

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Attention: Mr. W. A. Holloway

Dear Sir:

We are in receipt of your letter of February 17th wherein you state as follows:

> "We are in receipt of your opinion dated January 24, 1939, construing Sections 11677 and 11678, R. S. Mo., 1929, and stating that same are still in effect.
>
> This opinion implies by extended quotations of Sections imposing duties on circuit clerks to charge and collect for the county in all cases every fee accruing to this office, including fees under Section 11678, R. S. Mo. 1929.
>
> It is further pointed out that Sections 11677 and 11678, R. S. Mo. 1929, were not repealed by the 1937 Session Acts.
>
> In a situation where a circuit clerk taxes a recording charge regularly under these sections in all cases filed in his office, is such procedure in compliance with the Statutes?"

Sections 11677 and 11678 R. S. Mo. 1929 to which you refer provides as follows:

Section 11677 -

> "In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: Petitions, summons, affidavit for publication of notice to nonresident or unknown defendants, sheriff's, or other officer's, return of service to summons, proof of publication of notices to nonresident or unknown defendants, answers, motions, notices of sale of property involved and proof of its publication, return of sale by any sheriff, commissioner, or other officer, in case of sale of real estate, affidavit of commissioner, notice to parties by commissioner in partition; and any other paper or pleading tending to show the service on the defendants for their appearance in such case."

Section 11678 -

> "All clerks of the circuit court shall receive as compensation for recording papers under section 11677 of t his article the sum of ten cents per one hundred words, to be retained by said circuit clerks, and said clerks are not required to account for same in their annual or quarterly settlements."

As we understand your letter, and as Messrs. Barlow

and Garrison, of your staff, advised orally, a number of circuit clerks are recording various papers outlined in Section 11677 R. S. Mo. 1929, such as petitions, summons, affidavit for publication of notice, etc., without being requested by any interested party, and proceeding to tax same as costs in every case, which they retain as fees.

Some circuit clerks have evidently construed the phrase "have any or all of the papers recorded in the office of the clerk of the county in which such action is brought," as being mandatory upon them to record said papers. Such, however, is clearly not the case for the statute provides that same is only to be recorded when "any party interested therein may" desire same to be done, and "upon the payment of the fees."

Section 11676 R. S. Mo. 1929 provides what matters are to be recorded by the clerk:

> "Every clerk shall record the judgments, rules, orders and other proceedings of the court, and make a complete alphabetical index thereto; issue and attest all process when required by law and affix the seal of his office thereto, or if none be provided, then his private seal; keep a perfect account of all moneys coming into his hands on account of costs or otherwise, and punctually pay over the same: Provided, that where the clerk of the circuit court is a party, plaintiff or defendant (whether singly or jointly with others) to a suit or action, the writ of summons and all other process shall be issued by the clerk of the county court, the reason therefor being noted on said process, and said latter named clerk shall, on the trial of said cause, act as temporary clerk of the circuit court and otherwise perform in said cause all the duties of the circuit court clerk."

From the foregoing, we are of the opinion that circuit clerks are not to record papers outlined in Section 11677 R. S. Mo. 1929 unless specifically requested by parties interested therein, and when so requested are entitled to the fee provided in Section 11678 R. S. Mo. 1929.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

CRIMINAL COSTS: Sheriff is not entitled to mileage fees for a deputy sheriff for the apprehension of a prisoner before conviction.

March 10, 1939

3-13

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

FILED
83

Dear Mr. Smith:

This is in reply to your request for an opinio under date of March 6th, which reads as follows:

"We are submitting to you two supplemental criminal cost fee bills from Phelps County, Missouri, in the above mentioned cases, and would like to have an opinion from your office in regard to the State's liability for payment of same. We give you information in regard to the items listed, to-wit:

In Case No. 2529 a complaint was filed against the defendant in Justice of the Peace Court in Phelps County, Missouri, and a state warrant was issued by the Justice and handed to Sheriff Fred C. King of Phelps County to serve. The defendant was apprehended outside of the State of Missouri. The prisoner waived extradition and was returned by Sheriff King to Phelps County, Missouri. The Sheriff has submitted a relief claim to the Legislature for mileage and expenses outside of the State in this case. The 1248 miles at 5¢ per mile listed on the cost bill for Sheriff's fees in Justice of the Peace Court is for mileage of the Sheriff from Phelps County, Missouri to the Missouri state line and

return. The 1248 miles at 5¢ per mile for deputy sheriff fees is also mileage from Phelps County, Missouri to the Missouri state line and return in assisting the Sheriff in the arrest and return of said prisoner. The 624 miles at 5¢ per mile Sheriff fees for prisoner is mileage on prisoner from the Missouri state line back to Phelps County, Missouri.

In Case No. 2528 the circumstances are very much the same as those in No. 2529, except that the defendant escaped jail while awaiting trial on the first charge and was later apprehended in a foreign state and the Sheriff was again given a state warrant from Justice Court and went to the foreign state and brought the prisoner back to Phelps County for trial on a charge of breaking jail.

We desire to have your opinion in regard to the State's liability for payment of each of the items listed on these bills, * * "

Section 11791, R. S. Mo. 1929, partially reads as follows:

"The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, or who may remove a prisoner from one county to another for any cause authorized by law, or who shall have in custody or under his charge any person undergoing an examination preparatory to his commitment more than one day for transporting, safe-keeping and maintaining any such person, shall be allowed by the court, having cognizance of the offense,

> one dollar and twenty-five cents per day for every day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer.

Under this part of the section the fees are allowed the sheriff who shall take a person charged with a criminal offense before conviction from one county to another. Under this section, he is entitled to 5¢ per mile going and returning from one county to another. It will be noticed under this section that the guard employed shall, in no event, exceed the number allowed for transporting convicts to the penitentiary.

Section 11791, R. S. Mo. 1929, also partially reads as follows:

> "When three or more convicts are being taken to the penitentiary at one time, a guard may be employed, but no guard shall be employed for a less number of convicts except upon the order, entered of record, of the judge of the court in which the conviction was had, and any additional guards employed by order of the judge shall, in no event, exceed one for every three prisoners; * * "

Under this part of Section 11791, the number of guards that are allowed only applies to the taking of prisoners after conviction. It will be noticed under this part of the section that no extra guard shall be employed for a less number than three convicts, except by the order of the judge

of the court of record. This part of the section only applies to the taking of convicts to the penitentiary after conviction and does not apply to the facts of the case set up in your request. Under the facts in the case set up in your request, the fees claimed by the sheriff accrued before conviction.

Section 11791, R. S. Mo. 1929, partially provides:

> " * * the sum of five cents per mile for each mile traveled, while being taken to the penitentiary, shall be allowed to the sheriff to cover all expenses of each convict while being taken to the penitentiary; * * * "

This section provides a payment of 5¢ per mile for each mile traveled while being taken to the penitentiary to cover all expenses of each convict. Under this part of the section, the sheriff is allowed 5¢ per mile from the place of apprehending the prisoner to the place of confinement. There is no provision in Section 11791 for the allowance or the use of a deputy sheriff in the taking of a prisoner from one county to another before conviction. Under the facts stated in your request, the sheriff himself is entitled to 838 miles traveled at 5¢ per mile, also he is entitled to the fees of 5¢ per mile for the upkeep of the prisoner from the state line back to the courthouse of Phelps County, this being the fees allowed under case No. 2528. The same rule applies to case No. 2529 which would allow the sheriff 5¢ per mile from the county seat to the state line and return to the county seat with the prisoner. There is no provision for the use of a deputy sheriff in Section 11791, supra, under the facts in this case. The sheriff is also allowed 5¢ per mile for the upkeep of the prisoner from the state line back to the county seat of Phelps County.

Nowhere in Section 11791, R. S. Mo. 1929, can any authorization be pointed to allowing a guard for the apprehension of one prisoner before conviction.

The fees of sheriffs are specifically set out in crimi-

nal matters under Sections 11791 and 11792.

Unless the authorization of any fees is set out in the two above sections, which applies to criminal matters only, it would be unlawful to allow any other fees.

Section 11793, R. S. Mo. 1929, reads as follows:

> "No sheriff or ministerial officer in any criminal proceeding shall be allowed any fee or fees for any other services than those in the two preceding sections enumerated, or for guards not actually employed."

CONCLUSION

In view of the above authorities, it is the opinion of this department that the sheriff of Phelps County is entitled to 5¢ per mile actually traveled from the county seat of Phelps County to the state line and return to the county seat. Also, the sheriff, under the above authorities, is entitled to 5¢ per mile for the upkeep and expenses involved in bringing the prisoner from the state line back to the county seat of Phelps County.

It is further the opinion of this department that under the facts set out in your request, which is an apprehension before conviction, the sheriff is not entitled to mileage or fees for a deputy sheriff as a guard. This applies to case No. 2528 and case No. 2529.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RT

PROSECUTING ATTORNEY: Can be Probation Officer without violation of Section 18, Article 9 of the Missouri Constitution.

March 13, 1939

3-22

FILED
83

Honorable C. H. Skinker
Judge 18th Judicial Circuit
Bolivar, Missouri

Dear Judge Skinker:

We wish to acknowledge your recent letter wherein you state as follows:

"I wish to thank you for your letter of February 21st, enclosing your opinion on the subject of the eligibility of a prosecuting attorney to serve as a probation officer in a county of less than fifty thousand inhabitants.

I entirely agree with you that there is no conflict in the duties of the two officers, and I think as a matter of fact in most of the small counties the prosecuting attorneys have been performing the services which probation officers are supposed to perform.

However, your opinion does not go into the question of whether or not a prosecuting attorney can be probation officer without violating the provisions of Section 18 of Article 9 of the Constitution of this State.

This Section provides: 'No person shall, at the same time, fill two municipal offices, either in the same or different municipalities.'

If the word 'county' was substituted for

the word 'municipal', it would be clear that the prosecuting attorney could not properly be Probation Officer, as in the case of Hastings vs. Jasper County, 314 Mo., 144, the Supreme Court held that a Probation Officer is a County Officer.

I think you will find that Dillon, on municipal corporations, and other authorities, treat counties as well as cities as municipal corporations; or, in other words, that the term 'municipal', as used in the Constitution, includes counties as well as cities.

And I believe the reason for a Constitutional provision of this kind would certainly be as applicable to counties as to cities.

I would like to appoint some of the prosecuting attorneys in this Judicial Circuit Probation Officers, as the pay of the Prosecuting Attorney's office is very small; however, I do not wish to violate this Constitutional provision, and would not want a Prosecuting Attorney to accept another county office if in doing so he would violate the Constitution.

I would be very glad to have your opinion on this question."

Section 2021, Laws of Mo. 1935, page 216, relates to the terms of the court of the 18th Judicial Circuit in which Your Honor presides:

"The circuit courts shall be held in the eighteenth judicial circuit as follows: in the county of Camden, on the fourth Monday in March and the third Monday in October; in the county of Dallas, on the

> second Monday in January, the fourth Monday in Spril and the first Monday in September; in the county of Hickory, on the third Monday in April and the third Monday in November; in the county of Polk, on the first Monday in February, the fourth Monday in May and the third Monday in September; in the county of Webster, on the third Monday in January, the second Monday in May and the second Monday in September; in the county of Wright, on the fourth Monday in February, the second Monday in June and the fourth Monday in October."

The counties mentioned in the above section as being in the 18th Judicial Circuit are Camden, Dallas, Hickory, Polk, Webster and Wright, and the 1930 official census gives the population of the above counties to be respectively, as follows: 9,142; 10,541; 6,430; 17,803; 16,148 and 16,741. All of the above counties have a population less than 200,000 inhabitants.

Section 18 of Article IX of the Missouri Constitution provides as follows:

> "In cities or counties having more than two hundred thousand inhabitants, no person shall, at the same time, be a state officer and an officer of any county, city or other municipality; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the Militia."

In the case of Nickelson vs. City of Hardin 282 Mo. 198, l.c. 203, the contention of the plaintiff was that no part of the above section applied except in cities or counties having in excess of 200,000 inhabitants. De-

fendant's position is that the second clause of the section applied generally without any limitation as to population. The court in holding that the above section applied only in counties and cities having more than 200,000 inhabitants said:

> "The question is not free from difficulty, for we are of the opinion that the proper construction of the section is that it applies only in counties and cities having more than 200,000 inhabitants. This disposes of the only question presented by the briefs."

Inasmuch as Article IX, Section 18, of the Missouri Constitution, applies only to counties and cities having more than 200,000 inhabitants and no county or city in your Judicial Circuit has a population that comes within this figure, a determination of the question as to whether the term "municipal" includes county, as used in the said section, becomes unnecessary for determination in this opinion.

We are, therefore, of the opinion that a prosecuting attorney may be appointed probation officer in the 18th Judicial Circuit of the State of Missouri without violating Article IX, Section 18, of the Missouri Constitution.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

CITIES AND STATE BUILDINGS: Construction of State Buildings not subject to city ordinances.

March 21st, 1939.

FILED
83

Mr. B. Hugh Smith,
City Attorney,
Cape Girardeau, Missouri.

Dear Sir:

We have your letter of recent date in which you ask the opinion of this office as to whether or not the construction of state buildings is subject to city ordinances governing the securing of permits to build, payment of inspection fees and other similar city regulations contained in a city building code.

The identical question submitted in your letter was passed on in the case of City of Milwaukee v. McGregor, 121 N. W. 642. In this case the Supreme Court of Wisconsin said:

> "So the question comes down to whether the ordinary charter and ordinance regulations of a city requiring submission to local supervision, as regards the manner of constructing, altering and repairing buildings, have any application to state buildings. That must be answered in the negative. It is plainly so ruled by the familiar principle that statutes, in general terms, do not apply to acts of the state. Moreover, express authority to a state agency to do a particular thing in a particular way supersedes any local or general regulation conflicting therewith. Sandberg v. State, 113 Wis. 578, 89 N. W. 504: Dollar Savings Bank v. United States, 86 U. S. 227-239, 22 L. Ed. 80;

United States v. Verdier, 164 U. S. 213-219, 17 Sup. Ct. 42, 41 L. Ed. 407; District of Columbia v. Johnson, 165 U. S. 330, 17 Sup. Ct. 362, 41 L. Ed. 734.

"The infirmity of appellant's position has been, from the first, in supposing that the state, in respect to constructing a building in the city of Milwaukee, has no more free hand than a private person or corporation, while the fact is that the people of the state in their soverign capacity, except as restrained by some constitutional limitation, and there is none in this case, is as exempt from mere general or local laws as the king was of old in the exercise of his soverign prerogatives as "universal trustee" for his people. So it has been said, "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not" the soverign "in the least, if they may tend to restrain of diminish any of his rights and interests." So general prohibitions, either express or implied, apply to all private parties but "are not rules for the conduct of the state." Dollar Savings Bank v. United States, supra. That has been applied in many ways."

In the foregoing case the building which was being constructed by the Board of Normal School Regents, was a Normal school building.

CONCLUSION

It is, therefore, the opinion of this department that in the construction of state buildings in municipalities, the state does not have to comply with building codes or ordinances of the municipalities.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General.

HHK:RV

APPROVED

J. E. TAYLOR
(Acting) Attorney General.

LEGISLATION: A law expiring of its own force at a given future date cannot be revived or re-enacted without setting it out in full.

UNCONSTITUTIONALITY:

April 5th, 1939.

4-5

FILED
83

Honorable Forrest Smith,
State Auditor,
Jefferson City, Missouri.

Dear Sir:

This acknowledges receipt of your letter of March 30th, and enclosed copy of perfected House Bill #91, of the 60th General Assembly, your request is as follows:

"I am enclosing copy of perfected HB 91 which is intended to continue the Sales Tax bill which is found on pages 552 and 569, inclusive of the 1937 Laws.

I would like a written opinion from your department as to the constitutionality of the Sales Tax law as attempted to be amended by enacting HB 91.

Section 2 on page 557 of the present law provides that the law shall die at the end of December 31, 1939. The only thing included in HB 91 is Section 2 of the Act and my contention is that all of the rest of the Act will be null and void."

You make the broad general inquiry as to the constitutionality of the proposed sales tax law. While your letter indicates that you perhaps have in mind only one feature of the unconstitutionality of the bill, we will discuss the constitutionality of the bill from several angles that occur to us from a reading of it.

First: As To The Title. The title to the Act identifies the section of the statute sought to be amended and declares the Act to be a revision Act. It occurs to us that the title would be more complete and less subject to the criticism that might be lodged against it in court, if it also set forth the purpose of the bill. The title, as it now appears, does not set forth the purpose of the bill further than "to amend Section 2 of an Act of the 59th General Assembly * * * *, 1937."

We suggest that it would be better if the title set forth the substance of the amendment. Section 28, of Article 4, of the Constitution of Missouri, provides, "No bill * * * * shall contain more than one subject, which shall be clearly expressed in its title." It is to meet the provision of this last quoted section of the Constitution that the above is written.

Second: The Bill as written purports to amend Section 2 of the present Sales Tax Law, found at pages 557-558, Laws of 1937, by doing two things. One of them is to extend the operative force of the present law until December 31, 1941; the other is to make the Sales Tax law broader than it is at present, the latter being that part of the bill found at lines 42, 43 and 44 of page 3, thereof, placing said 2% tax on laundry, cleaning, pressing and dyeing services.

Section 34 of Article 4, of the Constitution of Missouri, provides:

> "No act shall be amended by providing that designated words thereof be stricken out, or that designated words be inserted, or that designated words be stricken out and others inserted in lieu thereof; but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, together with the act or section amended, shall be set forth in full as amended."

Section one of the said House Bill is silent as to the portion of Section 2, last hereinabove referred to, and dealing with the broadening of the collection of the taxes to include the new field of commercial laundry, cleaning, pressing and dyeing services. It occurs to us that the following words should be inserted in Section 1 in line 12, and after the words "December 13, 1941," by adding at the end of said section the following: "Tax equivalent to 2% of amounts of sales of charges for commercial laundry, cleaning, pressing and dyeing services."

Third: As to whether the provisions of the Bill inserting a different date, towit, December 31, 1941, is a valid extention of the provision of the whole Sales Tax Act to that date. It has been decided by the courts of this state that the Legislature may enact a law and postpone to a future date the time when it shall first become operative.

In State ex rel, v. Dirckx, 211 Mo. 568, the Supreme Court of this state en banc (1908), said at page 578:

> "That a statute or constitutional provision may have a potential existence, but which will not go into actual operation until a future time, is familiar law. (State ex rel. v. Wilcox, 45 Mo. l. c. 464; State ex rel. v. Pond, 93 Mo. l.c. 625; Ex parte Snyder, 64 Mo. l.c. 61)."

And it would appear that if that were the sole question involved in your inquiry, the Legislature has the consitutional authority to provide that it shall become operative at a future date other than the 90 days after adjournment of the Legislature.

However, your inquiry seems to raise a broader question than the above. The proposed bill does not enact the whole body of the Sales Tax law and provide that it shall become operative at some future date. On the contrary, it seeks to amend one section of the said Sales Tax law by inserting a date two years in advance of the date which the present bill provides is the date of the termination of the effective force of the present sales tax law.

If no legislation were passed by the Legislature at this session, the present sales tax law would die and cease to be effective on December 31, 1939. It was doubtless in the mind of the General Assembly at the time the present sales tax law was adopted, that each of the provisions of the present Sales Tax law should cease to become operative upon the last date hereinabove mentioned. Those provisions being found on pages 555 to 569 inclusive, Laws of 1937.

It is now sought by House Bill #91 to prolong the life of all of those sections by amending Section 2, so that it states that the effective date of this Sales Tax law shall be December 31, 1941, instead of

December 13, 1939. If it had been in the mind of the General Assembly when this Sales Tax was enacted in 1937, that it should have been extended to 1941, and that each of the provisions of the sales tax were to remain effective until the latter date, they would have so stated in the act.

If this were an obligation of a private nature, such as a promissory note, of course the parties to the instrument could have extended the due date of it to some future time other than that the instrument, when written, bore, and ratification and estoppel might successfully be set up in the courts as a reason why the attack on the validity of the obligation in its extended form should not prevail. But, generally speaking, ratification and estoppel are not recognized as a method of enacting laws. The Constitution sets out the course that must be followed by the Legislature in enacting laws, and that course must be followed, at least substantially in order for the enactment to pass the test of the courts.

Section 33, of Article 4, of the Constitution of the State of Missouri, provides as follows:

> "No act shall be revived or re-enacted by mere reference to the title thereof, but the same shall be set forth at length, as if it were an original act."

It would seem to be a reasonable conclusion that the real purpose and object of House Bill #91 is to revive or re-enact the state Sales Tax law for another period of two years beyond the date when the said state Sales Tax, in its present form, ceases to be operative. In other words, it would appear that the bill, by striking out of the present Sales Tax law at page 557 in Section 2, the words: "and up to and including December 31, 1939", and by adding the

words in lieu thereof as follows: "and up to and including December 31, 1941", should revive or re-enact and breathe life into the whole of the present Sales Tax law which, as enacted, comes to and end on December 31, 1939. Putting it another way, that the Legislature by merely inserting the expiration date two years in future from the present expiration date of the law, would revive about 50 sections of the statutes now representing the state Sales Tax law. By so doing, it would seem that the requirements of Section 33, of Article 4, of the Constitution hereinabove referred to, and which section requires that the bill shall be set forth at length as if it were an original act, is harshly dealt with. Section 33, supra, does not appear to have been construed by the courts, but it would appear that the fair meaning of it is that it requires that the whole sales tax law "shall be set forth at length as if it were an original act", and that an act which sought to revive or breathe life into the entire sales tax law which expires on the date therein designated, by amending that date so that the legislation would be extended and in the future would be by the courts declared unconstitutional as violative of said Section 33.

Fourth: As to the necessity of a section prescribing that the bill is declared to be a revision act.

The Missouri Constitution was amended at the election of November 8, 1932, (See Laws of 1933, 479). The amendment of the Constitution so adopted provides, among other things, "that after the expiration of 70 days of such revision sessions no measure other than appropriation bills and such bills as the General Assembly may determine by an express statement therein contained to be revision bills shall be considered by the General Assembly * * * * ." More than 70 days have passed, and under that constitutional provision this bill could not be considered except that it be designated by the General Assembly "by an express statement therein

contained" to be a revision bill. The words "by an express statement therein contained" mean that those provisions so designating such bill to be a revision bill must be contained in the bill itself. The title is no part of the bill. The title is merely the designation of the substance of the bill. In order for a bill to be saved for consideration by the Legislature more than 70 days from the first day of the session a provision must be contained in the bill itself, and this provision must state that the bill is a revision bill, (absent the Governor's special message recommending the bill for consideration).

The Constitution of the State of Missouri says, Section 25, Article 4: "No law shall be passed except by bill * * * *". The amendment to the Constitution as adopted in 1932 requires the designation by the Legislature of the bill to be a revision bill to be in the body of the bill, and if the constitution means what it says, a bill could not legally be considered by the Legislature when it is not an appropriation bill, and when the consideration thereof is more than 70 days after the first day of the session, and when the bill did not in the body of it express that it is a revision bill. In order to meet the above observations, a new section should be added to the bill stating that this is a revision bill.

We recognize that the courts lend every indulgence of construction in favor of the constitutionality of a law passed by the Legislature, and will not declare laws passed by the Legislature to be unconstitutional if there is any reasonable construction that can be placed on the act. While there may be grounds for argument upon some of the questions hereinabove discussed, yet we believe the Legislature and the public are best served by calling attention to the questions hereinabove referred to, in order that controversy in the courts may be averted, and it is in that spirit the observations herein expressed are made.

CONCLUSION

It is our conclusion that House Bill #91 in its present form is unconstitutional.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

DW/RV

ROADS AND HIGHWAYS:
SPECIAL ROAD DISTRICTS:
COMMISSIONERS EXPENDING ROAD FUNDS OUTSIDE OF THE DISTRICT:

The funds of a special road district may be expended outside of the district under certain circumstances.

April 13, 1939

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date requesting an official opinion on the following question:

> "I would like a written opinion as to whether a Special Road District can legally use the revenue collected within their district for the building and maintenance of roads outside of their district; or in other words, can a Special Road District assist the County Court by building roads that are under the jurisdiction of the County Court from funds arising on property within the Special Road District."

In your request you do not refer to what particular class of special road districts you inquire, but for the purpose of this answer we will refer to the districts designated as the eight-mile special road district created by virtue of the provisions of Article IX, chapter 42, R. S. Mo. 1929. Such districts, being creatures of the statute, we will be required to look there for their powers and duties.

By virtue of the provisions of Section 8042, R. S. Mo. 1929, the moneys collected as taxes for road and bridge purposes upon property in the district shall upon timely application being made therefor, be turned over to the Commis-

sioners of the Special road district. The courts have so construed this statute in a number of cases. One of the latest cases is State ex rel. v. Holman, 264 S. W. 908.

Section 8049, R. S. Mo. 1929, provides as follows:

> "Said board shall make and keep on file with the clerk of the board and the clerk of the county court correct plats of all the roads in its district, and duly sectionalized maps of such district, and such sections duly subdivided."

This section also evidences the intention of the lawmakers to confine the jurisdiction of the Commissioners of the road district to that district in which they are Commissioners.

Section 8033, R. S. Mo. 1929, provides in part as follows:

> "Said board shall have sole, exclusive and entire control and jurisdiction over all public highways within its district outside the corporate limits of any city or village therein to construct, improve and repair such highways, * * * * * * * * * * "

Section 8051, R. S. Mo. 1929, provides as follows:

> "Said boards may repair, grade, gravel, macadamize or pave any road in its district but nothing herein shall be taken or construed as enlarging the powers of the boards to expend money upon roads and streets within the corporate limits of any city within said special road district as limited by section 8034 of this article."

This section also evidences the fact that the lawmakers intended that the road funds be expended in their own district. In other words, even though this section authorizes the Commissioners to repair, grade and gravel, macadamize or pave any road in the district, still they clearly express their intention that they did not mean by this section that the Commissioners could expend any more than one fourth of the revenue of their district in cities as authorized by Section 8034, R. S. Mo. 1929, which is as follows:

> "Said board shall have authority to expend not more than one-fourth of the revenue which may now or which may hereafter be paid into its treasury for the purpose of grading and repairing any roads or streets within the corporate limits of any city within said special road district in conformity with the established grade of said roads and streets in said cities and for the purpose of constructing and maintaining macadam, gravel, rock or paved roads or streets within the corporate limits of any city within the said special road district in conformity with the established grade of said roads and streets in said city; provided that no part of the revenue of any special road district in this state be expended outside of the county in which such special road district is situated."

We find another section under this article which is Section 8036, R. S. Mo. 1929, which authorizes expenditures outside of the district. This section is as follows:

> "Said boards may repair, grade, gravel, macadamize, pave or otherwise improve to the distance of 15 miles from any line of such special road

district any highway outside of such district if the same be a prolongation of an improved street or highway in said district and if liberal contributions toward such improvements be made in money, material or labor by the inhabitants interested in such improvements or the county court or any special road district organized under the laws of this state, or the state highway board, or the United States government, or by any one or more of the foregoing. Or in lieu of doing such work in the improvement of such roads such boards may, under the same conditions as would authorize them to do such construction work under this section, contribute toward the repair, grading, graveling, macadamizing, paving or otherwise improving any such highway such an amount as the said board of commissioners may determine, providing the other contributions from any one or more of the sources herein mentioned are liberal contributions toward such improvements and together with the contribution of such board will be sufficient to make and complete such improvement; and provided also, that such work shall be done under plans and specifications and estimate of cost prepared by some competent engineer and approved by such board of commissioners and such contribution of such board shall be paid from time to time only as the work is done or the improvement constructed in compliance with said plans and specifications and on certificate of some competent engineer designated by such board of commissioners and the payments on the work completed shall be in the same proportion as the total contribution of said board bears to the estimated cost of the entire job, and said certificate of the engineer shall show the work completed and the proportional amount of contribution to be

paid thereon."

Section 8047, R. S. Mo. 1929, is a further limitation on the powers of the Commissioners to expend the moneys belonging to the district. This Section is as follows:

> "The fund received from the poll and road tax of said district shall constitute a general district road fund, and shall be disbursed only as hereinbefore provided, and shall be used only for working, repairing and improving the public roads of such district as herein provided, and for no other purpose; and no part thereof shall be used for paying damages and costs for opening new roads, but all such damages and costs for opening new roads paid by the county shall be paid out of the other county revenue, except as this article may otherwise provide."

By this section it would seem that the lawmakers intended that all of the funds raised from the property in the district should be expended within that district.

Considering the foregoing sections of the statutes together it is apparent that the lawmakers have intended that all of the district road funds shall be expended in districts except those authorized to be expended outside of the district by virtue of the provisions of said Sections 8034 and 8036.

Since the lawmakers have generally expressed their intention that these moneys be expended in the district and by an exception have expressed on what occasion the Commissioners of the district could expend the district funds outside of the district, then we think the Commissioners would be limited to such expenditures outside of the district to those exceptions set out in said Sections 8034 and 8036. As stated in Kansas City Power and Light Company v. Smith, 111 S. W. (2d) 513, "Whenever the statute prescribes that a thing should be done in a certain manner it necessarily prohibits the doing of it

in any other manner." So in this case the lawmakers have stated that the Commissioners may expend money outside of the district as provided by said Sections 8034 and 8036 and by so doing they have indicated that they did not intend for the money to be expended outside of the district under any other circumstances.

The foregoing statements have been based on the condition that the moneys have been turned over to the Commissioners of the district. If the district and county court are of the same mind and agree that there is more than enough money due the district than will be needed, then such funds might be handled in this manner:

By Section 8042, R. S. Mo. 1929, if the Commissioners make timely application for the road funds to do their district, then it is the duty of the county court to turn the funds over to them as they are collected. Speaking of this section the court, in the case of Holloway to use v. Howell County, 240 Mo. 601, l.c. 612, said:

> "Closer home and more to the point, it is not alleged in the bill or shown by the proof that the board of commissioners of the district made application to the county court in any of those years for a share of the county revenue raised by the tax levies in question.
>
> "Observe, section 10594, supra, only required the county court to draw warrants upon its treasurer 'as the board of commissioners of such special road district shall make application to such county court.' Such application is made a condition to getting any of the funds. Why was that condition made by the lawmaker? The reasons are manifest. The district might not need the money. So, the county court, charged with the duty of distributing the county revenue and keeping the county on a cash basis, might stand informed by such application of the need and demand and thereby take care to close up the year's business on such basis

> by adjusting its general expenditures accordingly."

In our search on the law applicable to the special road districts we do not find where it is required of the Commissioners to make application for all or any part of these funds and if they do not make such application, then at the end of the fiscal year the county court could transfer them to the other proper funds. This rule is suggested in the Howell County case, supra, at l.c. 612, in the following language:

> "* * * * It is not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied."

So the only way in which the funds raised from the taxes for road pruposes on properties in a special road district could be used outside of the district is for the Commissioners to not make application therefor and then at the end of the year the county court could transfer these funds to the proper account as suggested in the Howell County case, supra. The foregoing statement is conditioned on the two exceptions where the Commissioners of the District may expend their funds outside of the district as is provided by said Sections 8034 and 8036 cited above.

CONCLUSION.

From the foregoing it is the opinion of this department that all of the road funds which have been turned over

to the Commissioners of a special road district must be expended for the purpose of maintaining the roads in that district except those roads upon which such funds may be expended as authorized by virtue of the provisions of Sections 8034 and 8036, supra.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

TWB:DA

RECORDER OF DEEDS:
WHAT INSTRUMENT SHALL BE RECORDED:

Instruments of writing affecting real estate shall be recorded only when they have been duly acknowledged or proven by the grantor named in such instrument.

April 21, 1939

FILED
83

Mr. Forrest Smith
Circuit Clerk and Ex-Officio Recorder
Putnam County
Unionville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an official opinion from this department on the question of whether or not it is your duty as recorder to record a certain affidavit, a copy of which you included with your letter. Since the affidavit is so long we will not copy in full here but will give the substance of it, which is as follows:

The maker of the affidavit states that he owns oil and gas leases covering certain lands in your county. He sets out the number of the leases, the form, the name of the lessor, the description of the lands leased, the date of the lease, and the term of years for which the lease is to continue. He also states that he is the lessee of the mineral rights of said lands. He states that he has paid a valuable consideration for these leases and that they have been delivered to him and that he is now holding them as the owner. He also states that he has not filed these leases for record for the reasons that he is checking the descriptions and as soon as they are verified he expects to place them on the record. The affiant makes the affidavit and acknowledges it in due form. As stated above your question is: Are you required to record this instrument?

The office of the recorder of deeds is statutory and we must look to the Missouri Statutes for his powers and duties. Section 11543, R. S. Missouri, 1929, refers to the powers and duties of the recorder of deeds, and is

as follows:

> "It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; second, all papers and documents found in their respective offices, of and concerning lands and tenements, or goods and chattels, and which were received from the Spanish and French authorities at the change of government; third, all marriage contracts and certificates of marriage; fourth, all commissions and official bonds required by law to be recorded in their offices; fifth, all written statements furnished to him for record, showing the sex and date of birth of any child or children, the name, business and residence of the father, and maiden name of the mother of such child or children."

Sections 11529 and 11535, Laws of Missouri, 1933, pages 360 and 361, require the recorder of deeds to give a bond for the faithful performance of his official duties. On the question of what conveyance affecting real estate shall be recorded, we find that Section 3039, R. S. Missouri, 1929, applies and provides as follows:

> "Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

The purpose of recording such instruments is to give

a notice to the world that such a contract exists. This purpose is stated in Section 3040, R. S. Missouri, 1929, which as follows:

> "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

In speaking of recording acts, we find the subject is treated in Volume 23 R. C. L., page 170, section 24:

> "The recording of deeds and other instruments affecting the title to land is purely a system of legal institution, and not of common right or abstract justice. * * * * * * * "

At section 28, page 174 of the same Volume, the subject is also treated as follows:

> "The recording acts require all deeds and other instruments relating to or affecting the title to real property to be recorded; and a deed transferring land for the benefit of creditors under an insolvent law must be recorded the same as any other deed. Only the original instrument is entitled to record, and therefore a copy of a deed will not be admitted to record, even though it has indorsed on it a receipt signed by the grantor acknowledging that he had received a deed, of which it was a true copy, for the purpose of procuring it to be recorded. * * * * "

Referring to this section we think it is important to call particular attention to the statement that only the original instrument is entitled to record, and therefore a copy of a

deed will not be admitted to record, even though it has indorsed on it a receipt signed by the grantor and acknowledging that he had received a deed.

We think the rule stated in the foregoing section is very applicable to the question which you have submitted. If only the original instrument is entitled to be recorded, then certainly such an instrument as has been tendered to you for recording would not be entitled to be recorded.

In speaking of our recording act, we find that the Springfield Court of Appeals in Hellweg v. Bush, 74 S. W. (2d) 89, 93, par. 9, said:

> "It is urged, however, that, because the State Life Insurance Company recorded its assignment, and neither plaintiff nor his assignor filed for record any assignment of their note and mortgage, the State Life Insurance Company therefore has the superior equity. Many cases from other states are cited in favor of this theory. An examination of those cases shows, almost without exception, that they are based upon statutes of those particular states providing for or requiring the recording of assignments of mortgages. We have no such statute in this state. Section 3039, R. S. Mo. 1929 (Mo.St.Ann. section 3039, p. 1879), provides for the recording of all instruments conveying real estate. The simple assignment of a note or deed of trust securing same is not required to be recorded, and the recording thereof cannot be regarded as constructive notice of the contents thereof. * * * * * * * * "

We find the rule stated in Volume 74 A. L. R. at page 351, as follows:

> "An instrument purporting to be a copy of an original instrument held in trust, without revealing anything as to the

> execution or delivery of the original, if there was one, or giving any information as to where it could be found, is not entitled to record, and its actual record is ineffectual to impart constructive notice."

From an examination of the instrument which you have submitted, it will be seen that the person who has made the purported oil and gas lease has not signed it or acknowledged it. The only assurance that the recorder has that the original instrument has been acknowledged is the statement made by the affiant. At the most it could only be treated as a self-serving statement, and we do not think that it comes up to the requirements of Section 3040, supra, in giving a notice that such a lease exists.

The recorder of deeds has some liability on the bond which he is required to give. The bond is conditioned on the faithful performance of his official acts. An instrument, such as you have enclosed with your request, if it is a notice, then it affects the title to the real estate described therein. If such affidavit did not state the truth as to there being leases on the lands described therein, then the titleholder to the premises would have a cause of action against all parties who participated in the wrongful act and this might include the recorder of deeds.

We think that was one of the purposes why the lawmakers, by Section 3039, supra, required that conveyances affecting real estate should not be recorded until they were duly acknowledged by the party conveying the real estate.

CONCLUSION.

From the foregoing it is the opinion of this department that under the statute you are not required to record the affidavit a copy of which was enclosed with your request and the substance of which is hereinbefore set out.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CONSTABLE: Entitled to 10¢ per mile for serving court processes when arresting a person in another county.

May 3, 1939

FILED
83

Honorable George H. Skidmore
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

We acknowledge your request for an opinion dated April 5, 1939, which reads as follows:

> "I would like an opinion from your office as to the proper mileage a constable should receive for going into another county in the state and returning a person charged with a felony. Some of our constables have been under the impression that they are entitled to receive 10¢ per mile for each mile actually traveled, basing their contention on Section 11777, R. S. 1929, which allows a constable 10¢ for each mile actually traveled in serving any process.
>
> "I am of the opinion that Section 11791, while it does not mention constable by name, applies to a constable as well as any other officer and allows him only 5 ¢ per mile.
>
> "No doubt you have already had occasion to give an opinion on this matter, and I would very much like to be advised as to your judgment."

Black's Law Dictionary citing Blackstone's Commentaries defines the term "constable" at English Common Law thus:

> "A public civil officer, whose proper and general duty is to keep the peace within his district, though he is frequently charged with additional duties."

Section 11756 R. S. Mo. 1929 provides the general power of a constable in serving processes and reads:

> "Constables may serve warrants, writs of attachments, subpoenas and all other process, both civil and criminal, and exercise all other authority conferred upon them by law throughout their respective counties."

Although it would be unusual, a constable may be duty bound to travel miles, even into other counties, to effect an arrest in criminal cases, sometimes with and sometimes without criminal process. (See Sections 3418, 3467, 3469, 3479, 3492, 3494 and 3566 R. S. Mo. 1929.)

The question of fees due a public officer for doing his statutory duty is well settled in Missouri. Only when a public officer can put his finger on a statute allowing a fee is said officer entitled to his costs for official service, otherwise, he is bound to do his official duty gratuitously.

46 Corpus Juris, page 1014, Section 233 reads as follows:

> "The person rightfully holding an office is entitled to the compensation attached thereto; this right does not rest upon contract, and the principles of law governing contractual relations and obligations in ordinary cases are not applicable. Public officers have no claim for official services rendered except where, and to the extent that, compensation is provided by law, and, when no compensation is so provided, the rendition of such services is deemed to be gratuitous. * * * * "

In the case of Houts v. McCluney 102 Mo. 13 l.c. 16, 14 S. W. 766, the Supreme Court said:

> "* * * In the first place, no costs are allowed by the common law. They are, with us, creatures of the statute. They must be paid in the amounts and in the manner specified in the statute. * * * "

Chapter 84 R. S. Mo. 1929 entitled "Salaries and Fees" and Article 2 entitled "Fees, payment and disposition of" provide in Section 11776 as follows:

> "The several officers hereinafter named, * * * * * * shall be allowed such fees for their services rendered in discharging the duties imposed upon them by law as are hereinafter provided, * * * * * * * *"

The Constablels fees in general statute are allowable under the provisions of Section 11777 which provides in part:

> "Constables shall be allowed fees for their services as follows: * * * * * * * * * * * * For each mile actually traveled in serving any process . . . . . $0.10 * * * * * * * * * * *"

Section 11791 R. S. Mo. 1929 provides by special statute for particular fees of a constable when going through another county and returning a prisoner charged with a felony, and reads:

> "Sheriffs, county marshals or other officers shall be allowed fees for their services in criminal cases * * * * * as follows: * * * * * The sheriff or other officer who shall take a person, charged with a criminal offense, from the county in which the offender is apprehended to that in which the offense was committed, * * * * * * * * * * shall be allowed by the court, having cognizance of the offense, one dollar and twenty-five cents per day for every

> day he may have such person under his charge, when the number of days shall exceed one, and five cents per mile for every mile necessarily traveled in going to and returning from one county to another, and the guard employed, who shall in no event exceed the number allowed the sheriff, marshal or other officer in transporting convicts to the penitentiary, shall be allowed the same compensation as the officer. One dollar and twenty-five cents per day, mileage same as officer, shall be allowed for board and all other expenses of each prisoner. * * * *"

CONCLUSION

Our Missouri code provides for a constable as an officer of the court to serve process and also prescribes certain mandatory duties connected with said office which entail gratuitous service and also a bond for the faithful performance of duties.

Under the particular facts stated in your request, it can reasonably be said that the constable serves the process and is entitled to his fees under the special statute, Section 11791, supra. We are of the opinion that the legislature intended an exception to the general fee statute for constables when performing this specially identified official service of going into another county to arrest a person charged with a felony.

We are of the opinion that the constable in your case is entitled to fees for a round trip of 5¢ per mile for himself, plus a round trip of 5¢ per mile for taking charge of the prisoner. As far as mileage fees are concerned, the total computes the same as the fee allowed by the general statute which is 10¢ per mile.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney-General

APPROVED:

HARRY H. KAY
(Acting) Attorney-General

WOS/ww

CRIMINAL PROCEDURE:
COST BILLS:
SIGNING AND CERTIFIYING:

The trial judge is the proper party to certify a criminal cost bill.

May 25, 1939

5-29

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of the 23rd wherein you submit a question which was submitted to you by Judge Barton of the Nineteenth Judicial Circuit. The question was submitted with the following statement of facts:

> "We are in receipt of a letter from Honorable W. E. Barton, Judge of the 19th Judicial Circuit, in which he desires to know whether the Trial Judge or the Judge of the circuit in which the case originated and was tried should sign the cost bill in the Robert Kenyon murder case which originated in Howell County. I quote in part from the letter of Judge Barton, to-wit:
>
> "'The case of State v. Robert Kenyon originated in Howell County outside of my circuit. Judge Green being disqualified, called me to act as special judge in that case. I granted a change of venue to Oregon County, also outside of my circuit. There I tried the man and he was given the death penalty. The case was appealed and affirmed, but sent back to change the method of inflicting the death penalty from hanging to lethal gas. Now the fee bill has been made and signed by the Prosecuting Attorney of Howell County

> and has been submitted to me. I am under the impression that this fee bill should be audited and approved by the regular Judge of that circuit. Will you kindly give me the benefits of the practice in other places.'
>
> "You will note that this case originated in Howell County, was transferred on change of venue to Oregon County and that Judge Barton was called in to try the case. We request your official opinion as to whether Judge Barton as Trial Judge, or the Judge of the circuit in which the cause was originated and was tried, should certify his approval to the cost bill."

It appears from the statement which Judge Barton submitted that he was called in to try a criminal case by virtue of the provisions of Sections 3648 and 3651, R. S. Missouri 1929. After Judge Barton was called in to try the criminal case of State v. Kenyon, we think a portion of Section 3651, supra, will shed some light on the question as to who should sign the fee bill in the case which the judge tried. It is as follows:

> "* * * * * * * * * and he shall, during the trial of said case, possess all the powers and perform all the duties of the judge at a regular term of said court, and may adjourn the case from day to day, or to some other time, as the exigencies of the case may require, and may grant a change of venue in said case to the circuit court of another county in the same circuit, or to another circuit or criminal court; * * * * * * * * * * "

It will be noted by the foregoing provisions that the judge who is called to try a case shall possess all the powers and perform all of the duties of the judge, that is, the regular judge of such circuit as such regular judge would perform.

The sections of the statute which pertain to the making up of and certifying fee bills are 3842 and 3844, which are as follows:

> "It shall be the duty of the prosecuting attorney to strictly examine each bill of costs which shall be delivered to him, as provided in the next preceding section, for allowance against the state or county, and ascertain as far as possible whether the services have been rendered for which charges are made, and whether the fees charged are expressly given by law for such services, or whether greater charges are made than the law authorizes, and if said fee bill has been made out according to law, or if not, after correcting all errors therein, he shall report the same to the judge of said court, either in term or in vacation, and if the same appears to be formal and correct, the judge and prosecuting attorney shall certify to the state auditor, or clerk of the county court, accordingly as the state or county is liable, the amount of costs due by the state or county on the said fee bill, and deliver the same to the clerk who made it out, to be collected without delay, and paid over to those entitled to the fees allowed."

> "When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be; that the services were rendered for which charges are made, and that the fees charged are expressly authorized by law, and that they are properly taxed against the proper party, and that the fees of no more than three witnesses to prove any one fact are allowed. In cases in which the defendant is convicted, the judge and prosecuting attorney shall certify, in addition to the foregoing facts, that the defendant is insolvent, and that no costs charged in the fee bill, fees for board excepted, were incurred on the part of the defendant."

It seems from Section 3842, supra, that after the prosecuting attorney has examined and corrected a bill he shall report it to the judge of said court. The question here is whether he shall report the bill to the regular judge or the special judge who tried the case.

Referring to Section 3844, supra, we note that the certificate of the judge and prosecuting attorney which is attached to the fee bill must state that they have strictly examined the bill; that the defendant was

convicted or acquitted * * *; that the services rendered for which the charges are made, and that the fees charged are expressly authorized by law, * * * and that the fees of no more than three witnesses to prove any one fact are allowed.

While the regular judge of a court might be able to make a certificate covering some of the requirements set out in this section, yet there are some parts of the certificate which would be peculiarly within the knowledge and information of the judge who tried the case. We particularly refer to the part of the certificate which requires the judge to certify that no more than three witnesses were used to prove any one fact are allowed in a fee bill. The prosecuting attorney, of course, would be able to make this certificate and the regular judge who did not hear the case might make such certificate basing his statement on the statement of the prosecuting attorney, however, it seems that if the certificate is to be based on the judge's own knowledge that the judge who tried the case would be the proper one to make the certificate.

We do not find wherein this question has been directly before our courts, however, we find some cases in which the court announced a reasoning why the judge who tried the case would be the proper one to sign the criminal fee bill. We refer to the case of State ex rel. v. Wilder, 196 Mo. 418 at 425:

> "* * * An analysis of the sections of the statute in reference to bills of costs as herein pointed out, makes it manifest that the Legislature never intended that this section should be regarded as authority on the part of the judge and prosecuting attorney to finally audit, adjust and settle all costs bills in criminal cases. The very terms of the statute negatives any such intention on the part of the law-making power. There are no such terms used in any of those sections

> which indicate that they are to audit, adjust and settle bills of costs, but it is apparent that this section means to impose the burden upon the judge and prosecuting attorney, who are presumed to be familiar with the legimate costs that have accrued in the case, to strictly examine the fee bills and certify them to the State Auditor, who finally adjusts and settles the same by the drawing of an auditor's warrant. Under this section the judge and prosecuting attorny by no means audit and settle finally the bill of costs, but they are simply required to make an examination and certify it to the State Auditor."

In State v. Oliver, 116 Mo. 188 at 194, the court, in speaking of the duties of the judge in making the certificate to the criminal cost bill, said:

> "* * * * * There must be a determination of what issues of fact were involved in the trial and the number of witnesses necessary, not exceeding three, to each fact to properly present those issues to the jury. The statute does not mean that the number of independent facts must be ascertained and three witnesses allowed to each fact, though one or more witnesses might testify to a number of them. The judge and prosecuting attorney are present throughout the trial, hear the testimony of all the witnesses, know what issues were tried, and are especially qualified to judge of the witnesses who showed a knowledge of the various facts and in doing so they must exercise judgment."

It will be noted from the foregoing statement in the Oliver case, supra, that the court said that the judge and prosecuting attorney being present throughout the trial, hearing all the testimony of the witnesses and knowing what issues were tried, were especially qualified to make this certificate.

While the certificate of the regular judge who did not try the case, if he were willing to make it, might be sufficient to authorize the auditor to audit and allow the bill, yet under the suggestions in the foregoing cases it seems that the judge who tried the case would be the proper one to make the certificate.

CONCLUSION.

From the foregoing it is the opinion of this department that the judge who tries a criminal case would be the proper one to approve and certify the criminal cost bill which is issued for the payment of costs in the case.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION:
SALES TAX:
INTERSTATE COMMERCE TRANSACTIONS:

Contracts for sales of goods or for services consummated within the State of Missouri are subject to the provisions of sales tax regardless of the residence of the parties to the contract or of the location of the property.

June 9, 1939

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion from this department on three questions involving the applicability of the Missouri Sales Tax. These questions regard transactions in which interstate shipments are involved and will be more specifically referred to hereinafter.

In approaching your questions we are quoting certain sections of the Sales Tax Act which are applicable and controlling on these questions. Subsection (b) of Section 1 of the Act provides as follows:

> "The term 'Sale' or 'Sales' includes installment and credit sales, and the exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale, and means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for valuable consideration and the rendering, furnishing or selling for a valuable consideration any of the substances, things and services hereinafter designated and defined as taxable under the terms of this Act."

Subsection (a) of Section 2 of the Act provides as follows:

> "Upon every retail sale in this State of tangible personal property a tax equivalent to two (2) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Section 5 provides in part as follows:

> "* * * * * * * * * The tax imposed by this Act is a tax upon the sale, service or transaction and shall be collected by the person making the sale or rendering the service at the time of making or rendering such sale, service or transaction. * * * * * * *"

From these provisions of the act it is quite apparent that the lawmakers intended that the tax be imposed on all of the sales or services mentioned in the act which are made in the state of Missouri. On the question of the power of the Legislature to impose such a tax, we do not think it is necessary to go into that in this opinion.

Section 3 of the Act provides in part as follows:

> "There is hereby specifically exempted from the provisions of this Act and from the computation of the tax levied, assessed or payable under this Act such retail sales as may be made between this state and any other state of the United States, or between this state and any foreign country, and any retail sale which the State of Missouri is prohibited from taxing under the Constitution or laws of the United States of America, and such retail sales of tangible person-

> al property which the General Assembly of the State of Missouri is prohibited from taxing or further taxing by the Constitution of this state.
> * "

Evidently the lawmakers intended by this section to exempt from the provisions of the Act transactions which are interstate in character. Regardless of whether or not the lawmakers have included such an exemption, they would not be taxable on account of the provisions of the Federal Constitution.

By this provision we think that where an offer to buy a certain article or to perform a service which is included in the Missouri Act, is made in Missouri and accepted in another state, then it is an interstate transaction and not taxable. If a sale, whether made by a non-resident or a resident of Missouri, is consummated in Missouri, then it is a Missouri sale and taxable under the Act.

On the question of the place of the contract we find in Daggett et al. v. Kansas City Structural Steel Co., et al., 65 S. W. (2d) 1036, 1039, the court said:

> "It is settled law that the place where the final act occurs which makes a binding contract is the place of contract. Appellants' contention in the case at bar is that Daggett's act in beginning work in the state of Kansas was the final act which completed the contract of employment and for that reason it was a Kansas contract. This insistence is based upon appellants' claim that where an offer calls for the performance of an act, the doing of the act is necessary to complete the contract. We do not agree with appellants' statement of the law. Of course, if an offer calls for the

performance of an act, and further provides, either expressly or by necessary implication, that acceptance shall be made by performance of the act, then the acceptance must be in the manner indicated in the offer. But where an offer calls for the performance of an act, and does not provide the manner of acceptance, we know of no reason why the other party could not accept the offer and thus complete the contract by either performing the act called for in the offer, or by agreeing to perform it. The distinction between an offer which calls for a promise, and one which calls for the performance of an act, is that in the former, notice of acceptance is always essential, while in the latter such notice is not required if the act called for in the offer is performed, because performance of the act is an acceptance. Leesley Bros. v. Fruit Company, 162 Mo. App. 195, 208, 144 S. W. 138; Williams v. Emerson-Brantingham Implement Co. (Mo. App.) 198 S. W. 425, 427. However, a holding that notice of acceptance is not essential where the act called for in the offer is performed, is not a holding that the offer could not be accepted by agreeing to perform the act called for in the offer. In 35 Cyc. 55, the law is stated thus: 'An order for goods to be shipped or delivered to the buyer becomes an agreement when the goods are shipped or delivered according to the terms of the order without communication of the acceptance. But until the goods are shipped or delivered, there is no acceptance unless acceptance be communicated."

Applying the foregoing rule, any sale which is finally completed in Missouri is a Missouri transaction and subject to the provisions of the Sales Tax Act.

By the inquiry which you have submitted it seems that you are under the impression that the fact that the goods involved in the sales transaction are shipped from another state would have some bearing on this question. We do not think so if the sale is made in Missouri. In support of this view we refer you to State v. Brodnax and Essex, 228 Mo. 25, 52. This case went to the United States Supreme Court and was affirmed in 219 U. S. 284, 55 L. Ed. 219. In that case the defendants were prosecuted because they had failed to attach a revenue stamp to the memorandum of a sale of stocks, bonds, grain, etc., sold on the board of trade. The defendants raised the question of the constitutionality of the act because it was an attempt to interfere with interstate commerce transactions. The facts in that case showed that some of the transactions for which they were charged with having failed to attach a stamp to the memorandum of same, involved the shipment of grain in interstate commerce and also involved transactions between residents of different states.

For the purpose of giving a complete picture of the court's view on this question, and because we think that the opinion in this case is very important as to the construction which should be placed upon the Missouri Sales Tax Act, we are quoting the court's ruling quite fully. At l.c. 49 the court said:

> "This brings us to the consideration of the insistence on the part of the appellants that the statute now under consideration is illegal and invalid for the reason that it interferes with interstate commerce, and is therefore violative of the provisions of section 1, article 8, of the Constitution of the United States.
>
> "It is sufficient to say upon this proposition, after a most careful consideration of the subject, that

in our opinion the license or stamp tax required by the statute involved in this proceeding upon sales made at the places and in the manner provided by the statute does not, even in the remotest degree, interfere with interstate commerce. This subject was in judgment in the Supreme Court of the United States in the Hatch case. It was fully discussed by that court and all of the authorities applicable to the subject were fully considered, and the conclusion reached was that there was not a shadow of a ground for calling the transaction between the parties, in which a stamp tax was required upon a memorandum of sales, interstate commerce. The court said in that case, in treating of this subject, that 'the communications between the parties were not between different States, as in Telegraph Co. v. Texas, 105 U. S. 460, and the bargain did not contemplate or induce the transport of property from one State to another, as in the drummer cases. Rearick v. Pennsylvania, 203 U. S. 507. The bargain was not affected in any way, legally or practically, by the fact that the parties happened to have come from another State before they made it. It does not appear that the petitioner came into New York to sell his stock ..... It appears only that he sold after coming into the State. But we are far from implying that it would have made any difference if he had come to New York with the supposed intent before any bargain was made..... The facts that the property sold is outside of the State and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several States, and that is all that there is here. On the

general question there should be compared with the drummer cases the decisions on the other side of the line. (Nathan v. Louisiana, 8 How. 73; Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Emert v. Missouri, 156 U. S. 296.) A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. (American Steel & Wire Co. v. Speed, 192 U. S. 500.) We think it unnecessary to explain at greater length the reasons for our opinion that the petitioner has suffered no unconstitutional wrong.'

"It must not be overlooked that the license or stamp tax required by the statute involved in this proceeding is not a tax upon property, but is a requirement to place a twenty-five cent stamp upon the sale of property made in the manner and at the places provided for by such statute. In other words, it is a license or stamp tax upon a particular kind of contract when made in this State. This proposition confronted the New York Court of Appeals in the Hatch case, supra, and in treating of the subject of a stamp tax upon sales of certificates of stock, that court thus stated the law: 'The certificate, itself, is not liable for the tax, but the person selling it is. The tax is not a lien on certificates, nor on shares, which may be owned to any extent throughout the State, free from any claim under the statute in question. It is the sale alone that gives rise to the tax, which is imposed through the command of the law to the seller

to pay the tax when the contract to sell is made, and it is enforced not by levy and sale, but by civil and penal remedies against the person of the seller. While this tax, the same as all other taxes, must ultimately come out of the property of the seller, it cannot be enforced against the certificate sold as distinguished from his other property.'

"In further discussing that question it was said that 'jurisdiction over the persons who made the contract does not depend on their residence, but on their presence within the State when the contract is made. Jurisdiction over property depends on its physical presence here, or if it is personal property, either its presence here or the residence of the owner here .... When two citizens of Connecticut come into this State and make a contract here, to be enforced here, both they and their contract are subject to its laws, and they are not only entitled to the protection thereof, but are under the same obligation to obey as if they were citizens. Such a contract is valid or invalid as our laws declare. When the law commands that if they, or any other persons, whether residents or not, make a certain contract here they must pay a certain tax for the privilege, the command is personal, addressed to them as persons then within the State, and is as binding on them as if they resided in the State. Their rights and their obligations in reference to such a contract are the same as if they were citizens, no greater and no less.

The fact that the contract, though made here, may relate to property, real or personal, situated elsewhere, has no bearing upon the question. By coming into the State they subjected themselves to its laws and to its taxing power, so far as the making of such a contract is concerned. It is immaterial whether the contract is between residents or non-residents, or between a resident and a non-resident, for if it is made within the State it is subject to taxation by the State.'

"Manifestly the State has power within its territory to regulate all business done, and, as was said in Matter of McPherson, 104 N. Y. 306:

"'It has never been questioned that the Legislature can impose a tax upon all sales of property, upon all incomes, upon all acquisitions of property, upon all business and upon all transfers.'

"The requirements of the statute now under consideration have no bearing or influence whatever upon property sold. It is addressed to those furnishing the places, as well as those who deal in the transaction in such places. In other words, in sales of property in the manner and at the places pointed out by the statute it is required, where a sale is made in the manner contemplated by that statute, that the seller shall make a memorandum of such sale, and place upon such memorandum a twenty-five cent stamp. We repeat, that transactions of this character have no influence whatever upon commerce between different States,

> and, as was in substance said by the Supreme Court of the United States, sales of this character do not contemplate or have anything to do with the transportation of property from one State to another, as in the drummer cases, and the mere fact that the parties to such sale, or either one of them happens to be a resident of another State, in no way, legally or practically, affects the transaction and falls far short of subjecting such transaction to condemnation for the reason that it interferes with interstate commerce. Our conclusion upon this proposition is that this statute in no way interferes with interstate commerce and should not be held invalid for that reason."

We also find in New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. Ed. 415, 423, that the court said:

> "* * * * The facts that the property sold is outside of the state, and the seller and buyer foreigners, are not enough to make a sale commerce with foreign nations or among the several states, and that is all that there is here. * * * * * * * * * * * * * * * * "

The Missouri Sales Tax is an excise tax the same as was the tax in the Brodnax and Essex case, supra.

As to whether or not these transactions are Missouri transactions will depend upon each particular contract. In Republic Steel Corporation v. Atlas Housewrecking and L. Corporation, 113 S. W. (2d) 155, 158, the court said:

> "It is now well settled, not only by the Federal Courts but the Supreme Court of our State, that all interstate commerce is not sales of goods; that importation from one state to

> another is the indispensable element or test of interstate commerce and all dealing relative to the goods which contemplates and causes such importation is a transaction in interstate commerce. Furst v. Brewster, 282 U. S. 493, 51 S. Ct. 295, 75 L. Ed. 478; Butler Bros. Shoe Co. v. U. S. Rubber Co., 8 Cir. 156 F. 1; Yarbrough v. W. A. Gage & Co., supra."

The foregoing rule is applicable in the construction of the contract, but when we come to considering the contract as to whether or not it is a Missouri transaction, we do not think the foregoing rule would be applicable especially in cases where the shipment of the goods sold is incidental to the sale. For the purpose of bearing out our theories on this point we refer to the case of Wiloil Corporation v. Pennsylvania, 297 U. S. 168, 79 L. Ed. 839. In the Wiloil Corporation case, supra, a tax of three cents a gallon was imposed on liquid fuels sold and delivered by distributors in Pennsylvania. The Wiloil Corporation, through its agent in that state, ordered thirteen tank cars of oil to be delivered to its purchaser in that state. The oil was ordered from Delaware and shipped to the purchasers in Pennsylvania. The oil was billed to the Wiloil Corporation and the purchaser of the oil from the Wiloil Corporation, both in Pennsylvania. In this case it did not appear that the Wiloil Corporation people had any product on hand or that there was any such product in existence. The purchaser did not make any selection of the goods nor was there any contract between the purchaser and the Wiloil Corporation from what place the oils were to be shipped, and at l. c. 840 the court, in speaking of these transactions, said:

> "* * * * Upon these considerations, the state supreme court held that the liquid fuels in question were by appellant 'sold and delivered' to purchasers in Pennsylvania. * * * * "

> "These contracts did not require or necessarily involve transporation across the state boundary. The precise question is whether the mere fact that appellant caused the fuels to be shipped from Delaware for delivery in tank cars--deemed original packages (Askren v. Continental Oil Co. 252 U. S. 444, 449, 64 L. ed. 654, 659, 40 S. Ct. 355)-- on purchasers' sidings as agreed makes imposition of the tax repugnant to the commerce clause. There is nothing to indicate legislative purpose to discriminate against liquid fuels brought into Pennsylvania to be delivered in fulfillment of sales contracts or there to be used or sold. The commerce clause does not prevent taxation of goods by the State in which they are found merely because brought from another State, for that would unduly trammel state power of taxation and produce gross inequality and injustice. * * * * * * * * * * * * "

On page 841 of the same case the court said:

> "* * * * * Admittedly the sales contracts were made in Pennsylvania. Deliveries to purchasers at destination were made in accordance with the terms of the sales. As interstate transportation was not required or contemplated, it may be deemed as merely incidental. * * * * * * * * * * * * * * "

CONCLUSION

Referring back to your request the first question is as follows:

> "We rule that where cement is sold to a building contractor or user in

Missouri by a Missouri dealer or material supply house or by a salesman, person or agent for a Missouri dealer, either directly or indirectly, the Missouri Sales Tax should be collected on the gross receipts of the sale, irrespective of the method of shipment or delivery to the purchaser. Ordinarily, as you no doubt know, cement is sold for highway and public constuction by salesmen who act both as agents for the cement companies and for the Missouri cement dealers. When they receive an order for cement for a project within the corporate limits of a city, the salesman who receives the order transmits it to his company and the local dealer is notified that the order has been received, and the cement in most instances is shipped consigned to the contractor but in the name of the local material dealer. The local material dealer bills the contractor and collects from him. Oftentimes the cement originates outside the State of Missouri and is shipped from the plant located outside the State of Missouri to the contractor. We hold in these cases that the sale is taxable regardless of the origin of the cement. This is on the theory that the sale is consummated by the local material dealer and that the movement of the cement in interstate commerce is incidental and not essential to the sales agreement. Is this a correct interpretation of the law?"

In answer to this question will say that under the foregoing authorities and under the facts submitted on this question we think that this is a Missouri transaction and is subject to the Missouri Sales Tax Act and that you are correct in your interpretation of the law.

Referring to the second question which is as follows:

> "Under the following set of circumstances we have ruled the sale to be made in interstate commerce and not subject to tax. On highway and public work projects outside the corporate limits of cities or towns, cement is sold by the cement companies direct to the contractor and there is no billing or other type of contact with the local material dealer in the area where the project is being constructed. We have ruled, therefore, that where cement is sold to a contractor or user and where the order in writing specifies a specific brand of cement to be shipped directly to the purchaser from a specified cement plant located outside the State of Missouri, and where no Missouri cement dealer or his agent gets a commission or profit on the sale, and where the cement is billed directly to the purchaser and paid by him directly to the cement manufacturer, that this sale is not subject to the Missouri Sales Tax. This is on the theory that the shipment in interstate commerce is essential to the sales agreement and therefore the tax under the Missouri Sales Tax Act cannot apply. Is this a correct interpretation of the law?"

In answer to this inquiry will say that if this contract is finally accepted in another state and the goods are shipped in pursuance to the order, it is an interstate transaction and that you are correct in your interpretation of the law as it applies to such transactions.

Referring to your third proposition which is as follows:

"We have further ruled that where the order placed with the cement manufacturer does not specify that the cement is to be shipped directly from a specified plant located outside the State and the Cement Company is free to fill the order from a supply either within or without the State, that such sales are subject to the Missouri Sales Tax regardless of the fact that the cement might move in interstate commerce from its point of origin to the contractor or consumer. Is this a correct interpretation of the law?"

We think this answer will depend on the question of where the contract is completed. Under the ruling in the Wiloil Corporation case, supra, we do not think that the fact that the product is shipped from without the state would be controlling.

We are further fortified in our views on this question by the ruling in the case of State v. Brodnax and Essex, supra. So if the contract is a Missouri contract, you are correct in your interpretation of the third question which you have submitted.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

JUSTICES OF THE PEACE: A justice of the peace who is paid a
SALARIES AND FEES: salary cannot retain the fees which
come into his court.

June 12, 1939

FILED
83

Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is in answer to your request wherein you request an opinion from this department on the question of whether or not justices of the peace in certain cities and townships who receive a salary may also retain the fees which are paid into their courts.

The request indicates that the justices particularly referred to are those of Jackson County which come under special statutes.

As a general proposition of law any public official must point to the statute which authorizes him to receive a certain salary or to retain a said fee. Section 2136 R. S. Missouri 1929, provides as follows:

> "Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; and in all

> municipal townships that now contain or may hereafter contain a city of one hundred thousand inhabitants, and less than three hundred thousand inhabitants, the county court of the county in which said city is located shall, on or before the first day of March, 1890, divide the said township into districts, not to exceed eight, as nearly equal in population as may be possible; and at the general election in 1890, and every four years thereafter, there shall be elected in each of said districts, by the qualified voters thereof, one justice of the peace, who shall possess the qualifications required by law for other justices of the peace, shall take the same oath, possess the same jurisdiction, and shall hold his office for four years and until his successor is elected and qualified, and who shall be a resident of and keep and maintain his office in the district for which he is elected. The persons now holding the offices of justices of the peace in townships affected by this article shall continue to perform the duties of their respective offices until the general election of 1890, at which time one justice of the peace for each district, as herein provided, shall be elected, after which time there shall be no other justices of the peace in townships affected by this article, except as herein provided for."

Section 2136-a, Laws of Missouri, 1935, page 210, provides as follows:

> "In all municipal townships which have been divided, or may hereafter be divided, into justice of the peace

districts and in which the boundary of the municipal township is or may be extended beyond the boundaries of said justice of the peace districts, the county court of the county in which said township is or may be located is authorized and empowered to appoint and commission not to exceed two additional justices of the peace for such township when, in the opinion of said county court, there is need for such justices of the peace, who may maintain their offices at any convenient place in said township and who shall take the same oath and have the same duties, qualification and jurisdiction as other justices of the peace of such township. The justices of the peace first appointed under this section of the statute shall hold office till the general election day in 1938, and all other justices of the peace thereafter appointed hereunder shall hold office for a term of four years: Provided that said office shall terminate at any time the aforesaid justice of the peace districts are extended so as to include all of the territory of such township. Each justice of the peace appointed under this act shall have authority to appoint a constable who may appoint not to exceed three deputies, which constable and deputies shall hold office at the pleasure of the appointing justice of the peace, and shall take the same oath and possess the same qualification, and have the same duties and authority and give the same bond as other constables and deputies in said township. Said justices of the peace and constables shall, in lieu of salary, be allowed the same fees for services as is provided for justices of the peace and constables in Section

> 11777 and 11779 respectively of Article 2, Chapter 84, Revised Statutes of Missouri, 1929. All acts or parts of acts in conflict herewith, to the extent of such conflict, are hereby repealed."

It will be noted from this section that the justices of the peace who may be appointed by the provisions thereof are authorized to receive and retain the fees which are provided by Sections 11777 and 11779 of the Revised Statutes of Missouri, 1929, but these fees are retained in lieu of the salary that other justices of the township may be permitted to retain.

Under Article IX of Chapter 10, Revised Statutes of Missouri, 1929, and as amended in Laws of Missouri, 1937 at page 212, justices of the peace in townships from two hundred to four hundred thousand inhabitants were allowed a salary of Thirty-six hundred dollars ($3600.00) per annum. Under Laws of Missouri, 1933 at page 210, justices of the peace in that class are required to report the fees and costs by Section 2379, which is as follows:

> "All fees and costs collected in said courts not paid to or collected by the constables or their deputies, shall be paid to and received by said clerks, and in no instance paid to or received by said justices; said clerks shall pay over all said fees collected for services of the justice to the treasurer of said county every thirty days, accompanied by a statement thereof, sworn to by them, and all other costs collected by said clerks shall be paid by them every thirty days, accompanied by a like sworn statement, to the constables of the respective districts, who shall be responsible for the same, and pay over the same to the parties entitled thereto, as now required by law in case of costs collected by or paid to said constables."

As we understand this is the class within the justice of the peace in Jackson County come.

CONCLUSION.

From the foregoing it is the opinion of this department that the justice of the peace, in case he is receiving his compensation on a salary basis, may only receive the salary and is not authorized to retain the fees which may come into that court.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

PUBLIC ADMINISTRATOR: He may apply for appointment as administrator when a resident of this state has disappeared for a period of over seven years.

FILED
83

June 13, 1939

Honorable Randall Smart
House of Representatives
Jefferson City, Missouri

Dear Mr. Smart:

We are in receipt of your letter of June 5, 1939, requesting an opinion from this department, which reads as follows:

> "I would appreciate an opinion from you under the following set of given facts:
>
> The Public Administrator of Buchanan County, Missouri, is interested in filing application for letters of administration in a matter involving a few thousand dollars deposited in a local bank by one John Doe, a resident of Missouri, at the time of deposit on March, 1929. The administrator has been informed by the bank that said account has become inactive and unclaimed for a period of more than five years and has so published same under Section 5389, Revised Statutes, 1929.
>
> Said administrator has reason to believe after diligent search and investigation that said depositor or supposed decedent is dead and desires to administrate the estate under the provisions of Section 265, Revised Statutes, 1929, and other sections of the administration laws to a full and final determination and disposition of the estate.
>
> Is the Public Administrator a proper party to administer the estate under these facts in the absence of an application filed by any known heirs in

> said county or state subject to the provisions, of course, under Section 269, Revised Statutes, 1929?
>
> I would appreciate your opinion in this matter at your earliest convenience."

Section 299, R. S. Mo. 1929, partially reads as follows:

> "It shall be the duty of the public administrator to take into his charge and custody the estates of all deceased persons, and the person and estates of all minors, and the estates or person and estate of all insane persons in his county, in the following cases * * *:
>
> When money, property, papers or other estate are left in a situation exposed to loss or damage, and no other person administers on the same * * *;
>
> Where from any other good cause, said court shall order him to take possession of any estate to prevent its being injured, wasted, purloined or lost."

In the fourth and ninth divisions of Section 299, supra, it will be noticed that both divisions are practically the same in that it is to prevent the loss or damage to any extent. This section also makes it the <u>duty</u> of the public administrator to take into his charge and custody where the estate may be damaged by reason of no person applying for administration.

In the statement of facts set out under your request, I am assuming that no legal administrator has been appointed, nor has any beneficiary or legatee under the estate made application to the probate court for appointment as administrator or administratrix.

Section 265, R. S. Mo. 1929, reads as follows:

"Whenever application shall be made to any probate court, or judge thereof in vacation, for letters of administration upon the estate of any person supposed to be dead, because of the absence of such person for seven consecutive years from the place of his last known domicile within this state, or because, having been a resident of this state, such person has heretofore gone from and has not returned to this state for seven consecutive years, or, because having been such resident of this state, such person shall hereafter go from and shall not return to this state for seven consecutive years, or, because being a resident of this state, such person shall have so concealed or conducted himself within this state that he shall not have been heard of for seven consecutive years by the judge of the probate court having jurisdiction of his estate, or by the persons interested therein, then said probate court, or the judge thereof in vacation, if satisfied that the applicant would be entitled to such letters if the supposed decedent were in fact dead, shall cause a notice to such supposed deceased person to be published in a newspaper, published in the county, once a week for four consecutive weeks, setting forth the fact that such application has been made, together with notice that on a day certain, which shall be at least two weeks after the last publication of such notice, the court will hear evidence concerning the alleged absence of the supposed decedent, and the circumstances and duration thereof. The persons applying for such letters of administration shall file a petition, verified by affidavit, stating the facts upon which such application is based and the place where such supposed deceased person resided when last heard from by him--by any person within his knowledge."

Under the above section it will be noticed that in order that the presumption of death be presumed after a seven year's absence, the person whose estate must be administered must have had his last known domicile within this state or have been a resident and left and not returned to this state. In other words, this section does not apply to non-residents who have not been residents of this state.

Section 266, R. S. Mo. 1929, reads as follows:

> "At the hearing the court shall receive such legal evidence as shall be offered, for the purpose of ascertaining whether the presumption of death is established; and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the supposed deceased, or by reason of his or her interest in the estate of the person supposed to be dead."

This section merely sets out the qualification of witnesses who appear before the probate court.

Section 267, R. S. Mo. 1929, reads as follows:

> "If satisfied, upon such hearing, that the legal presumption of death is established, the court shall so declare and it shall forthwith cause notice thereof to be published once a week for four consecutive weeks, in a newspaper published in the county, and also, if the court shall find that such supposed decedent resided in or was possessed of property located in any county in this or any other state at a time subsequent to his residence in the county in which applications are made, the notice of such publication shall be published in like manner in such other county. Such notice shall require the supposed decedent, if alive, or any other person for him, to produce to the court, within twelve weeks from the date of the

> last publication thereof, satisfactory evidence of the fact that he is still living: Provided, that where publication is made in a daily newspaper, publication for each week after the first shall fall on the corresponding day of the week as did the first publication."

This section merely sets out the procedure of publication before the letters of administration are issued to the public administrator.

Section 268, R. S. Mo. 1929, reads as follows:

> "If, within such period of twelve weeks, evidence shall not be offered satisfactory to the probate court that said supposed decedent is in fact still living, then it shall be the duty of the court to issue letters of administration to the party entitled thereto; and said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the supposed decedent were in fact dead."

This section merely sets out that the decedent may, if still living, within a period of twelve weeks, appear and ask that letters of administration be revoked, but previous acts of the public administrator are valid.

Section 269, R. S. Mo. 1929, reads as follows:

> "The probate court may revoke said letters of administration at any time, upon satisfactory proof that the supposed decedent is in fact alive. After such revocation all the powers of the administrator shall cease, but all receipts and disbursements of assets, and other acts previously done by him, shall

remain as valid as if said letters were unrevoked; and the administrator shall thereupon make a settlement of his administration to the date of revocation, and shall transfer all assets remaining in his hands to said supposed decedent, or to his duly authorized agent or attorney: Provided, nothing in sections 265 and 272, inclusive, contained shall validate the title of any person to any money or property received as widow, next of kin or heir of such supposed decedent, but the same may be recovered from such parties in all cases in which such recovery could be had if said sections had not been passed."

This section is an additional section to Section 268 as to the validity of acts of the public administrator.

Section 270, R. S. Mo. 1929, reads as follows:

"Before any distribution of the proceeds of the estate of such supposed decedent shall be made, the persons entitled to receive the same, respectively, shall enter into a bond to the state of Missouri, with sufficient security, to be approved by the probate court having jurisdiction of said estate, in such sum and in such form as the court shall direct, conditioned that if said supposed decedent shall in fact be alive at the time of such distribution, then the distributees shall refund the amount received by them on demand, with interest thereon from the date of such demand; but if any person entitled to receive such distribution shall be unable to give the security aforesaid, then the money which he would be entitled to receive shall be paid over to the county treasurer, and by him loaned at the highest rate of interest obtainable, on security approved by said probate court,

> which interest shall be paid annually to the person entitled thereto, and such money shall remain so at interest until the security aforesaid is given, or the court, upon application, shall order it to be paid to the person or persons entitled to receive the same."

This section provides for the procedure of the distribution of the assets of the estate in cases where the estate is administered on the seven years absence of presumption of death.

Section 271, R. S. Mo. 1929, reads as follows:

> "After the revocation of such letters of administration as aforesaid, the person erroneously supposed to be dead may, upon suggestion of said fact, filed of record, be substituted in all actions brought by the administrator of his estate, whether prosecuted to judgment or otherwise. He may in all actions previously brought against his administrator, be substituted as defendant, on proper suggestion, filed by himself or by the plaintiff therein, but he shall not be compelled to go to trial in less than three months from the time of the filing of such suggestion. Judgments recovered against the administrator before the revocation of his letters, as aforesaid, may be opened, upon application by the supposed decedent, if made by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defense; but if, within said three months, such application shall not be made, or, being made, the facts exhibited shall be adjudged an insufficient defense, the judgment shall be conclusive to all intents, saving the defendant's right to have the same reviewed, as in other cases, by appeal or by writ of error, as now provided by law. After the

> substitution of the supposed decedent as defendant in any judgment, as aforesaid, such judgment shall become a lien on his real estate situate in the county for which the court is held, and shall have the same force and effect as if said action had been originally instituted against said supposed decedent."

This section describes the procedure in which the presumed decedent may take over all claims or actions brought by or against the public administrator.

Section 272, R. S. Mo. 1929, reads as follows:

> "The costs attending the issue of letters of administration, or their revocation, shall be paid out of the estate of the supposed decedent; and all costs arising upon an application for letters which are refused shall be paid by the applicant."

This section only holds that the cost of the letters of administration by a public administrator are valid even after the person supposed dead is substituted for the public administrator.

All of the above sections must be strictly construed, and it was so held in the case of Vaughn v. Cadwell, 279 S. W. 170, paragraphs 1 and 2, which reads as follows:

> "Learned counsel for respondent argues here that the estate was properly taken from plaintiff, and that the bonding company should be held, rather than the respondent, and insists that the bond shows that its purpose is to hold the administrator and his bondsmen harmless, and that the order of the probate court is final and conclusive and cannot be attacked in this manner. We do not agree with these suggestions of defendant's counsel. It was only by reason of statutory enactment that administration

could be had upon plaintiff's estate due to the presumption of death after an absence of seven years, and the statute must be strictly complied with. In the first place, the probate court had no authority or power to accept any other than the statutory bond required in such cases. Leahy v. Mercantile Trust Co., 296 Mo. 561, 247 S. W. 396. The defendant administrator, saw fit to take a bond indemnifying him, instead of a refunding bond, as the probate court ordered to be taken. The statute gave the probate court the power to fix the form and the sum of the bond, but did not confer upon it the authority to designate such a bond as was given in the instant case. The construction of a very similar statute was before the court in the case of Musser v. Oliver, 21 Pa. 362, loc. cit. 367. The court there said:

'The object of the statute in requiring refunding bonds was to protect claims that might arise through mistaken or fraudulent settlements, as well as such that had not yet come to light. The only safe line of conduct for executors or administrators to follow is to obey all the requisitions of the law. Governed by its directions, they will be protected by its shield. Disobeying its mandates, they must suffer its penalties."

The defendant in the instant case, no doubt, was careful to see that the bond was given to indemnify him. He was extremely anxious to protect himself, and therefore he should not complain if he is held liable. No doubt, if he had taken the bond required by the statute and by order of the probate court, he could not be held liable. But we have no such case before us, and therefore it is unnecessary to determine that question here. See Schaeffer's Appeal, 119 Pa. 640, 13 A. 507. We think, on

account of defendant's failure to take bond according to the statute, he is personally liable. 24 C. J. 481.

The judgment of the circuit court is accordingly reversed, and the cause remanded with directions to enter judgment for plaintiff and against defendant for the amount claimed in the petition."

It was also held that the above sections must be strictly construed in the case of Flynn v. Stoutimore, 226 S. W. 591, paragraph 2, where the court said:

"The action of defendant in applying for an order of distribution of the estate of Mary E. excluding this plaintiff, and the action of the court in granting it, were without authority. If this plaintiff had been absent seven years, without being heard from and without knowledge of where she was, proceedings should have been taken under sections 271-278, R. S. 1909, where it is provided that administration may be had on such person's estate, provided that no satisfactory evidence is given within 12 weeks that the supposed decedent is still living; it being further provided that if no such evidence is brought forward, and letters are granted, distribution may be had of such supposed decedent's estate, upon a sufficient bond being given by those claiming to be entitled to the estate to refund the sums distributed, if the supposed decedent should be alive. These provisions of the law were wholly ignored, and that portion of the estate of Mary E. belonging to this plaintiff as one of her heirs was unlawfully appropriated to the two other heirs by the action of this defendant."

All of the above sections, of course, are to be governed by the Escheats Law as set out in Section 620, R. S. Mo. 1929.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the public administrator is a proper party and may administer the estate of a person who was a resident of this state and has since disappeared, leaving money on deposit in a bank in this state, for a period of at least seven years from the time of the deposit.

It is further the opinion of this department that before the public administrator can be appointed, upon his application to the probate court, conclusive evidence must be presented showing that the decedent was a resident of this state and that competent heirs are unknown, who reside in this state, who have failed to present application to the probate court for appointment as administrator or administratrix of the estate.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:VC

INSURANCE:
FRATERNAL INSURANCE: Senate Bill No. 286, known as the Fraternal Insurance Act, exempts voluntary unincorporated associations issuing insurance contracts such as the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen from the provisions of the fraternal laws, however, the women's auxiliaries of such brotherhoods must comply with the fraternal laws of Missouri, unless the insurance contracts involved are benefits provided exclusively through local or subordinate lodges. Such brotherhoods are suable entities in courts of this state when insurance contracts are involved.

June 23, 1939

FILED
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Honorable Francis Smith
Missouri Senate
Jefferson City, Missouri

Dear Senator Smith:

We have received your request of June 20th, 1939, in which you inquire as to what effect, if any, Senate Bill No. 286, known as the Fraternal Insurance Act, has on certain organizations such as the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. Attached to your request is a memorandum asking specific questions in connection with the effect of the Act, which memorandum reads as follows:

"We are a Voluntary Unincorporated Association, chartered in the State of Ohio. Our Insurance Department is not a separate organization but is a part of our labor union, and we admit to membership only persons engaged in one or more crafts or hazardous occupations.

"How would we be affected by the following Sections of Senate Bill No. 286, and the House Amendments thereto?

"Sections 6001, 6002, 6004 and 6005 of the Bill.

"Would we be required to incorporate under the laws of Ohio by these sections, or does the provisions of Sections 6021 (a) exempt

us from all the provisions of these sections?

"Sections 6006 and 6006A of House Amendment No. 4.

"In view of the language of Section 5993 and Section 6021 (a), does the provisions of these Service Sections apply to us, and further, if they should apply on insurance matters, is there anything in the language of Section 6006 and 6006A, especially that on page 3, lines 20 to 27, inc, of amendment No. 4, that would tend to make us a suable entity on contracts and business other than insurance?

"Section 6021 (a) of the Bill.

"This Section has been the law for years and has always exempted us from the things above mentioned. Will it still do so?

"The Women's Auxiliaries to our organizations are also voluntary unincorporated associations and admit to membership, only the wives, mothers, daughters and sisters of our members. Will all the provisions of this bill apply to them and will they have to incorporate in the states in which they are now chartered?

"During the 1937 Session someone tried to make us a suable entity by amending Section 701, of the Statutes of Missouri, 1929. That was attempted by House Bill No. 23. We hope there isn't anything in this or any other bill that will succeed in doing that."

The first question is whether, under sections 6001, 6002, 6004 and 6005 of the Bill, these organizations will be required to incorporate under the laws of the State of Ohio, or whether, section 6021 exempts them from the effect of such sections.

In the first place, section 1 of the new Act and also the title thereof, provides that:

> " * sections 5990, 5991, 5992, 5994, 5995, 5996, 5997, 5998, 5999, 6000, 6001, 6002, 6004, 6005, 6006, 6010, 6013, 6014, 6015, 6016, 6020, and 6024, of Article 13, of Chapter 37, of the Revised Statutes of Missouri, 1929, entitled 'Fraternal Beneficiary Associations,' and relating to the definition, organization and regulation of fraternal beneficiary associations, and section 6021, Revised Statutes of Missouri, 1929, as amended at the Session of the Fifty-Seventh General Assembly, said section as amended appearing in the Session Acts of 1933, on Pages 273-274 thereof, relating to the exemption of certain societies, be and the same are hereby repealed and twenty-four new sections enacted in lieu thereof, pertaining to the same subject, to be known as sections 5990, 5991, 5992, 5994, 5995, 5996, 5997, 5998, 5999, 6000, 6001, 6002, 6004, 6005, 6006, 6010, 6013, 6014, 6016, 6020, 6021, 6024, 6029 (a), and 6029 (b), to read as follows:

It is apparent that the sections named and which were contained in Article 13, of Chapter 37, R. S. Missouri, 1929, dealing with "Fraternal Beneficiary Associations" were repealed and certain sections were enacted in lieu thereof to be known

by the same section numbers. The new sections enacted "in lieu thereof, pertaining to the same subject" and to be known by the same numbers, unquestionably were intended by the legislature to become a part of Article 13, of Chapter 37, of the Revised Statutes dealing with the "Fraternal Beneficiary Associations". It follows then, that the new sections enacted including 6001, 6002, 6004, 6005 and also 6021, are a part of and are included, or at least will be so, when the new act becomes a law, in said Article 13 of Chapter 37.

In substance sections 6001, 6002, 6004 and 6005, provide for the incorporation and licensing, together with the powers, duties and obligations, of Fraternal Beneficiary Associations, which are required to be incorporated and licensed by the terms of said Article 13.

Section 6021 of the new act reads in part as follows:

> "Nothing contained in this article shall be so construed as to affect or apply to grand or subordinate lodges of societies, orders, or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges, or to:
>
> "(a) Orders, societies, or associations which admit to membership only persons engaged in one or more crafts or hazardous occupations, in the same or similar lines of business."

Section 6021 R. S. Missouri, 1929, and the same section as amended and contained in the Laws of Missouri, 1933, page 273, also provided that societies which limited their membership to those engaged in any one hazardous occupation, should be exempted from the provisions of the fraternal act in this language:

> "Nothing contained in this article shall be construed to affect or apply to grand or subordinate lodges of Masons, Odd Fellows or Knights of Pythias (exclusive of the insurance department of the supreme lodge of Knights of Pythias), and the Junior Order of United American Mechanics (exclusive of the beneficiary degree or insurance branch of the National Council Junior Order United American Mechanics) or societies which admit to membership only those employed in any one hazardous occupation. * *"

It will be observed therefore, that the new section 6021 does not change in any way the law as contained in the repealed section 6021, in exempting from the provisions of the fraternal act such orders or associations which admit to membership only persons engaged in any one hazardous occupation.

So we can say that if the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen were exempted from the operation of the fraternal laws by the repealed section 6021, then the new section 6021 would likewise exempt said associations. The repealed and the new sections contain the same provisions as to hazardous occupations.

The repealed statute was considered by the courts on several occasions. For instance in the case of Roberson v. Brotherhood of Locomotive Firemen and Enginemen, 114 S. W. (2d) 136, (the defendant in this case being one of the associations about which you have inquired), the Kansas City Court of Appeals held that the membership of this brotherhood was engaged in a hazardous occupation, and therefore exempted from the fraternal laws by section 6021, the court said:

"The pleadings and the evidence disclose that defendant is a voluntary, unincorporated labor union, with a Grand Lodge, many subordinate lodges, and with thousands of members in the United States and foreign countries; that it has a representative form of government with a constitution and by-laws and practices secret ritualistic lodge work; that its membership is confined exclusively to one class of persons who are engaged in a single hazardous occupation, to wit, persons employed as locomotive firemen and enginemen; and that it carries on an insurance business, without profit, for the exclusive benefit of its members.# * * * * * * * * * * * * * * *

"Defendant was and is doing a fraternal beneficiary insurance business in Missouri and its contracts of insurance will be governed by the law applicable to such contracts. Bennett v. Brotherhood of Locomotive Firemen and Enginemen, Mo. App. K. C., 106 S. W. 2d 25, loc. cit. 26; Clark v. Grand Lodge, 328 Mo. 1084, 43 S. W. 2d 404, loc. cit. 409, 88 A. L. R. 150; Elliot v. Grand Lodge Brotherhood of Railway Trainmen, Mo. App. K. C.,95 S. W. 2d 829, loc. cit. 833. Under the provisions of section 6021, R. S. 1929, Mo. St. Ann. section 6021, p. 4588, defendant is exempt from all of the provisions of article 13, chapter 37, R. S. Mo. 1929, Mo. St. Ann. section 5990 et seq., p. 4563 et seq., which governs fraternal beneficiary companies. Therefore no part of same applies to the case at bar. Elliot v. Grand Lodge Brotherhood of Railway Trainmen. Mo. App. K. C., 95 S. W. 2d

829, loc. cit. 833.

We have no specific information regarding the Brotherhood of Locomotive Engineers, and its method of doing business. However, we assume that its operations are similar to that of the Brotherhood of Locomotive Firemen and Enginemen, as described in the Roberson case, supra, in which event the new section 6021 would apply with equal force, and would also exempt such association from the provisions of the fraternal law.

Your next question is whether or not sections 6006 and 6006a of the new enactment would apply to these associations.

These two sections when the same finally become a law, will likewise become a part of article 13, chapter 37, R. S. Missouri, 1929, dealing with fraternal beneficiary associations.

Section 6006 provides that no society doing business under the terms of the said article 13, shall issue policies or transact business in this state without first executing a power of attorney in writing, appointing and authorizing the superintendent of insurance to acknowledge or receive all lawful service of process for, and on behalf of such society.

Section 6006a provides that if any such society shall fail or neglect to file such a power of attorney with the superintendent of insurance for service of process, that the superintendent of insurance shall be deemed to have been properly appointed for this purpose and service upon such superintendent or any agent or adjuster of any such

association shall constitute good service. However since these two associations appear to be exempted from all the provisions of said article 13, and since sections 6006 and 6006a are, or may become a part of said article, the same will not be applicable to the two brotherhoods. We again quote from the case of Roberson v. Brotherhood of Locomotive Firemen and Enginemen, as follows:

> "Under the provisions of section 6021, R. S. 1929, Mo. St. Ann. section 6021, p. 4588, defendant is exempt from all of the provisions of article 13, chapter 37, R. S. Mo. 1929, Mo. St. Ann. section 5990 et seq., p. 4563 et seq., which governs fraternal beneficiary companies."

We conclude then that the two service sections, that is sections 6006 and 6006a of the new act do not apply to the operation of the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen. Here again we are assuming that the Brotherhood of Locomotive Engineers is a similar organization and conducts its business in the same or a similar way as the Brotherhood of Locomotive Firemen and Enginemen.

The next question is stated in the following language:

> "The Women's Auxiliaries to our organizations are also voluntary unincorporated associations and admit to membership, only the wives, mothers, daughters and sisters of our members. Will all the provisions of this bill apply to them and will they have to incorporate in the states in which they are now chartered?"

You state that the women's auxiliaries to such organizations are also voluntary unincorporated associations; that such associations admit to membership only the wives, mothers, daughters and sisters of the members of the brotherhoods. Unless a fraternal beneficiary association is exempted from the provisions of the fraternal act by the terms of section 6021 the full act will of course apply. As we understand the situation it cannot be said that the women members of the auxiliary organizations are engaged in "one or more crafts or hazardous occupations in the same or similar lines of business." Undoubtedly many housewives are members and also many women who have no occupation whatsoever. We gather from your letter that the only necessary requisite is that a woman must be either a wife, mother, daughter or sister of a member of one of the brotherhoods; that the women themselves need not be engaged in any particular line of endeavor or craft. Consequently, from the facts that we have sub-section (a) of section 6021 will not exempt the women's associations from the effect of said article 13, of chapter 37.

The only other part of section 6021 which might be applicable is part (1) thereof which reads as follows:

> "Nothing contained in this article shall be so construed as to affect or apply to grand or subordinate lodges of societies, orders, or associations now doing business in this state which provide benefits exclusively through local or subordinate lodges."

We do not know whether the insurance benefits of the women's associations to which you refer "provide benefits exclusively through local or subordinate lodges" or not. It is quite apparent that said subsection (1) means that each local lodge can provide insurance benefits for its members as a strictly local matter and thereby be exempted from the act. In other words, if each local lodge issues its own

certificates to its own particular members and if each local lodge provides its own benefits which are paid only out of local funds, all of which is not connected even remotely with the grand, or head, lodge, then such arrangement would in our opinion exempt such societies from the provisions of article 13. If the certificates are not issued in this manner, and if such obligations are really obligations of the grand lodge, and are paid by the grand lodge, and not strictly out of the funds of a local lodge, then we do not believe such associations would be exempted from the fraternal act.

Since the features which will determine this question are entirely questions of fact and since we do not have such facts we cannot arrive at a conclusion as to the exact status of the women's auxiliaries.

Your next and last question reads as follows:

> "During the 1937 Session someone tried to make us a suable entity by amending Section 701, of the Statutes of Missouri, 1929. That was attempted by House Bill No. 23. We hope there isn't anything in this or any other bill that will succeed in doing that."

We find nothing in the act which refers in any manner to the question of whether voluntary unincorporated associations are suable entities or not. The act does not change any existing law on the subject. However, we observe in passing that voluntary unincorporated associations appear to be suable entities under existing law when insurance contracts are involved. In the case of Clark v. Grand Lodge of the Brotherhood of Railroad Trainmen, 43 S. W. 2d 404, the Supreme Court of Missouri en banc said:

"Evidently the statutes above mentioned, and there may be others, authorize voluntary, unincorporated associations such as defendant to carry on its business of insurance in this state and to make insurance contracts such as here involved. Contracts are not contracts unless they are enforceable. To say that an association like defendant can make contracts necessarily means valid contracts-- contracts that are binding on the parties and enforceable against them. It is an absurdity to say that defendant can make contracts of insurance but cannot be sued thereon. If defendant has legal capacity to make a contract of insurance, it has legal capacity to be sued thereon. If it is a legal entity when making such contracts, it retains such legal entity when sued thereon."

CONCLUSION

We conclude that voluntary unincorporated associations such as the Brotherhood of Locomotive Engineers and the Brotherhood of Locomotive Firemen and Enginemen are exempted from the provisions of the fraternal act by the newly enacted section 6021 of Senate Bill 286, because its members are all engaged in hazardous occupations. Further, that the newly enacted sections 6006 and 6006a relating to the service of process on fraternal beneficiary associations in legal proceedings are not applicable to such fraternal organizations. The sections are, or willbe, a part of article 13, chapter 37 R. S. Missouri, 1929, and section 6021 exempts such fraternals from the pro-

provisions of said article. We further conclude that the women's auxiliaries of such brotherhoods, which also appear to be voluntary unincorporated associations, are not exempted from the provisions of the fraternal act by section 6021, unless the insurance benefits are provided by and through the local or subordinate lodges. That is to say, that if each local lodge provides such insurance benefits as a strictly local proposition and the benefits are paid strictly out of local funds, and other local lodges or the grand or head lodge have no connection whatsoever with the insurance features or the proceeds therefor, then the act will not apply to such auxiliaries. If such facts are not strictly true the auxiliaries would not be exempted. Since the members of the women's auxiliaries are not engaged in one or more crafts or hazardous occupations, such societies cannot be exempted from the provisions of the fraternal act on that ground.

Further we find nothing in the new fraternal act which in any manner touches on the question whether voluntary unincorporated associations are suable entities or not, and the existing law on that subject has not been changed. However, when insurance contracts are involved under the existing law such voluntary unincorporated associations are suable entities and an action may be maintained against such associations on the insurance contract involved.

Respectfully submitted,

APPROVED:

J. F. ALLEBACH
Assistant Attorney General

J. E. TAYLOR
(Acting) Attorney General

JFA:RW

PROSECUTING ATTORNEY: Special Prosecuting Attorney not entitled to salary or fees.

July 18, 1939

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request for an opinion, dated July 11, 1939, which reads as follows:

"The County Court of Johnson County has submitted to us copy of a bill which was presented to them for the pay to a special prosecutor appointed by the Circuit Judge, we presume under the provisions of Section 11322 R. S. Missouri, 1929. You will note that the bill was approved by the Judge of the Circuit Court.

"The County Court desires to know, first, what are its rights concerning the approval or disallowance of this account, and if they, the county court, consider the amount requested excessive, do they have a right to compromise that amount?

"Second, as the statutes specify the amount that is to be paid for Prosecuting Attorney per annum, should the amount paid a special prosecutor under these circumstances be charged as a part of the Prosecuting Attorney's annual compensation?

"As the Court desires to withhold consideration of this account until they can be advised, we would appreciate an opinion from your office concerning the above questions.

"The special council in this particular case has submitted an explanation of his charge which we are enclosing herewith."

According to the last decennial census, the population of Johnson County was 22,413, and by reason of that population the prosecuting attorney of Johnson county is on a salary which is set out in section 11314 Session Laws of 1933, page 178, which partially reads as follows:

"The prosecuting attorney shall receive for his services per annum, to be paid out of the County treasury, * * * * *; in all counties now or hereafter having a population of 20000 and less than 25,000 inhabitants the sum of $2000.00"

Under the above section the prosecuting attorney is on a salary basis and not a fee basis.

Section 11322 R. S. Missouri, 1929, reads as follows:

"If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant in any criminal prosecution, either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause."

Section 11324 R. S. Missouri, 1929, reads as follows:

"The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present."

The word "fees" as used in section 11324, supra, should not be considered as a salary and it was so held in the case of State ex rel v. Patterson et al., 152 Mo. App. 264, l.c. 268, where the Court said:

> "The prosecuting attorney receives no fees as compensation for his services and it is clear a special prosecutor can receive none since there is a positive mandate of the statute that all fees must be paid into the public treasury and in the absence of express statutory warrant they cannot be diverted to any other use or purpose.
>
> "But relator argues that the term 'fees' in section 1014 should be defined to mean the salary of the prosecuting attorney in counties where the law gives him no other compensation than a salary. This section appears in the article of the statutes relating to 'Circuit and Prosecuting Attorneys' and we think it sufficiently discloses the legislative intent that its provisions should apply only to those counties mentioned in section 1005 and that, even where applicable, it does not authorize the payment of any salary to the special prosecutor. The rule is well settled that a public officer cannot demand any compensation for his services not specifically allowed by statute, and that statutes providing such compensation must be strictly construed. (Shed v. Railway, 67 Mo. 687; Gammon v. LaFayette Co., 76 Mo. 675; State v. Wofford, 116 Mo. 220; State ex rel v. Walbridge, 153 Mo. 194; Sanderson v. Pike Co., 195 Mo. 598.)"

Under section 11322, supra, the Court was authorized to appoint a special prosecutor under the facts set out in your request, and it was so affirmed in the case of State v. Jones, 268 S.W. 83, pars. 1,2, where the Court said:

> "The information charged the defendant with

operating a motor vehicle while in a state of intoxication. Mr. Massengill, the prosecuting attorney of New Madrid county, filed the information and was the principal witness for the state. The evidence discloses that he is an interested party; his car and the car of the defendant were in collision. On account of his personal interest in the matter, he was disqualified to act as prosecuting attorney, or to prefer a charge based on the alleged criminal conduct of the defendant. Section 742 R. S. 1919. The trial court had inherent power, independent of the statute, to appoint a special prosecuting attorney for the state when the prosecuting attorney, for any reason, was disqualified. 32 Cyc. 719."

Also it was so affirmed in the case of State v. Wilson, 200 Mo. 23, l.c. 28, where the court said:

"That the special prosecuting attorney was duly appointed appears from the record of the court on the twenty-first of February, 1905, wherein it is recited that Mr. Moss, the regular prosecuting attorney of the county, had been employed as counsel by the defendant and for that reason the court appointed Mr. Scott as special prosecuting attorney for this case. Section 4955, Revised Statutes 1899, provides: 'If the prosecuting attorney . . . be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office, or shall be related to the defendant . . . either by blood or by marriage, the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause.' And section 4957, Revised Statutes 1899, provides: 'The person thus appointed shall possess the same power and receive the same fees as the proper officer would if he were present.' That a special prosecutor appointed by virtue of these sections has all the power for the purposes of the case in which he is appointed as the regular prosecuting attorney, there can be no doubt. (State v. Griffin, 87 Mo. l.c. 615, 616; State v. Moxley, 102 Mo. l.c. 383, 384.)"

Under the holding in the case of State ex rel v. Patterson, 152 Mo. App. l.c. 268, the court specifically held that where the prosecuting attorney receives no fees as compensation for his services it is very clear a special prosecutor can receive none and that there is a positive mandate of the statute that all fees must be paid into the public treasury, and in the absence of express statutory warrant they cannot be diverted to any other use or purpose. The court also in that case held that a public officer even though he is specially appointed cannot demand any compensation for his services not specifically allowed by statute and that statutes providing such compensation must be strictly construed. We find no statutory authority allowing the county court to pay a special prosecuting attorney who has been appointed temporarily for the trial of one specific case. The courts have placed the appointment of a special prosecutor in the same bracket as that of an attorney appointed by the court to defend in a criminal action. In neither position does the statute set out for the payment of a salary, either by statute or by a written agreement of the county court. This was so held in the case of State ex rel v. Patterson, 152 Mo. App. 264.

CONCLUSION

In view of the above authorities, it is the opinion of this department that a special prosecuting attorney cannot be allowed a fee or salary for the reason that the statutes do not provide for such a salary or fee and that the county court cannot by written contract allow such a salary or fee. In view of this holding it is further the opinion of this department that since the special prosecutor cannot be allowed a fee or salary it would be impossible to deduct a fee or salary from the salary allowed the prosecuting attorney.

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW

INCOME TAX: GRAND JURY: Income Tax Returns must be produced under subpoena duces tecum to a Grand Jury.

July 20, 1939

FILE 83

Mr. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of July 14th in which you request the opinion of this office on the questions therein submitted. Your letter is as follows:

> "A representative of the State Income Tax Department has been served with a subpoena duces tecum to appear before the Grand Jury now in session in Jackson County, Missouri, to produce and submit, for its inspection, State Income Tax Returns which were filed by certain individuals with the County Assessor of Jackson County as provided by law.
>
> It is our opinion, and we have been so advised, that under Section 10144, R. S. Missouri, 1929, that the State Auditor or any employee in the State Income Tax Department, the County or Township Assessor or any employee thereof, any County or Township Collector or any employee thereof, has no authority to divulge any information to any person, Grand Jury or court as to the contents of any State Income Tax Return, or any information pertaining thereto.
>
> I would like to have your written opinion as to whether or not it is permissible for any of the above mentioned officers, or employees, to produce for

the inspection of any person, Grand Jury or court, or to disclose any information in connection with the contents of such Returns under the above statement of facts."

As we understand your question from your letter, it is whether or not you are required to produce under a subpoena duces tecum in court of competent jurisdiction, or to a grand jury, state income tax returns made by an individual so that the grand jury may determine whether there has been a violation of the law in connection with said individual's return.

In your request for an opinion you refer particularly to Section 10144, R. S. Mo. 1929. The portions thereof pertinent to the question involved are as follows:

"It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person, or persons, any information relative to, or the contents of any income tax return filed under this article, or to permit any other person, or persons not connected with his office to see, inspect or examine the same; and it shall be unlawful for any person or officer to use any income tax return filed under this article in any manner whatever in connection with, or for the purpose of assessing of property tax or determining the amount of assessment of any person or corporation or to use the same in any way in making up an assessment roll. It shall be unlawful for any board of equalization, or any member thereof, or any officer to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this article, and any person violating the provisions of this section shall be deemed guilty of a felony and upon conviction thereof shall be fined a sum of not less than one hundred dollars ($100) and not more than one thou-

> sand dollars ($1,000) or by imprisonment in the penitentiary for a term of not less than two years and not more than five years, or both such fine and imprisonment as the court may deem proper; and any officer convicted for the violation of this section, the judgment of conviction shall be construed and held to be a forfeiture of the office held by such convicted person: Provided, however, that this shall not apply to the state auditor, his agents or inspectors in the discharge of their official duties in the administration of the income tax laws. The state auditor, his agent or inspector, shall have power to and be permitted to examine any income tax return on file in the office of any county or township assessor, county collector, county treasurer or the assessor, auditor or comptroller of the city of St. Louis."

Section 10141, R. S. Mo. 1929, relating to criminal prosecutions under this act, provides as follows:

> "Any individual who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return, shall upon conviction be fined not to exceed five hundred dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the costs of prosecution." (Italics ours.)

Cardinal rules in the construction of statutes are that all the statutes on a given subject should be read together and they should be given a reasonable interpretation and read in a practical and sensible light. In construing statutes one should try to ascertain the legislative intent. It might be well to add that the modern trend of the cases is against constructions of statutes which permit tax avoidance.

With these preliminary remarks, we come now to the real question at hand; that is, whether the income tax returns of an individual are beyond the reach of the courts in the administration of the Income Tax Law. Does Section 10144, supra, which makes it unlawful for the officers administering the Income Tax Law to divulge the contents of an individual's income tax return, prevent those officials from divulging such information or delivering income tax returns to an inquisitorial body, such as a grand jury, who are investigating the returns of certain individuals, to determine whether or not they have made false and fraudulent returns?

It will be noted that the proviso in Section 10144 says that this shall not apply to the State Auditor, his agents or inspectors, in the discharge of their official duties in the administration of the income tax laws. The word "this" refers to the inhibition in the first part of this section which makes it unlawful for the tax officials to divulge information relating to tax returns. We think that the prosecution of those who make false and fraudulent tax returns comes within the term "administration of the income tax laws" and permits the tax officials to divulge such information to the legally constituted law enforcing agencies of the state when such individual's return is under investigation. If these returns are withheld from the grand jury or other agencies of the state in the prosecution of the criminal laws for the violation of same, we are at a loss to see how anyone could be successfully prosecuted under Section 10141, supra, for rendering a false or fraudulent return unless the law enforcing officers are permitted to examine the return of the individual to determine whether a false return has actually been made by an individual.

One of the first steps in the prosecution of an individual under the statutes would be the introduction of such person's income tax return in evidence and the proving by the state that said return is false and fraudulent, and this could not be done without the tax return being introduced in evidence. On the other hand, one might be prosecuted for making a false and fraudulent return, and the individual so charged might prove his innocence by the introduction in evidence of the tax return so made by him. So what may be the sword in the hands of the prosecuting officers might be a shield for the protection of the individual himself.

There are cases in Missouri which, in our opinion, point the way to the above construction of this law. We quote from the case of Ex Parte French, decided by the Missouri Supreme Court in 1926, reported in 315 Mo. 75, 47 A. L. R. 688,

285 S. W. 513, l. c. 515, construing Section 11679, R. S. Mo. 1919, now Section 5291, R. S. Mo. 1929, relating to the question of whether the State Finance Commissioner is required to divulge certain alleged confidential matters pertaining to banks, as follows:

> "We may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial is an unwarranted interference with the functions of the court. A leading case on this subject is Brown v. Circuit Judge of Kalamazoo County, 75 Mich. 274, 283, 42 N. W. 827, 830, 5 L. R. A. 226, loc. cit. 230 (13 Am. St. Rep. 438) where it is said:
>
> 'It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights.'
>
> If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired and a 'certain remedy' is not 'afforded'.
>
> This is not an attempt by the Legislature to enact a rule of evidence, nor to define the effect of a certain character of evidence in making out a prima facie case.
>
> It is an attempt to say the courts shall not have or use certain evidence, however pertinent or necessary for the proper determination of a case. It is an unconstitutional encroachment upon the proper functions of the courts. 10 R. C. L., pp. 863-867."

In the case of In re. Millspaugh, 307 Mo. 186, l. c. 193, 270 S. W. 110, l. c. 112, the court said:

"Taking the whole act of which this particular section forms a part, it must be concluded that the secrecy imposed was for the protection of banking interests and their patrons. This petitioner has in his possession books and papers belonging to a defunct bank, the assets of which were absorbed by the plaintiff bank in the circuit court case. The purpose of the law was not to hide legitimate evidence when the same is required by the courts in the disposition of even and exact justice as between litigants. We do not believe that it was the intent of the lawmakers, by the language used, to preclude the use of such facts as the commissioner of finance might possess in the disposition of justice in a court having on trial a civil case. We think the intent was to except both criminal proceedings and trials in the courts of civil actions from the general bar of secrecy first imposed by the law."

Also in the case of State ex rel. Ross, Commissioner of Securities v. Sevier, 69 S. W. (2d) 662, l. c. 665, wherein the court had before it for construction Section 7739, R. S. Mo. 1929, which is a statute giving the State Commissioner of Securities the right to treat certain information in his office as confidential and not subject to inspection by the public, the court said:

"The purpose of the proviso seems to be to empower the commissioner, in his discretion, to keep from the prying eyes and hands of the general public 'any information which he deems in justice to the person filing the same should not be made public.' * * * * However, it is a far different thing to say that such information shall be deemed beyond the reach of an order of a court acting within its jurisdiction. It does not appear that such is a necessary intendment of section 7739, as was apparent on the face of the statute involved in the French Case, and we do not think it should be brought in by construction."

And further, at l. c. 666, the court said:

> "And as said in Wigmore on Evidence (2d E.) p. 176: 'Even where the privilege is strictly applicable, the trial Court may compel disclosure, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony."

> "A person's own statement of his own taxable property * * * * to the proper official is not a privileged communication at common law." 4 Wigmore, Section 2374, Subsection 4, Page 33-34.

From the above and foregoing, and after reading many cases from other jurisdictions, it is our opinion that the individual's income tax return does not fall within the classification of privileged communications so that they may be beyond the reach of the courts in the administration of even and exact justice by litigants and in the administration of the Income Tax Law, whether it be in the prosecution of one for making false and fraudulent statements or in exacting other penalties as provided in the Income Tax Law.

CONCLUSION

It is therefore our opinion that the State Auditor, or other tax officials having the care, custody and control of the income tax returns, must, under a subpoena duces tecum issued by a court of competent jurisdiction, produce said returns for the inspection of the grand jury so that it may be determined whether there has been a violation of the law.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

(Acting) Attorney General

INTOXICATING LIQUOR: Person paying only sales tax not eligible for liquor license. Section 27 of Liquor Laws does not apply to 3.2 per cent beer license.

July 27, 1939 7/29

FILED 83

Honorable B. Hugh Smith
City Attorney
Cape Girardeau, Missouri

Dear Sir:

We have received your letter of July 25th, which reads as follows:

"On page 533 of the Laws of 1937 Section 27 sets out the qualifications for an applicant applying for a license to sell intoxicating liquors. Part of which reads as follows: 'No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a 'tax paying citizen' of the county, town, city or village.'

It is almost impossible to tell from examining the various liquor laws passed by the legislature whether or not the qualifications laid down in the above section are also required of an applicant to sell 3.2 beer.

However, I am assuming that the applicant for a license to sell either 3.2 or 5 percent beer or intoxicating liquors must meet the requirements set out in above section 27.

I am familiar with the Sections of the Statutes that lay down certain qualifications for certain officers and which provide as for instance for a city officer that he must have paid a city tax the year preceding his election, but I have not been able to find

where our Courts have defined the meaning of 'A tax paying citizen of the county, town, city or village' relating to an applicant for license to sell 3.2 beer or intoxicating liquors.

In this day and age of such variety of taxes it would seem that many persons would now be considered tax payers who have not heretofore been so considered. For example every one who purchases merchandise in this State pays a sales tax. We have income tax and various degrees and forms of license taxes.

Do you construe the phrase 'A tax paying citizen of the county, town, city or village' to mean that the applicant must have paid city taxes on real property or personal property during the year preceding the time of his making an application for a license to sell in our city?"

Section 27 of the Liquor Control Act, Laws of Missouri, 1937, page 533, does provide, as you state, that "No person shall be granted a license hereunder unless such person is of good moral character and a qualified legal voter and a tax paying citizen of the county, town, city or village * * * *". However, said section 27 applies only to licenses for the sale of intoxicating liquor, such as 5 per cent beer, whiskey, etc., and does not apply to 3.2 per cent beer licenses.

Furthermore, there is no similar section in the non-intoxicating or 3.2 per cent beer laws which contains any qualifications for license such as is contained in Section 27. The manufacture and sale of non-intoxicating or 3.2 per cent beer is governed entirely by Sections 13139-a to 13139-z-24 as contained in Laws of Missouri, 1933, and amended in Laws of Missouri, 1935.

As we said above, said Section 27 applies only to the sale of intoxicating liquor and not to 3.2 per cent beer.

You have asked what is meant by the statutory term "A tax paying citizen of the county, town, city or village". Recently this office was asked to render an opinion as to whether or not a person who pays only sales taxes and no other taxes is eligible under the terms of said Section 27 for a

license to sell intoxicating liquors. We briefed this question in connection with that request, and we are enclosing copy of said opinion, which was addressed to the Honorable Walker Pierce, Supervisor of Liquor Control, and dated May 26, 1939. In that opinion we concluded that a person seeking a liquor license must have paid a tax, or at least must be liable for the payment of a tax to the county, town, city or village; that since the Missouri Sales Tax is a tax payable to the state, and to the state alone, and not to the county, town, city or village, a person who pays only sales taxes and no other taxes whatsoever to the county, town, city or village in which he seeks a liquor license is not eligible under the law for a license to sell intoxicating liquors.

Respectfully submitted:

J. F. ALLEBACH
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

JFA:VC
Enc.

CRIMINAL COSTS: State is not liable for costs in apprehending a parolee sentenced to the penitentiary by a Circuit Judge upon revocation of the parole. Parole is not part of case proper.

August 10, 1939

FILED
83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

The following opinion is in answer to your letter of July 26th, 1939, for an official opinion in regard to payment by the state of costs relative to persons convicted of felonies and sentenced to the penitentiary, where said defendants are paroled by the court. The request also includes a bill of costs rendered by the Clerk of the Circuit Court of Johnson County, State of Missouri, in the case of State of Missouri v. Joseph Ament, on a charge of burglary and larceny, under section 4056 R. S. Missouri, 1929. The charge of burglary and larceny is subject solely to imprisonment in the penitentiary, or to another institution on account of age of the defendant, and upon conviction the State of Missouri must pay the costs. Your request specifically asks an opinion as to whether or not the state is liable for the fees due the probation officer who apprehended the defendant on a revocation of parole. Under the statement of the fee bill, the court and prosecuting attorney certify that the defendant entered a plea of guilty, and was sentenced to four years at Boonville, Missouri, and paroled October 27th, 1938. The statement further sets out that the court ordered the probation officer to apprehend the defendant because of information he is violating parole orders and ordered that the probation officer bring him before the court for sentence. After the parolee had been apprehended and brought back to Johnson County at an expense of $143.05, the court granted a stay on the parole which amounted to an order of probation.

Section 3826 R. S. Missouri, 1929, partially reads as follows:

> "In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. * * * "

It will be noted under the above section that it reads specifically "shall be convicted". The word "convicted" means final conviction, that is, that the defendant was sentenced to either the penitentiary on a felony or was sentenced to imprisonment in the county jail, workhouse, or reform school because such person is under the age of eighteen years. Before sentence, the court, under the law, must give the defendant allocution and then sentence him, which sentence at the same time commits the defendant to the penitentiary. A commitment is then ordered for the sheriff to take the defendant to the penitentiary in conformity with the order of sentence of the court.

The population of Johnson County, according to the last decennial federal census, was 22,413. Under that bracket of population the Circuit Court of Johnson County has the power to parole a defendant who has been convicted by reason of section 3809 R. S. Missouri, 1929, which reads as follows:

> "The circuit and criminal courts of this state, and the court of criminal correction of the city of St. Louis, shall have power, as hereinafter provided, to parole persons convicted of a violation of the criminal laws of this state."

Section 3811 R. S. Missouri, 1929, reads as follows:

> "When any person of previous good character and who shall not have been previously convicted of a felony, shall be convicted of any felony except murder, rape (where the rape charged and the proof shows said rape to have been committed by means of force, violence or by putting the female in fear of immediate injury to her person), arson or robbery, and imprisonment in the penitentiary shall be assessed as the punishment therefor, and sentence shall have been pronounced, the court before whom the conviction was had, if satisfied that such person, if permitted to go at large, would not again violate the law, may in his discretion, by order of record, parole such person and permit him to go and remain at large until such parole be terminated as hereinafter provided: Provided, that the court shall have no power to parole any person after he has been delivered to the warden of the penitentiary."

It will be noted under the above section that the parole can only be granted after sentence is pronounced, which occurs immediately after allocution. A commitment is then issued which orders the sheriff to take the prisoner to the penitentiary. Up to this point the state is liable for the costs, but after the commitment to the penitentiary the state is not liable for any further costs, except the costs of transporting the prisoner to the penitentiary. It was so held in the case of State v. Kelly, 274 S. W. 731, par. 4,5, where the court said:

> "Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate

> determination of defendant's guilt or innocence, are so related to the trial of the cause as to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt of innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R. S. 1919) and that judgment has become a finality (section 4167, R. S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

In this opinion, as set out above, the court not only passed upon the authority of the special judge in granting a parole, but also ruled that the parole was not an incident to the conviction, and was not part of the trial of the cause, and could not be given until after judgment of conviction had been rendered and that judgment had become a finality. This holding means that after the judgment and sentence the cause was finally disposed of and that the parole was a matter separate and apart from the case itself, and in view of this holding judgment for costs adjudged against the defendant could not be paid by the state after the judgment and sentence except the transportation fees which accrue in favor of the sheriff in taking the defendant to the penitentiary. The parole, when granted before the defendant is taken to the penitentiary may be revoked by virtue of section 3812 R. S. Missouri, 1929, which reads as follows:

> "When any person shall be paroled under the provisions of section 3811 of this article the court granting said parole or the judge thereof in vacation may terminate said parole at any time without notice to such person by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and his parole has been terminated, and it shall be the duty of such officer, upon receipt of such certified copy of sentence, to immediately arrest such person and transport and deliver him to the warden of the penitentiary in the same manner as if no parole had been granted, and the time such person shall have been at large upon parole shall not be counted as a part of the term of his sentence, but the time of his sentence shall count from the date of his delivery to the warden of the penitentiary."

Under the above section it will be noticed that the court may revoke the parole without notice to the defendant, by merely directing the clerk of the court to make out and deliver to the sheriff or other proper officer a certified copy of the sentence, together with a certificate that such person has been paroled and has been terminated. It shall then be the duty of such officer to immediately arrest the defendant and take him to the penitentiary. This order or revocation, as set out in section 3812, supra, does not provide for the taking of the defendant before the court, but provides only that he be taken and delivered to the warden of the penitentiary in the same manner as if no parole had been granted. In case of a parole being revoked, the order of the court to the sheriff that he transmit the defendant to the penitentiary is still a part of the record proper in the case, and even if two years had elapsed from the time of the sentence of the defendant the transportation fees of the sheriff in taking the defendant to the penitentiary would not be barred and would not violate section 11416, R. S. Missouri, 1929, which reads as follows:

> "Persons having claims against the state

> shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

The reason why it would not be barred is that the transportation fees would not accrue until the prisoner was transported to the penitentiary. According to the case of State v. Kelly, supra, the parole is not an incident nor is it part of the record proper of the case, and therefore parole costs should not be paid by the state in any event. We find no authority which provides that the state should pay any costs of the proceedings of a parole. In the case of Ring v. The Chas. Vogel Paint & Glass Co., 46 Mo. App. 374, l.c. 377, the court said:

> "Preliminary to the discussion of the items of cost here in controversy, it may be stated that the entire subject of costs, in both civil and criminal cases, is a matter of statutory enactment; that all such statutes must be strictly construed, and that the officer or other persons claiming costs, which are contested, must be able to put his finger on the statute authorizing their taxation. Miller v. Muegge, 27 Mo. App. 670; Shed v. Railroad, 67 Mo. 687; Gordons v. Maupin, 10 Mo. 352; Ford v. Railroad, 29 Mo. App. 616."

Under the holding in the above case one must point out the statute authorizing the taxation of costs in connection with this case. We have pointed out section 11791, R. S. Missouri, 1929, supra, which is too lengthy to set out in this opinion. Under this section which specifically sets out fees of sheriffs we find no authority for the sheriff to receive any costs involved in a parole proceeding.

As we have said before the state is only liable for the costs up to the time of the final allocution and sentence of defendant subject to the further costs of transportation as ordered by the sentence and commitment of the court.

CONCLUSION.

In view of the above authorities it is the opinion of this department that the state is only liable for the payment of costs in the case proper where a defendant is convicted on a felony charge.

We are further of the opinion that where a defendant is convicted and sentenced the commitment may be held up by parole, and probation, and if later on the parole or probation is revoked or set aside, the state will be liable for the transportation of the prisoner to the penitentiary. The state will be liable, even if more than two years had elapsed from the time of the original sentence, for the reason that the costs of transportation of the parolee on revocation to the penitentiary did not accrue until after the prisoner was confined in the penitentiary.

In view of the fact that we have held that the state is not liable for costs involved in the granting and enforcement of paroles, it would not be necessary for this department to state under which appropriation such costs should be paid. The appropriation for that department, which appears in House Bill No. 586, Sixtieth General Assembly, - Appropriations for Costs in Criminal Cases, and Appropriations for Costs in Criminal Cases Transportation, are of course for two different purposes. The appropriation for transportation does not mean transportation in cases of apprehension of parole violators, but only means the transportation of prisoners from their place of conviction to the state penitentiary.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

ATION AND : Unless drainage, levee and special improvement
ENUE : districts have protected their interest by paying the general taxes or redeeming before the third general tax sale, they have thereby lost their claim for assessments for the particular years involved. Also they must redeem the certificates of purchase as provided in Section 9963f, supra, as a condition precedent to the foreclosure of their lien.

August 11, 1939.

FILED
83

Mr. Alvin Smyth
Treasurer & Ex-officio Collector
Stoddard County
Bloomfield, Missouri

Dear Mr. Smyth:

We desire to acknowledge your letter of August 5, 1939, which is as follows:

"A few days ago, I received a copy of Senate Bill No. 311, amending the Jones-Munger Law, and I am advised that this bill has been signed by the Governor and will become operative before the November sales.

"In reading Section 9963f of this amendment, I notice the following sentence: 'But no drainage, levee or any other special improvement district shall foreclose its lien against any property sold under this act until it has redeemed as provided herein.' It is presumed, of course, that this applies only to first and second sales, there being no redemption period after a third sale. However, this provision, coupled with the fact that hereafter there will be no redemption period after a third sale, immediately raises a couple of questions regarding conflicts between sales for general taxes and sales for drainage taxes for the same years.

"As an example, we shall say that a tract of land in a drainage district is offered at third sales in November, 1939 under the amended, Jones-Munger law for the years 1935, [illegible]6, 1937 and 1938. At the same time, a suit pending in Circuit Court on the drainage taxes for the same years. At the Jones-Munger sale, this property

is sold to the highest bidder and a deed immediately issued, as provided in Section 9953a of Senate Bill No. 311. There being no redemption period, does the issuance of the deed under the Jones-Munger sale nullify the lien of the drainage district and bar further action or foreclosure under the pending suit for the drainage taxes? Also, will Section 9963f require the drainage districts to redeem certificates issued in 1937 and 1938 in order to pursue to foreclosure suits already filed on drainage taxes for the same years for which the certificates were issued? I have a number of drainage tax suits pending that come under this classification and there is a question in my mind as to whether or not I shall have the right to foreclose under these suits after Senate Bill No. 311 becomes effective unless the outstanding certificates are redeemed by the several drainage districts involved.

"Your opinion on these questions will be very much appreciated."

Section 9963f of Senate Bill No. 311 of the 60th General Assembly of Missouri, is as follows:

"Any drainage, levee or any other special improvement district having a lien on any land or lot, upon which there has been issued a certificate of purchase, may, if authorized by the law creating such drainage, levee or other special improvement district, at any time within the period of redemption applicable to any certificate of purchase, deposit with the collector the amount necessary to redeem such lands. Upon any such deposit the collector shall give immediate notice thereof to the holder of the certificate of purchase. But no drainage, levee or any other special improvement district shall foreclose its lien against any property sold under this act until it has redeemed as provided herein. The holder of

such certificate of purchase shall then surrender said certificate of purchase to the collector, who shall pay to the holder of the certificate the money so deposited by such drainage, levee or other special improvement district. In cases to which this section is applicable said certificate of purchase shall not be cancelled but shall be considered as legally assigned to the drainage, levee or other special improvement district making the deposit as hereinbefore set forth and shall be delivered by the collector to such district, noting thereon compliance with this section. Any such certificate may then be redeemed as provided for in this act from any such drainage, levee or other special improvement district; if not redeemed, then any such drainage, levee, or other special improvement district shall be entitled to a collector's deed, in the same manner and under the same conditions as provided for in this act as to other holders of a certificate of purchase."

Section 9952a of Senate Bill No. 94, Laws of Missouri for 1933 is, in part, as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this act on the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; * * * * "

Section 9956a, thereof is, in part, as follows:

""The owner or occupant of any land or lot sold for taxes, or any other persons having an interest therein, may redeem the same at any time during the two years next ensuing, in the following manner: * * * "

Section 9953a of Senate Bill No. 311, supra, is as follows:

"Whenever any lands have been or shall herafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. If any lands or lots are not sold at such third offering, then the Collector, in his discretion, need not again advertise or offer such lands or lots for sale oftener than once every five years after the third offering of such lands or lots, and such offering shall toll the operation of any applicable statute of limitations. A purchaser at any sale subsequent to the third offering of any land or lots shall be entitled to the immediate issuance and delivery of a collector's deed and there shall be no period of redemption from such sales; provided, however, before any purchaser at a sale to which this section is applicable shall be entitled to a collector's deed it shall be the duty of the collector to demand, and the purchaser to pay, in addition to his bid, all taxes due and unpaid on such lands or lots that became due and payable on such lands or lots subsequent to the date of the taxes included in such advertisement and sale.

"In the event the real purchaser at any sale to which this section is applicable shall be the owner of the lands or lots purchased, or shall be obligated to pay the taxes for the non-payment of which such lands or lots were sold, then no collector's deed shall issue to such purchaser, or to anyone acting for or on behalf of such purchaser, without payment to the collector of such additional amount as will discharge in full all delinquent taxes, penalty, interest and costs."

Section 9953a, supra, provides that there shall be no period of redemption from the sale of lands at a general State and County third tax sale.

Section 9963f, supra, provides that any drainage, levee or improvement district may redeem from the certificate holder of a general tax sale "if authorized by the law creating such drainage, levee or other special improvement district at any time within the period of redemption applicable to any certificate of purchase.

The underscored part of the above section is construed by the Springfield Court of Appeals in the case of Drainage District No. 23 vs. Hetlage, 102 S. W. (2nd) 702, 709 wherein the court says:

> "Ordinarily, the holder of an inferior lien has the right of redemption where it is not made a party or not served in a suit by the holder of a superior lien to foreclose its lien. * * * Section 10766 thereof expressly grants circuit court drainage districts the right, under certain circumstances, to bid on real estate offered for sale for state and county taxes and the right to redeem, but no such power or authority is vested by said section in county court districts. * * * "

Prior to the enactment of Senate Bill 94 many cases were decided by the court on the question involved. In Little River Drainage District vs. Sheppard, 7 S. W. (2d) 1013, the court said (p. 1014):

> "The lien for state and county tax shall be paramount. The statute does not say that it shall necessarily destroy the district lien for special taxes. The plaintiff district, according to the stipulation and finding of the trial court, was not made a party to this proceeding. No person or corporation can be affected by a proceeding to which he or it was not made a party, and that applies to tax suits. For instance, the state's lien for taxes is superior to a prior mortgage lien, and a sale under such tax lien conveys title to the purchaser but does not affect the mortgagee's right to redeem."

In said suit the court held that because the drainage district was not made a party to the tax suit that said suit would not have the effect of extinguishing or satisfying the drainage district's lien. However, the court made this pointed observation (p. 1014).

> "If the district had been made a party to the proceeding with an opportunity to meet and pay the general taxes at the time, a different question would be presented for consideration."

Also, in McAnally v. Little River Drainage Dist. et al., 28 S. W. (2nd) 650, the Supreme Court of Missouri, en banc, made this remark:

> "Since the ruling in Little River Drainage District v. Sheppard, 320 Mo. 341, 7 S. W. (2nd) 1013, respondents concede they lost their lien for delinquent annual installments levied prior to the levy and subsequent sale of the land in question for state and county taxes for the year 1926."

In case of Holly vs. Rolwing, 87 S. W. (2nd) 651, in enforcing a general tax lien a levee and drainage district were made parties defendant, judgment was rendered against them and the land sold. Construing their rights on this record, the court said:

> " * * * Since the district had its rights and remedies as fully set out in section 10766, supra, and stood by and did not protect its interest as specifically provided in the statutes, it thereby lost its claim for taxes for the particular years involved. This does not mean that the district has lost any other rights, or that the landowner may defraud the districts by letting his land be sold for general taxes and have it bought by a friend and afterwards returned to the original owner, as claimed by defendants here. The statutory provisions clearly answer that argument. The districts may have

> protected their interests by paying the general taxes, and thereby precluded any such fraudulent act on the part of the landowner as has been suggested here. It might under some circumstances be some burden on the part of the drainage or levee districts to use their funds for a while in paying the general taxes, but they were organized under such provisions of the statutes, and if the lands involved are not of such value to justify the district in paying the general taxes to protect the liens, of the districts, then under such condition there would be nothing lost to stand by and let the lands be sold for general taxes. But the condition was not true in this instance, and as a general rule it is not true. Certainly the lands in these districts are always worth more than the general taxes against them, and the district's rights and the rights of the bondholders may be protected if the board of supervisors will be vigilant in acting under the rights given by the statutes."

Under the provision of Senate Bill No. 94, supra, and Section 9952a, thereof, a notice being given as therein required, no owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale could establish that there was not due process.

CONCLUSION

Therefore, it is the opinion of this department that unless drainage, levee and special improvement districts have protected their interests by paying the general taxes or redeeming before the third general tax sale, they have thereby

lost their claim for assessments for the particular years involved. Also they must redeem the certificates of purchase as provided in Section 9963f, supra, as a condition precedent to the foreclosure of their lien.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

CRIMINAL COSTS: Upon a case being "continued generally" on either a capital case, penitentiary case or county jail sentence, or fine, the cost is taxed but not certified to either the State Auditor or Clerk of the County Court.

November 16, 1939

FILED: #83

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

FILED
83

Dear Sir:

We are in receipt of your request for an opinion, dated October 20, 1939, which reads as follows:

"We are in receipt of a letter from Mr. G. H. Summers, Circuit Clerk of Vernon County, Missouri requesting information in regard to a felony case which had been continued generally. Mr. Summers desires to know whether the State or County if liable for the payment of costs.

"We are enclosing herewith a copy of the letter from Mr. Summers. You will note that he mentions that the case was State vs. Vern Foley and was a felony case. He does not state, however, whether it was a capital case, a case punishable solely by imprisonment in the penitentiary, or whether it was a mixed felony, that is, one punishable either by penitentiary sentence or by jail sentence or fine. He recites, however, that the defendant, while awaiting trial in Vernon County, broke jail, and I presume that the case in question was on the charge of breaking jail before conviction, which charge would be punishable under Section 3916 R. S. Mo. 1929.

"Your office has heretofore, under date of January 22, 1934, rendered an opinion in regard to costs when a criminal case was continued generally. However, I presume that the opinion rendered at that time does not apply to cases where the punishment grades from penitentiary sentence down to jail sentence or fine.

> "We would like to have your official opinion in regard to the payment of costs where a general continuance is had in criminal cases. We would appreciate it if you will advise us fully in regard to the payment of all costs, both state and defendant's costs, in capital cases or cases where penitentiary sentence is the sole punishment, and also in mixed felony cases where the punishment grades from penitentiary sentence down to jail sentence or fine."

In answer to the above request, will say that this office, on January 22, 1934, rendered you an opinion in reference to the liability of state for defendant's cost where case is "continued generally." You have mentioned this opinion in your request, and after reading the same I find that the opinion does not cover your present request. In that opinion, the point involved seemed to be whether or not the state, meaning the plaintiff, was liable for costs on a case "continued generally." This opinion involved mostly the question of whether the plaintiff or defendant was liable, when the continuance was made on either the application of the plaintiff or on the application of the defendant. I am enclosing a copy of this opinion.

The section to be construed is Section 3841 R. S. Missouri, 1929, and reads as follows:

> "The clerk of the court in which (any criminal cause shall have been determined) or (continued generally) shall, immediately after the adjournment of the court and before the next succeeding term, tax all costs which have accrued in the case(and if the state or county shall be liable under the provisions of this article for such costs or any part thereof,) he shall make out and deliver forthwith to the prosecuting attorney of said county a complete fee bill, specifying each item of services and the fee therefor. (Underscoring and parentheses ours)

This section specifically states "the clerk of the court in which any criminal cause shall have been determined * *." This phrase is a disjunctive of the following phrase, "or continued generally shall, * *." In other words, the clerk must tax all costs which have accrued in the case first where the cause shall have been determined, or second, continued generally. In other words, under either circum-

stances, that is, determined or continued generally, the clerk must tax the costs which have accrued in the case. This section further provides "and if the state or county shall be liable under the provisions of this article for such costs or any part thereof, he shall make out and deliver forthwith to the prosecuting attorney of said county a complete bill specifying each item of services and the fee therefor." In other words, the last quoted phrase only applies to the first quoted phrase, that is "shall have been determined", while the second quoted phrase, that is "contained generally" the clerk must tax the cost. When reading the same as to the above set out disjunctives, this section is not ambiguous, and in plain ordinary language it means that in cases where the cause shall have been determined the clerk shall not only tax the costs but should certify as to whether or not the state or county shall be liable under the provisions of this article for such costs or any part thereof.

In construing section 3841, supra, it must have been the intention of the legislature that when the cause is "continued generally" all that is necessary for the clerk to do is to tax the costs as costs against that particular case. The state can only be liable for costs specifically set out by the statute, and under section 3841, supra, it would be impossible for the clerk, the prosecuting attorney, or the circuit judge to state that the state would be liable for costs in which the cause has not been determined.

Under Section 3826 R. S. Missouri, 1929, it is provided that the state shall pay costs in all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, where the defendant is unable to pay them. But, where a case is "continued generally" it cannot be pointed out by any statute that the defendant has been convicted and sent to the penitentiary for the reason that the case has not been finally determined.

Also, under Section 3827 R. S. Missouri, 1929, the statute specifically says that when the defendant is sentenced to imprisonment in the county jail, or to pay a fine and is unable to pay the costs, the county in which the indictment was found, or information filed, shall pay the costs, except such as were incurred on the part of the defendant. When a case is "continued generally" and not determined, the clerk, prosecuting attorney, or the trial judge cannot say that the county shall pay the costs for the reason that the

defendant when placed upon trial at a later date may be sentenced to the county jail, or may be sentenced to the state penitentiary on a graded felony.

Also, Section 3828 R. S. Missouri, 1929, provides that upon an acquittal on any case, either capital cases or those in which imprisonment in the penitentiary is the sole punishment for the offense, the cost shall be paid by the state and in all other trials on indictment or information, if the defendant is acquitted, the costs shall be paid by the county. Under this section, neither the clerk, the prosecuting attorney nor the circuit judge could say that the defendant had been acquitted on either an offense punishable solely in the penitentiary or that he had been acquitted on a graded felony.

The state can only be liable for costs specifically set out by the statute. It was so held in the case of State v. Wilder, 197 Mo. 27, l.c. 32, where the court said:

> "The sole question arising from the facts alleged by the relator and admitted by the State Auditor, is whether the State is liable for the costs claimed by the relator. For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State ex rel. v. Hill, 72 Mo. 512; Williams v. Chariton County, 85 Mo. 646."

Also, in the case of State of Missouri, ex rel., v. Carpenter, et al, 51 Mo. 555, l.c. 556, the court said:

> "The statute in relation to criminal costs, provides, that they shall be paid by the State in all capital cases in which the defendant shall be convicted, and shall be unable to pay them; and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and shall be unable to pay them. And the county in which the indictment is found, shall pay the costs in all cases where the defendant is sentenced to imprisonment in the county jail, and to pay a fine, or either of these modes of punishment, and is unable to pay them. (1 W. S., pp. 348-9, sections 1,2.)
>
> "Before the State can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be convicted of a capital offense,

or that he should be sentenced to imprisonment in the penitentiary. Neither of these occurrences took place in this case. It is true the jury brought in a verdict in favor of punishing him by imprisonment in the penitentiary, but the court passed no sentence thereon; on the contrary, it set the same aside. There was then nothing final, either as to conviction or sentence.

"The operation and effect was the same as if there had been a mis-trial, and no liabilities or rights were determined thereby.

"But when the case was ultimately and finally disposed of, the result was a conviction and sentence to pay a fine, and be imprisoned in the county jail. This was the sentence that established the character of the offense, and made the costs a charge against the county.

"Although the indictment was for a capital crime, and under it the prisoner might also have been convicted of a felony, punishable by imprisonment in the penitentiary, yet it is also true, that it was competent to find him guilty of a less degree or grade of crime, by which the punishment would be reduced to imprisonment in the county jail, or by such imprisonment coupled with a fine. It is the conviction and sentence in such case which establishes the grade of the offense, for the purpose of fixing the liability for costs, and not the allegations contained in the indictment. This is the only question we are called upon to review. * * * ."

Under the above case the court specifically said before the state can be made liable to pay costs in a criminal prosecution, it is necessary that the defendant should be sentenced to imprisonment in the penitentiary. This applies on conviction and under Section 3841, supra, when a cause is continued generally, especially so on a graded felony, the clerk, prosecuting attorney or the circuit judge, cannot certify that there has been a conviction on a capital case or that the defendant would be sentenced to imprisonment in the penitentiary when the cause has not finally been determined. The same holding could be had on an acquittal under Section 3828, supra.

CONCLUSION

In view of the foregoing authorities it is the opinion of this department that under Section 3841 R. S. Missouri, 1929, that when a cause is "continued generally" all that the clerk may do is tax all costs which have accrued in the case, and that the part of Section 3841, supra, which reads "and if the state or county shall be liable under the provisions of this article for such costs or any part thereof * * *" does not apply to causes "continued generally", but only to the disjunctive in the section which says "any criminal cause shall have been determined."

Therefore, it is the further opinion of this department that when a cause is "continued generally" whether the cause be a capital case or a case where a penitentiary sentence is the sole punishment, or in graded felonies the costs are only to be taxed against the cause by the clerk and not to be certified by the trial court or prosecuting attorney to the county or to the state.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB:RW
1 Encl.

APPROVED:

TYRE W. BURTON
(Acting) Attorney General

ESCHEATS: Time spent in the army under Section 890 R. S. Missouri, 1929, should be excluded from the twenty-one year limitation on escheats to the state.

December 6, 1939

12-9

Hon. Forrest Smith
State Auditor
Jefferson City, Missouri

FILED
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Dear Sir:

We are in receipt of your request for an opinion, under date of November 28, 1939, which reads as follows:

"I desire to request an opinion of your office on the following statement of facts.

"One Henry B. Smith of Sacramento, California has made inquiry of this office as to how to proceed to receive monies from the above entitled estate, the said Henry B. Smith being a nephew of the deceased.

"The said J. J. McQuinn died in Maysville, DeKalb County, Missouri sometime in the year 1917. His estate was administered in DeKalb County, Missouri and the administrator of said estate remitted to the State Treasurer on August 8, 1918, the sum of $468.11. The records in office of the State Auditor show that in the years 1924 and 1925, four disbursements were made from this estate aggregating the sum of $189.32, leaving a balance credited to said estate at this time of $278.79. The said Henry B. Smith received $54.84 from the sale of personal property left by the decedent in 1917.

"The said Henry B. Smith, claimant, entered the military service of the United State in the World War in 1917 and remained in service for approximately two years, most of which service was rendered outside the boundaries of the United States.

"Under the provision of Section 642, R. S. Mo., 1929, which provides: 'All monies paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be, on the order of the board of fund commissioners, transferred to the public school fund.' The twenty-one year period of time would elapse August 8, 1939. However, no transfer to the school fund has been made by the board of fund commissioners for the year 1939, as this is usually done once a year.

"The sole question for determination is whether or not the claimant, Henry B. Smith, is entitled to make claim for the monies in said estate at this time, and whether or not the twenty-one year period prescribed by Section 642, R. S. Mo., 1929, can be waived to the fact that the claimant was in the military service of the United States during the years 1917 and 1918, and had no opportunity during those two years to make application."

Section 642, R. S. Missouri, 1929, reads as follows:

"All moneys paid into the state treasury under the provisions of this chapter, after remaining therein unclaimed for twenty-one years, shall escheat and vest absolutely in the state and be, on the order of the board of fund commissioners, transferred to the public school fund."

Section 890, R. S. Missouri, 1929, reads as follows:

> "That if any citizen of this state, entitled to institute or bring action, suit or proceeding in this state, is unable during the continuance of the present war or during the period of one year after peace is declared, to institute or bring the same within the time limited therefor by the laws of this state, because of absence from this state in the military or naval service of the United States, such person shall not on that account be barred, but shall be entitled to institute or bring such action, suit or proceeding within six months after the removal of such disability; otherwise the same shall be barred."

Section 890, supra, was repealed by the Laws of 1939, page 278, but was in effect in 1919.

In regard to the above section the case of Hammond v. Johnston, 93 Mo. 198, based upon a similar statute which applied to the Civil War. In that case, at page 219, the court said:

> "Fourteen years, nine months and fifteen days elapsed from the date of the patent to the commencement of this suit, while the period of our statute of limitations is ten years. The plaintiffs, to overcome the bar of the statute, show that, before, during, and after the late war, they resided in the Confederate States, and to that they couple the claim that the patent did not, in point of fact, become an operative grant until the twelfth of November, 1860. * * * "

Also, in that case, at page 221, the court said:

> " * * * As to the states of South Carolina, Georgia, and Alabama, it was held in the case of The Protector, 12 Wall. 700, that the war began on the nineteenth of April, 1861, the date of the blockade proclamation, and ended on the second of April, 1866. The same dates were taken as fixing the time for the suspension of statutes of limitations in Brown v. Hiatts, 15 Wall. 177; Adger v. Alston, 15 Wall. 555, and Ross v. Jones, 22 Wall. 576. It is earnestly and with much force argued, that August 16, 1861, the date of President Lincoln's proclamation, declaring that the states before named were in a state of insurrection, and prohibiting commercial intercourse, should be taken as the date of the commencement of the war, and not the nineteenth of April, 1861, the date of the blockade proclamation. But we cannot see that the rule of those cases is modified in the later cases (91 U.S. 3; 93 U. S. 593; 99 U. S. 493), at least, so far as fixing the period during which the statute of limitations was suspended. Until modified, we accept them as fixing the dates by which the computation is to be made in cases like the present one."

It will be noticed that the court considered the statute suspended during the period of the war.

In the case of Bolz Cooperage Corporation v. Beardslee, 244 S. W. 611, the court said:

> "'Claimant pleads and claims the exemption granted under the Soldiers' and Sailors' Civil Relief Act, passed by the Congress of the United States, being Act March 18, 1918, c. 20, sec. 604, 40 Statutes at Large of United States, and particularly sections 10313, 10314, 10315, 10318, 10322, and 10347, as found in Barnes' Fed-

eral Code 1919, and states that, under and by reason of the provisions of said act of Congress and of the facts herein set out in this petition and demand, it is entitled to recover from the said estate of Thomas J. Beardslee, deceased, the sum of $2,203.70, for which sum, together with its costs herein, it prays judgment.'

"Respondent thereupon pleaded the statute of nonclaim, and also what in effect was a general demurrer; that is, that the demand or petition of claimant does not constitute a valid claim against said estate.

"The court sustained the defendant's plea and entered judgment accordingly, from which judgment Bolz Cooperage Corporation has appealed."

Also, the court further said: (l.c. 612)

"Appellant next insists that the claimant, though a corporation, is relieved from the bar of the statute of nonclaim by the Soldiers' and Sailors' Civil Relief Act, passed during the Sixty-Fifth Congress. It is argued, on the other hand, by respondent, that said act of Congress cannot be construed to relieve a corporation from such bar. We share the latter view. Said act (volume 40, c. 20, U. S. Stat. at Large) recited (section 100) that the purpose of said act is to extend certain privileges and exemptions to 'persons in military service.' Section 101 of this act defines what is meant by persons in military service. The same provides:

'That the term "persons in military service,"

> as used in this act, shall include the following persons and no others: All officers and enlisted men of the regular army, the regular army reserve. * * *'
>
> "Without setting forth the entire section, it is enough to say that the enumerated list is a class of natural persons; that is, individuals engaged in different branches of the military and naval services of the United States. Corporations are not included, and, not only that, they are expressly excluded from the privileges and exemptions of the act because the list is written in terms made exclusive, since the act provides that only the persons named and no others shall receive the benefit of the act. * * "

And, the court further said at page 613:

> "* * In the latter the term 'person' is made broad enough to include all persons, artificial as well as natural, while, as already said, in the former it is limited to natural persons only. No contention is made that this claim is other than a claim in favor of a corporation, though Bolz, the agent, is conceded to have been the owner of some stock in the corporation. We are jealous to liberally construe the Soldiers' and Sailors' Civil Relief Act so as to effectuate its purpose, but we cannot read into the Act something which is not therein contained and which is clearly excluded. We therefore rule that the Soldiers' and Sailors' Civil Relief Act cannot be construed to relieve this corporation from the statute of nonclaim. Our Missouri statutes likewise contain no exception applicable to this claimant, a corporation. Section 182, R. S. Mo. 1919; section 1345, R. S. Mo. 1919."

In the case of Gray v. Shelton, 282 S. W. 53, l.c. 55, the court said:

> " * * * Aside, however, from the failure of the defendant to preserve the objection for consideration, it appears that the court, on its own motion, excluded the testimony on the ground that the statute was limited to citizens of this state, and that Edgar and Charles Gray were residents, at the time of their enlistment for military service, of the state of Arkansas. Thus excluded from the consideration of the jury, the defendant suffered no injury on this account, and this assignment must go for naught."

It will be noticed under this holding that the statute is construed to apply to only citizens of this state and I am assuming that Henry B. Smith was a citizen of this state at the time of his entering the army.

21 C. J., page 862 states the following rule:

> "* * Statutes providing for escheat for defect of heirs usually protect the rights of heirs by providing a certain period within which persons claiming as such may come in and establish their title, * * * While the state may as a matter of grace agree to reimburse the rightful owner of escheated property subsequently appearing, it is not bound to do so, and it may exact conditions on which it will make reimbursement, and limit the time within which reimbursement will be made, provided such limitation does not interfere with vested rights. * * "

Under this rule the state is not forbidden

to acknowledge a claim against the escheats fund, even after the time had gone by for filing the claim.

You also state in your request that no transfer to the school fund has been made by the board of fund commissioners for the year 1939.

In view of that statement we are citing the case of Mathews v. Savings Union Bank & Trust Company, 184 Pac. 418 (Cal.) l.c. 419:

> "So obnoxious to the sense of justice is the suggestion that the state may take for its own use the property of one of its citizens, without compensation and without hearing, that, unless the language of a statute is express and unmistakable, courts will not attribute to the co-ordinate law-making body the purpose of invading the common right and violating those fundamental constitutional provisions by which the individual is protected against arbitrary action on the part of the government. The language of the statutes here in question requires no such interpretation.
>
> "Section 1273 of the Code of Civil Procedure and section 15 of the Bank Act are correlative. They deal with bank deposits upon which, except for the accumulation of interest, neither deposits nor withdrawals have been made for a period of 20 years. The Bank Act provides that the moneys in such deposits-'which shall have remained unclaimed for more than twenty years * * * and where neither the depositor or any claimant has filed any notice with such bank showing his or her present residence, shall * * * be deposited with the state treasurer after judgment in the manner provided in the Code of Civil Procedure.' Stats. 1915, p. 1106.

"'The general language of the Code section is the same, except that the last phrase reads 'shall * * * escheat to the state.' Code Civ. Proc. sec. 1273. The section then provides that, when the Attorney General shall learn of such deposits he shall bring suit in the superior court of Sacramento county, and that upon the trial, 'if it be determined that the moneys * * * are unclaimed as hereinabove stated, then the court must render judgment in favor of the state declaring that said moneys have escheated,' and commanding the bank to deposit the money with the state treasurer thereafter to be dealt with as other escheated property.

"So careful is the state of the rights of its citizens that even after the adjudication, for a period of 5 years, any person not a party or a privy to the escheat judgment may sue the state to recover the money, and this time is extended to infants and persons of unsound mind for a period of one year after the removal of the disability. Code Civ. Proc. section 1272."

Also, in the case of Commonwealth v. Thomas' Adm'r. 140 Kentucky 789, l. c. 796, the court said:

"* * * The State may in its generosity, or sense of fairness, say that it will not in such case hold the proceeds against the original claimant, if he subsequently appears, and may provide for his reimbursement. It may do less. As by shortening the time in which it will make reimbursement, or it may exact conditions. In the instance here the State has declared that for escheated property which it dedicates to purposes of education, it will not make reimbursement. Rather, it fails to make

provisions for it in such instances. It was in the competency of the state to so provide, or fail to provide as it saw fit. The policy is one of legislative discretion, and is not a condition precedent to the State's exercise of power. * * * "

CONCLUSION.

In view of the above authorities, it is the opinion of this Department, that although Section 890, supra, was repealed by the Laws of 1939, page 278, it was in effect during the twenty-one year limitation, and the right to bring action was suspended during the period of the war and that time spent by the claimant in the service of the army should be deducted from the twenty-one year limitation.

It is further the opinion of this Department that the state, under the facts in this case, may waive the statute of limitation and acknowledge the claim for the reason that the money has not been transferred to the school fund by the board of fund commissioners for this year.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

TYRE W. BURTON
(Acting) Attorney General

WJB:RW

TAXATION AND REVENUE : (1) Collector can offer resales after effective date of Senate Bill No. 311. (2) Necessary steps for collector to follow. (3) When collector should issue a tax deed thereunder. (4) Retroactive feature of Senate Bill No. 311

December 12, 1939.

FILED: #83

Honorable Rorrest Smith
State Auditor
Jefferson City, Missouri

FILED
83

Dear Mr. Smith:

We desire to acknowledge your request for an opinion on December 7, 1939, which is as follows:

"Under the provisions of Senate Bill 94, laws of Mo. 1933, the collectors of Missouri have been establishing two items in the back real estate tax books as follows:

To balance of tax due from third sale of real estate subject to two year redemption.
To balance of tax due from third sale of real estate subject to one year redemption.

"These items consist of the amount of taxes which were not realized from the proceeds of property sold at third offering, or stated another way, they represent the unpaid balance of taxes after the proceeds derived from third sales have been pro-rated and deducted from the back real estate tax charge.

"Amounts representing such tax balances are carried in the collector's books for the sales which were held in November 1937 and 1938, and which had occurred before the effective date of Senate Bill 311. The maintenance of such accounts were necessary under Senate Bill 94, in view of Section 9953B which provided for resale on failure of the

redeemer to pay balances on tax bills which were unpaid out of proceeds at third sales.

"In view of this situation we would like answers to the following questions embodied in an opinion:

(1) Can a collector offer the remaining unpaid balance of taxes for resale after the effective date of Senate Bill 311?

(2) If these resales can be made, what are the necessary steps for the collector to follow in order to make such sales valid?

(3) If such sales are made when should a collector issue a tax deed?

(4) Is Senate Bill 311 retroactive in effect in respect to these special items caused by the provisions of Section 9953B of Senate Bill 94?

(5) If such resales cannot be made by the collector what disposition should be made of the unpaid balance of taxes on 1937 and 1938 sales and on which certificates of purchase with redemption features are outstanding?"

I.

CAN A COLLECTOR OFFER THE REMAINING UNPAID BALANCE OF TAXES FOR RESALE AFTER THE EFFECTIVE DATE OF SENATE BILL NO. 311?

Section 9953a, of Senate Bill No. 94, Laws of Missouri 1933, page 432, is as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delin-

quent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and the purchaser thereof shall acquire thereby the same interest therein as is acquired by purchasers of other lands at such delinquent tax sales."

Section 9953b, thereof, page 432, is as follows:

"Such lands may be redeemed from such sale upon the same terms and conditions as other lands may be redeemed from delinquent tax sales, as provided herein; but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

Senate Bill No. 311, Laws of Missouri 1939, at page 850, repeals the above two sections and Section 9953a, thereof, is, in part, as follows:

"Whenever any lands have been or shall hereafter be offered for sale for delinquent taxes, interest, penalty and costs by the collector of the proper county for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes thereon, interest, penalty and costs provided by law, then such county collector shall at the next regular tax sale of lands

> for delinquent taxes, sell same to the highest bidder, and there shall be no period of redemption from such sales. No certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed. * * *" (Underscoring ours)

Sales for general delinquent taxes on lands and lots began November 6, 1939, at which time Senate Bill No. 311, supra, was in full force and effect.

Therefore, sales submitted and made thereunder eliminated the right of redemption from such sales and thereby made them final. Therecould be no further offering for deficiency delinquent taxes under the conditions and procedure of Section 9953b, supra, where the sale was executed under the provisions of said Section 9953a of said Senate Bill No. 311.

Under the provisions of Section 9952c, Laws of Missouri 1933, at page 431, providing for the first offering of lands for delinquent taxes on real estate, there could be no sale unless the bid was for the full amount of taxes, penalty, interest and costs. The same is true of a second sale or "reoffering" under the provisions of Section 9953 thereof. Therefore, the resale or "deficiency" provision of Section 9953b of Senate Bill No. 94, supra, can only refer to Section 9953a of Senate Bill No. 94, supra, which is commonly termed the "third sale" or the sale to the highest bidder.

If, under the provisions of Section 9953a or "third sale" of Senate Bill No. 94, a sale were effectuated which might bring the total taxes, penalty, interest and cost, the state's claim would be satisfied and the collector could not invoke the deficiency clause. However, a bid for less than such sums would create a deficiency which the collector must enforce, provided:

> " * * * but in the event of the redemption of any land from any sale made under the provisions of this act, the land so redeemed shall be liable to resale by such county collector at the next or any subsequent tax

sale of lands for delinquent taxes for all delinquent taxes, penalty, interest and costs not paid by such sale."

A delinquent third tax sale, made by the collector under the provisions of said 9953a, Senate Bill No. 94, for less than the total amount of taxes, penalty, interest and costs, in event of redemption under the provisions of said Section 9953b would reveal on the books of the collector a balance of the taxes, penalty, interest and costs, after crediting the amount with the proceeds of such third sale.

CONCLUSION

Therefore, it is the opinion of this department that if, prior to the effective date of Senate Bill No. 311, Laws of Missouri 1939, a sale were had under the provisions of Section 9953a, Laws of Missouri 1933, for less than the total amount of taxes, penalty, interest and costs, that unpaid part would constitute a deficiency, and, if redeemed, such deficiency should be enforced by the collector by submitting the same to resale at the time and in the manner provided in said Section 9953b.

II.

IF THESE RESALES CAN BE MADE, WHAT ARE THE NECESSARY STEPS FOR THE COLLECTOR TO FOLLOW IN ORDER TO MAKE SUCH SALES VALID?

The only statutory provisions of procedure in effectuating such resales is found in Section 9953b.

The above statute provides that "the land so redeemed shall be liable to resale * * * at the next or any subsequent sale of lands for delinquent taxes", which clearly indicates one offering for the resale.

If the legislature had intended that the procedure for resale should follow the procedure of the original sales, the bbill would have provided for a first, second and third sale for such resale. The language of said section plainly expresses that one sale is intended and that the lands to be submitted for such resale shall be advertised and sold at the time and in the manner other delinquent tax sales of real estate are executed.

In State ex rel. Barrett v. Boeckler Lumber Co., 301 Mo. 445, 532, in speaking of whether a statute means what it says when it is plain, the Supreme Court en banc said:

> "'The statute of this State leaves scant room for construction. We are not concerned in this case with any question as to a contract, otherwise lawful, which incidentally restrains trade. The rule applicable in such a case is not applicable in this. Nor is it within our province to give the statute any other meaning than its language inports. Our duty to apply the statute as it is written is as plain as the language of that statute and in that language there is no ambiguity. * * *'"

CONCLUSION

Therefore, it is the opinion of this department that a resale must be advertised and executed at the "next or any subsequent tax sale of lands in the same manner that other lands are offered for sale but that there may be only one offering for such sale.

III.

IF SUCH SALES ARE MADE, WHEN SHOULD A COLLECTOR ISSUE A TAX DEED?

When a sale is made upon advertisement for resale under the provisions of Section 9953b, supra, there being no special statute providing redemption, redemption therefrom is controlled by the general statute of redemption, to-wit:

Section 9956a, Laws of Missouri 1933, at page 437, which provides that parties interested in the land may redeem at any time during the two years next ensuing.

CONCLUSION

Therefore, after the expiration of the two years redemption period, a purchaser is entitled to receive and the collector must issue a deed to a purchaser under a resale providing he pays taxes accruing after the issuance of the certificate and all prior taxes, that may remain due and unpaid on said property, and the lien for which was not foreclosed by the sale under which the holder of the certificate makes demand for the deed as provided in Section 9957c, Laws of Missouri 1933, at page 440.

IV.

IS SENATE BILL 311 RETROACTIVE IN EFFECT IN RESPECT TO THESE SPECIAL ITEMS CAUSED BY THE PROVISIONS OF SECTION 9953B OF SENATE BILL 94?

Section 15, Article II of the Constitution of Missouri, is as follows:

"That no ex post facto law, now law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities can be passed by the General Assembly."

After the effective date of Senate Bill No. 311, all offerings under Section 9953a, thereof, which provides that "whenever any lands have been or shall hereafter be offered for sale for delinquent taxes * * * for any two successive years and no person shall have bid therefor a sum equal to the delinquent taxes, thereon, interest, penalty and costs provided by law, then such County Collector shall at the next regular tax sale of lands for delinquent taxes, sell the same to the highest bidder, and there shall be no period of redemption from such sales", cannot be submitted for resale because "no certificate of purchase shall issue as to such sales but the purchaser at such sales shall be entitled to the immediate issuance and delivery of a collector's deed." Such so-called third sale is final. Therefore, there can be no redemption and deficiency resale.

Third sales consummated under the provisions of Sections 9953a, Laws of Missouri 1933, or third sale, prior to the effective date of Senate Bill No. 311 and deficiency resales - in case of redemption - under the provisions of Section 9953b, Laws of Missouri 1933, prior to the effective date of Senate Bill No. 311 could not be affected by said Senate Bill No. 311 because the redemption rights and rights of the certificate-holder involved in such sales and resale would be a vested right and to hold that such sales were affected by said Senate Bill No. 311, which is retrospective in its terms, would bring them within the constitutional ban of retrospective laws or laws which create a new obligation or impose a new duty. The same would be true of so-called third sales under the 1933 law prior to the effective date of Senate Bill No. 311 but where the resales thereunder were had after the effective date of said Senate Bill No. 311.

Senate Bill No. 94 and Senate Bill No. 311 are both procedural laws for the collection of delinquent taxes.

A statute which is remedial or procedural, and especially one providing for the enforcement of the lien of county and state for delinquent taxes on real estate already assessed and levied, may be retroactive and not come within the above constitutional inhibition.

In construing this question, the Supreme Court in McManus vs. Park, 287 Mo. l. c. 115, says:

> " * * * This, however, applies only to statutes which would affect vested rights, and not to statutes which are remedial only. No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode. (Schuermann v. Union Cent. Life Ins. Co., 165 mo. l. c. 652; Roenfeldt v. St. L. & Sub. Ry. Co., 180 Mo. l. c. 564; State v. Taylor 134 Mo. l. c. 144-145; State ex rel. v. Taylor, 224 Mo. l. c. 464; St. Louis v. Calhoun, 222 Mo. l. c. 52.)
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> "This court said in case of Mainwaring v. Lumber Co., 200 Mo. l. c. 732-733:
>
> "'Acts changing remedies in any way that do not destroy or impair vested rights, are excluded from the rule invalidating retrospective laws, even when they are intended to retroact.'"

In the course of said opinion, the court further said:

> " * * * A statute may retroact without being retrospective in the sense that it is inimical to the Constitution. So far as remedies are concerned, it may operate upon property rights and interests which are already vested, but the remedial action authorized by the statute of course applies to the future. It has been many times held by this court that a statute is not retrospective in its operation, within the terms of the Constitution, unless it impairs some vested right. * * * "

Also:

> "'This, because the retrospective laws forbidden by that instrument are laws impairing

existing vested civil rights. The law must take away such vested right, or it must create a new obligation, impose a new duty, or attach a new disability in respect to gone-by transactions, in order to be retrospective and under the constitutional ban. There is no vested right in a particular mode of procedure.'

"The amplification of the principle in the last sentence of the first paragraph quoted, only particularizes what is meant by existing vested rights. A law which does not impair any vested right is not retrospective in the constitutional sense, although it may change the remedy or provide new remedies for enforcing or defining such a right. * * * "

The rule in Missouri is that a law is not retrospective in its operation, within the terms of the Constitution, unless it impairs some vested right.

The court has defined vested rights in the case of State ex rel. vs. Hackman, 272 Mo. 600, 607, as follows:

" * * * By a vested right we mean one which is absolute, complete and unconditional (Orthwein v. Insurance Co., 261 Mo. l. c. 665), to the exercise of which no obstacle exists and which is immediate and perfect in itself and not dependent upon a contingency. (Young v. Jones, 180 Ill. l. c. 221; Bailey v. Railroad, 4 Harr. (Del.) l. c. 400; Day v. Madden, 9 Colo. App. 464; Royston v. Miller, 76 Fed. l. c. 53) * * * "

The Supreme Court of Arkansas, in the case of Matthews vs. Bailey, 131 S. W. (2nd) 423, 428, gave the following definition of a vested interest:

" * * * 'A vested right "must be something more than a mere expectation bas-

> ed upon the anticipated continuance of existings laws. It must have become a title * * * to the present or future enjoyment of property," in some way or another * * * But parties have no vested rights in remedies or matters of procedure.! It is also well settled that no one has a vested right in a public law. Roberson v. Roberson, 193 Ark. 669, 101 S. W. 2d 961."

A retrospective law to be forbidden by the constitution must either impair existing civil rights or using the expression of the court in Mainwaring v. Lumber co., supra, "it must create a new obligation, impose a new duty, or attach a new disability in respect to a gone-by transaction, in order to be retrospective and under the constitutional ban".

In the case of Smith v. Dirckx, 283 Mo. 188, the court in applying an amendment of 1919, which undertook to assess an additional 1% upon that portion of the net income for the calendar year of 1919 which was received by the appellant prior to the going into effect of said amendment, held that, it did create a new obligation or impose a new duty but pointed out:

> "However, this should not operate to prevent the collection of a tax not exceeding one-half of one percent for the period above mentioned. This for the reason that since the old law imposed a tax of one-half of one per cent upon that portion of his income which appellant received prior to the taking effect of the 1919 amendment, that portion of the amended rate which did not exceed the old rate did not create a new obligation or impose a new duty. It therefore follows that a tax not to exceed one-half of one per cent may be collected under the amendment with reference to the net income received by appellant prior to the going into effect of the amendment, without violating the Constitution."

In State ex rel. Bair vs. Producers Gravel Co., 341 Mo. 1106, 1112, the court said:

"Section 658, Revised Statutes 1929, (Mo. Stat State Ann., Sec. 658, p. 4910), provides ' . . . nor shall any law repealing any former law, clause or provision be construed to abate, annul or in anywise affect any proceedings had or commenced under or by virtue of the law so repealed, but the same shall be as effectual and be proceeded on to final judgment and termination as if the repealing law had not passed, unless it be otherwise expressly provided.' What is now Section 658 was passed in 1822, Revised Statutes of 1825, page 492, and has remained without change.

"Also, Section 660, Revised Statutes 1929 (Mo. Stat. Ann., p. 4912), is pertinent. This section is as follows: 'The repeal of any statutory provision shall not affect any act done or right accrued or established in any proceedings, suit or prosecution, had or commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force.'

"In State ex rel. Wayne County v. Hackman, 272 Mo. 600, l. c. 609, 199 S. W. 990, the purpose of what are now Sections 658 and 660, was considered, and it was there said that the general nature of these sections 'authorizes the conclusion that they were intended to continue in force repealed laws until proceedings commenced thereunder, regardless of their nature, might be completed.'"

In construing the right of taxpayers as to original assessments and special assessments of drainage districts under an amendatory act, the court in State ex rel. Ross v. General American in 336 Mo. 829, 839-840, the court held:

> " * * * Or, as stated conversely in Sedgwick on Statutory and Constitutional Law, 160: 'A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions . . . already past, is to be deemed retrospective or retroactive.' Respondent's cases cited in support of this point are State ex rel. v. Redman, supra; Hope Mutual Insurance Co. v. Flynn, 38 Mo. 483; Barton County v. Walser, 47 Mo. 189; Gast Realty, etc., Co. v. Schneider, 296 Mo. 687, 246 S. W. 177; Smith v. Direkx, 283 Mo. 188, 223 S. W. 104.
>
> "No existing contractual rights of the landowners were infringed upon or violated through said amendment. 'We do not hesitate . . . to say that the charter of a public corporation does not constitute a contract with its members that the laws it was created to administer will not be changed; and the State is still at liberty, as to them and the corporation, to continue its efforts to improve its methods of taxation with respect to these subjects.' (Houck v. Drainage District, 248 Mo. 373, l. c. 394, 154 S. W. 739. See, also, Barnes v. Pikey, 269 Mo. 398, 190 S. W. 883; Rauch v. Himmelberger, 305 Mo. 70, 264 S. W. 658.)"

In Aetna Insurance Co. v. O'Malley, 342 Mo. 800, 812, the court said:

> "It is true that Section 5874 was not in effect when the review action was brought.

The review action was brought on November 10, 1922. The effective date of Section 5874 was June 25, 1923. Although Section 5874 was not in effect when the review action was brought, its applicability to that action depends upon whether or not it is a procedural statute. If it deals with procedure only, it was applicable to and should have governed the case from its effective date June 25, 1923. The rule governing the applicability of procedural statutes under such circumstances is stated by this court in Clark v. Railroad, 219 Mo. 524, 534, 118 S. W. 40, 43, as follows:

"'No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a statute deals with procedure only, prima facie it applies to all actions - those which have accrued or are pending, and future actions. What was before a subject of equitable relief may be made triable by jury without affecting vested rights. If, before final decision, a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings.'"

CONCLUSION

Therefore, the sales provided in Section 9953a, Senate Bill No. 94 and amendatory Senate Bill No. 311, after the effective date of said Senate Bill No. 311 would be controlled by the procedure of said Senate Bill No. 311, but sales consummated under the provisions of Section 9953a, Senate Bill No. 94, before the effective date of Senate Bill No. 311 would be controlled by the procedure of Senate Bill No. 94 and resales based thereon would be controlled by the procedure of said Senate Bill No. 94 even when executed after the effective date of said Senate Bill No. 311.

V.

IF SUCH RESALES CANNOT BE MADE BY THE COLLECTOR WHAT DISPOSITION SHOULD BE MADE OF THE UNPAID BALANCE OF TAXES ON 1937 and 1938 SALES AND ON WHICH CERTIFICATES OF PURCHASE WITH REDEMPTION FEATURES ARE OUTSTANDING?

This question has been answered by the answers to the above questions holding that resales can be executed after the effective date of Senate Bill No. 311 where the sale under Section 9953a Senate Bill No. 94 was consummated prior to the effective date of said Senate Bill No. 311.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney-General

SVM:LB

BARBER BOARD: Physical and mental examination of barbers to be conducted by licensed physician under direction of State Board of Health.

December 20, 1939

12-20

FILED
83

Skaggs.

State Board of Barber Examiners
208 N. Broadway
St. Louis, Missouri

Gentlemen:

This will acknowledge receipt of your inquiry of December 19th, which reads as follows:

> "During the 1939 session of the State Legislature there was an amendment passed to the Barbers' License Law which requires that all barbers must be examined each year by a licensed physician duly designated by the State Board of Health to ascertain the fact that he is free from infectious and contagious disease and not afflicted with any physical or mental ailment which would render him unfit to practice the occupation of barbering.
>
> "We would therefore appreciate an opinion as to which is the proper agency to conduct and supervise such examinations, the State Board of Health or the State Board of Barbers' Examiners."

Section 13523, page 250, Laws of 1939, after providing for the creation of a board of examiners and prescribing their duties, provides as follows:

> "Each barber to whom a certificate of registration is issued must be examined at least once a year and as often thereafter as the board may deem necessary, by a licensed physician duly designated by the state board of health to make such examinations, to ascertain the

> fact that such barber is free from infectious or contagious diseases, and is not afflicted with any physical or mental ailment which would render him unfit to practice the occupation of barbering. * * *"

It will be seen from the foregoing portion of the statute in question that a physician designated by the State Board of Health is the one to make the examination. Just what type of examination such physician would make in order to determine the fact that such barber is free from infectious or contagious diseases, and is not afflicted with any physical or mental ailment which would render him unfit to practice the occupation of barbering, would of necessity have to be determined by the examining physician under directions of the State Board of Health. In other words, the conduct of the examination is necessarily a matter for the examining physician. The examining physician could make a report as to what, if any, diseases or ailments the person being examined was afflicted with. The manner in which the physician determines this would of necessity be a matter peculiar to his profession, and therefore the conduct of the examination would of necessity be governed by the physician and the State Board of Health.

CONCLUSION

It is, therefore, the opinion of this office that the State Board of Health is the proper agency to conduct the physical and mental examination required of registered barbers under the terms of Section 13523, page 250, Laws of 1939.

Respectfully submitted

HARRY H. KAY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

HHK:HR

COUNTY COURT: County Court of Platte County cannot appoint a purchasing agent, but must purchase supplies for all county offices except that of sheriff.

March 14, 1939

opinion request
#172
3/13/39

FILED
84

Hon. B. F. Spratt
Presiding Judge
Platte County
Weston, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of March 11th, 1939, which reads as follows:

> "Would like to have an opinion from you regarding the purchase of supplies for Platte County.
>
> "Have the Sheriff, County Clerk and different county officers the legal right to purchase their supplies for their offices?
>
> "Has the Presiding Judge or someone else, desiginated by the County Court, the right to act as purchasing agent for all county offices?"

The constitutional authority of the county courts is found in article 6, sec. 36 of the Missouri Constitution, which provides:

> "In each county there shall be a county court, which shall be a court of record, and shall have jurisdiction to transact all county and such other business as may be prescribed by law. * * *

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

Section 12107 of article 5, chapter 85, R. S. Missouri, 1929, provides as follows:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

The question to be determined is whether the county court may delegate to an agent, duties which belong to the court itself. The general rule, as stated in 15 C.J., section 116, page 465, is as follows:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant."

In the case of State ex rel Buckner v. McElroy,

309 Mo. 595, the court held that the term "county business," as those words are used in Section 36, Article VI, of our Constitution, declaring that the county court "shall have jurisdiction to transact all county and such other business as may be prescribed by law," means all business pertaining to the county as a corporate entity, and ordinarily includes the exercise of the corporate powers of the county and must be understood to include the control and management of all county property, whether such property be in the form of penal or eleemosynary institutions, such as the jail, the poor farm and county institutions, and that such power could not be invested in another board by the Legislature.

According to the last decennial census of 1930 Platte County had a population of 13819 and did not come under the classification as set out in sections 2107-2108 and 2109, of the Revised Statutes of Missouri, 1929, in reference to the purchasing of supplies. These three sections only apply to counties of not less than seventy thousand inhabitants nor more than ninety thousand inhabitants. The three sections provide for the method of advertisement for bids on supplies used in the following year. Section 2108 also defined what supplies consist of.

In your request you have mentioned the sheriff along with the county clerk and other different county officers. The sheriff under section 8526 R. S. Missouri, 1929, has been given custody and the keeping and charge of the jail within his county. Under this section the sheriff is empowered to purchase necessary supplies for use in the jail. It was so held in the case of Kansas City Sanitary Company v. Laclede County, 269 S. W. 395, at page 398, where the court stated.

> "Under section 12549 the jail is required to be kept in good and sufficient condition and under section 12551 the sheriff has the custody, keeping and charge of the jail. He, therefore, has full authority to purchase all supplies necessary to keep such jail in good and sufficient condition,

which includes sanitary condition, and needed no authorization by the county court to render the county liable for purchases for such jail for such purpose. Harkreader v. Vernon County, 216 Mo. 696; 116 S. W. 523."

The sections referred to are the same sections as sections 8524 and 8526 R. S. Missouri, 1929.

"It is not doubted that the statutes (Secs. 1571 and 1573 R. S. 1909) and the construction thereof by this court in a case to an extent analogous(Harkreader v. Vernon County, 216 Mo. 696) furnish authority to a sheriff of a county to purchase such articles and supplies as are requisite and necessary to keep and maintain the county jail 'in good and sufficient condition and repair.' But such authority absent an order of the county court, which might pro hac vice make him its agent, would not extend to purchases made for the poor house or the poor farm, the custody and control of which are vested by statute in the county court, and not in the sheriff. Likewise the county court is by statute vested with the control of the court house (Sec. 4081 R. S. 1909) and while it is made the duty of the sheriff to furnish fuel, stationery and other things more necessary for the use of the court (Sec. 3887, R. S. 1909), this duty is delimited by the appended provision directing performance thereof whenever ordered by the court. This latter conditional duty is disassociated from control of the premises and is a general one which the sheriff owes to the circuit court, to the probate court, and even to the county court itself, though the latter court is the general statutory contracting, auditing and fiscal agency of the county. Clearly, such an order should either be express, or plainly implied from

the necessities of the situation."

Sections 4081 and 3887, Revised Statutes of Missouri, 1909, referred to in the above quotation, are substantially sections 2078 and 1870, Revised Statutes of Missouri, 1929, respectively.

CONCLUSION.

In view of the above authorities, it is the opinion of this department that the county court of Platte County cannot designate a purchasing agent to purchase supplies for the county of Platte, and that such purchases must be made by the county court for each county office, except that of the sheriff who has the authority to purchase supplies for the county jail only, and not the court house. In order for the sheriff to purchase supplies for the county court house, or circuit court rooms, the order must be approved by the county court itself, but no approval is necessary for the purchase by the sheriff of supplies for the jail, such as soaps, disinfectants etc. It appears by the above authorities that the sheriff is a partial exception to the general rule that the county court is the financial agent of the county in the purchase of supplies.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

WJB;RW

APPROVED:

J. E. TAYLOR
(Acting) Attorney General.

COUNTY BUDGET ACT: Surplus of funds after payment of judgment may be transferred to general revenue fund for retiring protested warrants; under Laws of 1933, p. 340, County Court may include such balance in estimate for ensuing year's expenditures.

January 13, 1939

FILED
85

Mr. W. F. Stevenson
County Treasurer
McDonald County
Pineville, Missouri

Dear Sir:

This Department is in receipt of your letter of December 30th, wherein you make the following inquiry:

> "In the event a county votes bonds to pay a judgment, and after the judgments are satisfied to what use can the balance of funds be applied, can it be transferred to the general revenue fund for retiring protested warrants?
>
> "In making its estimate can the county court include such balance in their estimates for the year's expenditures?"

Since you state that the judgment for which the bonds were voted has now been satisfied and that there is a balance, we think the same can be transferred to the general revenue fund and used in any other fund which is in need of the same or for any legitimate purpose, under Sections 12167 and 12168, R. S. Mo. 1929. These sections are applied in the decision of Decker v. Diemer, 229 Mo. 296; likewise, in the decision of of State ex rel. v. Appleby, 136 Mo. 408, wherein it is said:

> "The county court may make transfers to the county contingent fund

from any surplus remaining in the other funds provided for in Revised Statutes, 1889, Section 7663, and can, after such transfers are made, pay proper demands on such contingent fund."

In the decision of Holloway v. Howell County, 240 Mo. 601, l. c. 612, it is said:

"The bill alleges that the share of the district is still in the county treasury, but the proof shows nothing of the sort. Whatever mere theory be indulged by way of inference, one way or the other, the actual fact is, as shown by the proof, the money levied for county purposes was used for county purposes, presumably for paupers, insane persons, the salaries of officials, the expenses of running the courts, jury fees, expenses of elections, criminal costs and roads and bridges elsewhere. (Vide, R. S. 1909, sec. 11423.) It is not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied. (State ex rel. v. Johnson, 162 Mo. 621; State ex rel. v. Appleby, 136 Mo. 408; Decker v. Diemer, 229 Mo. 296.)

"This view of the law but establishes a sensible and practical working plan

for transacting the business affairs of the county. In the Decker case the legality of a court house fund made up in part of the odds and ends of unused funds was sustained. There is in that case an extensive discussion of the statutes relating to the administrative details in handling county funds. We will not repeat what is there said."

Under the facts which you present we are of the opinion that the balance or surplus of funds, resulting after the payment of the judgment, can be transferred to the general revenue fund for retiring protested warrants. We are of the further opinion that under the County Budget Act, Laws of Missouri, 1933, page 340, the County Court can include such balance in the estimate for the ensuing year's expenditures.

Yours very truly,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

SHERIFFS : Constables may not supplant sheriffs in performance
: of duties imposed upon sheriffs under the law.
CONSTABLES: Constables may be used as elisors in the event the
sheriff is disqualified from acting.

January 18, 1939

FILED
85

Hon. Berry Wall Stanley
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion reading as follows:

> "The Probate Judge has brought to my attention the fact that there is some doubt as to whether or not a Constable can act as an administrative officer of the Probate Court.
>
> "I would appreciate it if you would give me your opinion on the question and also inform me if your office has ever made any ruling in similar matters in the past, that is, whether or not the Constable is empowered to serve subpoenas, et cetera, and to act as attending officer of the court when in session."

Briefly, your precise question, otherwise stated from your request, is whether or not the constable may supplant the sheriff in respect to the duties imposed upon the sheriff by law.

At the outset, we invite your attention to a consideration of Section 34 of Article 6 of the Constitution of Missouri, which reads in part as follows:

> "The General Assembly shall establish in every county a probate court, which shall be a court of record, and consist of one judge, who shall be elected."

Under the provisions of Chapter 9, Article 1 of the Revised Statutes of Missouri, 1929, and more particularly under the provisions of Section 1870 of said chapter, it is provided that:

> "The several sheriffs shall attend each court held in their counties, except where it shall otherwise be directed by law; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Obviously, after consideration of the constitutional provision and the section above quoted, it is the duty of the sheriff to attend courts of record in their particular counties except where it has been otherwise provided for by law. The statute imposing the duties upon the several sheriffs is plain and unequivocal in its terms, and when so, no room for construction exists. Cummins v. Kansas City Public Service Commission, 66 S.W. (2nd) 920.

Your attention is further directed to Section 11518, R.S. Missouri, 1929, relating to the duties imposed upon every sheriff. This section of the statute is found under the provisions of Chapter 73, Article 4, R.S. Missouri, 1929, and reads in part as follows:

> "Every sheriff shall * * * execute all process directed to him by legal authority, * * * and he shall attend upon all courts of record at every term * * *."

Section 2068, R.S. Missouri, 1929, relates to the election of a probate judge of the county by the sheriff in the event there be no clerk of the court. This section of the statutes reads as follows:

> "The election shall be held by the clerk of the court, if there be one, if not, by the sheriff of the county. And in the event of a tie, the clerk, if there be one, or if not, the sheriff of the county, shall cast the deciding vote. The clerk of the court, if there be one, if not, the sheriff of the county, shall enter the proceedings of such election on the probate records of that day; and the special judge shall, before entering upon the discharge of his duties, take and subscribe the same oath that the judge of probate is required to take, which oath shall be filed with the records of said court."

The above section of the statute would seem to contemplate that the sheriff should be in attendance in the probate court in the event such sheriff is needed to participate in the election of the probate judge.

Attention is further directed to Section 1845, R.S. Missouri, 1929, relating to when the court or any clerk of any court of record may appoint one or more persons to execute its process in the event there is no sheriff or ministerial officer qualified to act. This section reads as follows:

> "Where there is no sheriff or other ministerial officer qualified to act, or where they are interested or prejudiced, the court, or clerk thereof in vacation, may appoint one or more persons to execute its process and perform any other duty of such officer, who shall be entitled to such fees for their services in each cause as are allowed by law to sheriffs in like cases."

If the probate court may appoint another person other than the sheriff to execute its process or perform any other duty of the sheriff, it must be first made to appear that the sheriff is interested or prejudiced. In the case of State v. Young, 286 S.W. 29, l.c. 32, the Supreme Court of this state held that it was a matter of discretion of the court with respect to disqualifying the sheriff, and so long as such discretion was not arbitrary or unjust, then any action of the court disqualifying the sheriff would still be sustained. The court said:

> "It has long been the settled law of this court that the disqualification of the sheriff under this section is a matter of discretion with the court, and unless there is some showing that the discretion exercised was arbitrary and unjust, the action of the court will not be overruled."

In the case of State v. Jeffries, 210 Mo. 302, l.c. 323, the Supreme Court of Missouri quoted approvingly from State v. Hultz, 106 Mo., l.c. 49, as follows:

> "'a duly chosen officer ought not to be deprived of his office save and for the gravest reason. This is true because the people have reserved to themselves the right to name their officers, and have not, save in exceptional cases, left to any one man the power to select them. . . . And when a citizen is to be deprived of his life or liberty, one of his safeguards is that it can be done only by an officer duly elected, and who is under the obligation of his oath of office and a sense of responsibility to the public which elected him. . . The statute does not prescribe how the court shall ascertain the prejudice of the sheriff, but it is left to the discretion of the court in what form the evidence shall be presented, and of course it is for the court to say

> when it is satisfied. This investigation the law has confided to the circuit judge. Of course, his action is subject to review, if it shall appear arbitrary and unjust.'"

While the above observations particularly relate to the disqualification of a sheriff by the circuit judge in criminal cases, it is believed that the probate judge also exercises a discretion as to the disqualification of the sheriff with respect to the duties imposed upon such officer in the probate court, when such sheriff is interested or prejudiced.

In an opinion directed to the Honorable L.L. Robinson, Presiding Judge of the County Court of Osage County, this department ruled that "it is the mandatory duty of the sheriff to attend, when in session, each court of record * * * held in his county, either in person or by deputy, whether his services be required or not at the time of his attendance". This opinion was written by the Honorable Tyre W. Burton, Assistant Attorney General, and approved by the Honorable J.E. Taylor, Acting Attorney General.

CONCLUSION.

In view of the above, it is the opinion of this department that constables may not supplant sheriffs in the performance of the duties imposed upon such sheriffs, but that a constable may be used when, in the opinion of the probate court, the sheriff is interested or prejudiced.

We further rule that the sheriff should not be deprived of his office except for the gravest reason, and from our considerations, it is the duty of the sheriff to attend each court of record held in his county whether his services be required or not, for which he is entitled to receive a fee as indicated from the opinion submitted.

Respectfully submitted,

RUSSELL C. STONE
Assistant Attorney General

APPROVED By:

____ _____

(Acting) Attorney General

RCS:VAC

MOTOR VEHICLES: Commissioner may permit corporation that has changed its name to retain and continue use of dealer's license plates issued to it without making new application and payment of additional fees.

FILED 85

June 23, 1939

Mr. V. H. Steward
Commissioner of Motor Vehicles
Jefferson City, Missouri

Dear Sir:

We wish to acknowledge your request for an opinion under date of June 10th, as follows:

"We are desirous of obtaining from your department an opinion upon the following state of facts:

On April 28, 1939, Mr. Ray Rixman, President of the Ray Rixman, Inc., sold his stock in said corporation to one H. J. Smith, who was then the Vice-president and General Manager of said corporation. Under the terms of the agreement it was provided that the name of the corporation be changed from Ray Rixman, Inc., to H. J. Smith Motor Corporation. This was done. During the license year of 1939 the Ray Rixman, Inc., was issued Dealer's plates, under the provisions of Section 7764 of R. S. Missouri 1929. This section of the statute in substance and effect requires that all dealers, instead of registering such motor vehicles dealt in is required to make an application for such registering. The statute requires that a brief description of each motor vehicle dealt in be set forth as well as the name and business address of such dealer. It is further provided in the same statute that the Commissioner of Motor Vehicles shall use diligence to determine and ascertain whether or not the applicant is in fact a dealer.

It is the contention of the attorneys who represent the H. J. Smith Motor Co., that they are entitled, under the provisions of the statute above noticed, to retain the dealer plates formally issued to Ray Rixman, Inc., upon the theory that the corporation is still in existence and the only change which has occurred in the corporation is the matter of name.

Our precise question for your consideration is:

May the Commissioner of Motor Vehicles permit any corporation which has changed its name, when such corporation has heretofore been issued dealers license plates, retain and continue to use such dealer license plates when the name of such corporation has been changed, without making a new application and the payment of an additional fee for the issuance of new dealers plates, under the provisions of Section 7764, above noticed."

Section 7764, R. S. Mo. 1929, provides in part as follows:

"(a) * * * dealers shall, instead of registering each motor vehicle * * * dealt in, make application upon a blank to be furnished by the commissioner for a distinctive number for all the motor vehicles owned or controlled by such * * * dealer, said application to contain: (1) a brief description of each type of motor vehicle * * * dealt in, including character of the motive power, amount thereof, stated in figures of horsepower, and (2) the name and business address of such * * * dealer; * * *

> (b) Fees and plates for * * * dealers: On the payment of a registration fee of $21.00 there shall be assigned to such * * * dealer a certificate of registration in such form as the commissioner shall prescribe, and two sets of number plates bearing such number. As many duplicate sets of number plates as may be desired may be obtained upon the payment of a fee of $10.50 for each duplicate set."

Section 7759, R. S. Mo. 1929, defines the term "dealer" as being:

> "Any person, firm, corporation, association, agent or sub-agent engaged in the sale or exchange of new, used or reconstructed motor vehicles or trailers."

Thompson on Corp., Vol. 1, 3rd Ed., Section 71, p. 76, makes the following statement with respect to the effect of a change of name on a corporation's rights and liabilities:

> "It is evident that a mere change of the name of a corporation can have no effect upon its existence or identity, or upon rights and liabilities flowing either to or from it, a corporation being said to be one and the same entity notwithstanding the change of its name. The change in the name has no more effect on the identity of the corporation than a change in the name of a natural person has upon his identity. The mere change of a name does not create a new corporation."

Such statement finds support in the case of W. T. Rawleigh Co. v. Grigg, 191 S. W. 1019, l. c. 1021, wherein the Springfield Court of Appeals said:

> "* * * a change of name does not make a new corporation, but only gives it a new name."

42 C. J., Section 75, p. 659, discusses the purpose of registration and licensing of motor vehicles:

> "The registration and numbering of motor vehicles is necessary to secure a proper observance of their duties on the highway and for the purpose of aiding in the detection of such vehicles and of those responsible for their movements and conduct, in case they fail to observe such duties, and the object of the license is to furnish a further guaranty that proper use of the vehicle will be made and that it will be operated in compliance with the law."

We do not see how a change in the name of a corporation could affect the detection of vehicles, or diminish the guaranty that they will be operated in compliance with the law, when considered in light of the fact that such change does not affect the rights and liabilities of such corporation.

We are therefore of the opinion that the Commissioner of Motor Vehicles may permit a corporation that has changed its name to retain and continue to use the dealer's license plates issued to it without making a new application and payment of an additional fee for the issuance of new dealer's plates.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

MW:VC

SCHOOLS & CHILDREN: Manner of enforcing compulsory school attendance laws.

October 16, 1939

10-19

FILED
85

Miss Anna Stearns
County Superintendent of Schools
Dallas County
Buffalo, Missouri

Dear Miss Stearns:

We are in receipt of your request for an opinion, dated October 12, 1939, regarding the procedure in enforcing the compulsory school attendance laws, and which is as follows:

> "Please send a written opinion of the exact proceedings of enforcing the compulsory school law."

Section 9433, R. S. Missouri, 1929, required the attendance at school of children between the ages of seven and sixteen years, and which is as follows:

> "Every parent, guardian or other person in this state having charge, control or custody of a child between the ages of seven and fourteen years shall cause such child to attend regularly some day school, public, private, parochial or parish, not less than the entire time the school which said child attends is in session, or shall provide such child at home with such regular daily

> instruction during the usual hours as shall, in the judgment of a court of competent jurisdiction, be substantially equivalent at least to the instruction given the children of like age at said day school in the locality in which said child resides; and every parent or person in this state having charge, control or custody of a child between the ages of fourteen and sixteen years, who is not actually and regularly and lawfully engaged for at least six hours each day in some useful employment or service, shall cause said child to attend regularly some day school as aforesaid: Provided, that a child between the ages aforesaid may be excused temporarily from complying with the provisions of this section, in whole or in part, if it be shown to the satisfaction of the attendance officer, or if he declines to excuse, to the satisfaction of a court of competent jurisdiction, that said child is mentally or physically incapacitated to attent school for the whole period required, or any part thereof, or that said child has completed the common school course as prescribed by constituted authority, or its equivalent, and has received a certificate of graduation therefrom."

This section has been amended by Laws of Missouri, 1937, at page 453, to require compulsory attendance of deaf children between the ages of six and fourteen years.

Section 9435, R. S. Missouri, 1929, has been repealed and a new section enacted at page 379, Laws of Missouri, 1933, which sets out the powers of the county attendance officer, who is now the County Superintendent of Schools, which section is as follows:

"The county superintendent of schools in each county shall act as school attendance officer for the county without additional compensation for such services. The county superintendent of schools shall have the power of a deputy sheriff in the performance of the duties of school attendance officer in all school districts of the county except as hereinafter provided: Provided, that the board of education in school districts organized under the provisions of Article 4, Article 16 and Article 17, of chapter 57, R. S. 1929, may appoint and remove at pleasure one or more school attendance officers and shall pay them from the public school funds; and provided further, that, if any board of education in any school district organized under the provisions of the aforesaid articles does not appoint a school attendance officer, the county superintendent of schools shall act in such district. The attendance officer or officers, as aforesaid, shall have the right to investigate the claims of children for exemptions under section 9433, and to issue certificates of exemption when such claims are established to his or their satisfaction; shall serve written or printed notices upon the parents or guardians or persons who, having charge, control or custody of children, as aforesaid, violate the provisions of said sections; shall, when reasonable doubt exists as to the age of any such child, require a properly attested birth certificate or an affidavit stating such child's age, giving date of birth, physical characteristics and bearing the signature of the child; shall have

the right to enter and visit any mine, office, factory, workshop, business house, place of amusement, or other place in which children are employed or engaged in any kind of service, or any place or building in which children loiter or idle during school hours; shall have the right to require a properly attested certificate of the attendance of any child or children at such day school shall have the power to arrest, without warrant, any truant, or non-attendants or other juvenile disorderly persons, and place them in some school, or take them to their homes, or take them to any place of detention provided for neglected children in such county or school district; shall serve in the cases which they prosecute without further fee or compensation than that paid by the board as aforesaid, and shall carry into effect such other regulations as may lawfully be required by the board appointing them. Whenever a county superintendent of public welfare has been appointed in any county, such county superintendent of public welfare may be appointed by the county superintendent of schools as the county school attendance officer, with such additional compensation as may be fixed by the county court. Where any law confers any powers or imposes any duty on the county school attendance officer such law shall be construed to mean the county superintendent of schools, except as otherwise provided herein, and such power shall hereafter be conferred upon and such duties imposed upon the county superintendent of schools, except as otherwise provided herein."

The following section 9436, R. S. Missouri, 1929, sets out the manner in which the county superintendent of schools who is now ex-officio county attendance officer, shall enforce the attendance of children at school. It provides that the teacher shall furnish a list of all non-attendant children between the ages of seven and sixteen years, together with the names of their parents or guardians, to the county superintendent of schools at least once a month. The County Superintendent of Schools shall investigate and shall warn the parents or guardians of any child who is not in attendance as provided by law to place and keep said child in regular attendance within three days after the service of a written or printed notice to be given said parents or guardians by the County Superintendent. After the parents or person having control of any such truant child and such failure to keep such child in school, then it shall be the duty of the County Superintendent (Ex-officio County attendance officer) to make a complaint against such parent, guardian or other person in charge of such child before the Judge of the Juvenile Division of the Circuit Court or before a Justice of the Peace. Since Article 12 of Section 2 of the Constitution of Missouri provides that all punishment for criminals shall be inflicted under indictments or informations, this complaint should be in the form of an information setting out fully the time and place of the offense. After the filing of such complaint or information, the Judge or Justice of the Peace shall issue a warrant directed to the defendant and upon his entry of appearance shall proceed in the same manner as provided in other criminal cases.

There is a second manner in which your problem may be solved. Under Section 14161, R. S. Missouri, 1929, which is applicable to counties of less than 50,000 population, and which applies to Dallas County, we find the following definition of a delinquent child:

> "The words 'delinquent child' shall include any child under the age of seventeen years * * * * *; or who is either habitually truant from any day school, or who, while in attendance at any school, is incorrigible, vicious or immoral."

Section 14164, R. S. Missouri, 1929, as amended by Laws of Missouri, 1939, at page 273, sets out the manner of procedure for the correction of delinquent children, which is, in part, as follows:

> "When any reputable person, being a resident of the county, shall file a complaint with the prosecuting attorney, stating that any child in the county appears to be a neglected or delinquent child, the prosecuting attorney shall thereupon file with the clerk of the juvenile court a petition in writing, setting forth the facts and verified by his affidavit. It shall be sufficient that the affidavit be on his information and belief. It shall be the duty of the prosecuting attorney immediately thereafter to fully investigate all the facts concerning such neglected or delinquent child including its school attendance, home condition, and general environment, and to report the same in writing to the juvenile court, and upon hearing of such complaint to appear before the juvenile court and present evidence in connection therewith. * * * * * * *"

Section 14167, R. S. Missouri, 1929, as amended by Laws of Missouri, 1931, at page 167 sets out the manner of procedure by the court and the disposition to be made of a delinquent child by the court.

The court may commit the child to some suitable person or family or agency, or may permit it to remain in the home of its parents, subject to the control of a probation officer and may make such orders in regard to its attendance at school as it may consider necessary.

We believe that either of the procedures above outlined will take care of any situation that may arise in your county.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:RV

COUNTY COURTS: The right of county courts to compromise with deliqnuent officials

October 19, 1939

FILED
85

Honorable Berry Wall Stanley
Prosecuting Attorney
Ray County
Richmond, Missouri

Dear Sir:

We are in receipt of your telegram of October 18th, requesting an official opinion as follows:

> "Please give me your opinion as to whether a county court can compromise a claim against a county official for allegedly retaining fees due the county and whether such a judgment can be compromised. Rush special delivery."

Section 12162, R. S. Missouri, 1929, sets out the general powers of the County Court with regard to claims to which the County is a party, and is as follows:

> "The county court shall have power to audit, adjust and settle all accounts to which the county shall be a party; to order the payment out of the county treasury of any sum of money found due by the county on such accounts; to enforce the collection

of money due the county; to order suit to be brought on bond of any delinquent, and require the prosecuting attorney for the county to commence and prosecute the same; to issue all necessary process to secure the attendance of any person, whether party or witness, whom they deem it necessary to examine in the investigation of any accounts; and if any person, being served with such summons, shall not appear according to the command thereof, the said court may compel his appearance by attachment; and in order to procure the exhibition or delivery to them of any accounts, books, documents or other papers, the said court may issue a summons, directed to the person in whose custody or care the said accounts, books, documents or other papers may be, commanding him to deliver or transmit the same to said court, which summons shall be served by the sheriff; and if the person named in such summons refuse to appear with or transmit the accounts, books, documents or papers, or show good cause why he does not, at the time appointed for his appearance, the said court may enforce the delivery thereof by attachment; and the said court may examine all parties and witnesses on oath, touching the investigation of any accounts, and may commit to jail any person who shall refuse to answer any lawful question: Provided, that if the county court finds it necessary to do so, it may employ an accountant to audit and check up the accounts of the various county officers."

In the case of Blades v. Hawkins, 240 Mo. 187, we find the following summary of the duties of the court in regard to delinquent officials at page 196:

> "The various provisions of the statutes demonstrate that it is not only within the power, but is the duty, of the county court to look after public funds, examine and investigate the accounts of the different officials and other persons, enforce the collection of money due the county, and order suits to be brought on the bonds of delinquents. In short, responsibility for the safety of public moneys, the accuracy and honesty of the accounts and settlements of officials, and the collection of defalcations, is imposed on county courts."

More specific powers of the County Court in regard to the right to settle with all persons chargeable with money belonging to any county are set out in Sections 12153 to 12158, inclusive, R. S. Missouri, 1929. In substance they permit the County Court to enter a judgment against any delinquent officer and to issue execution thereon. The latter section permits the Court to set aside its findings for good cause, and to compromise delinquencies with any officer.

In the case of the St. Louis Iron Mountain & Southern Railway Company v. Anthony, 73 Mo. 431, l. c. 434, the question of the power of a County Court to make a compromise was discussed by the Court in the following language:

> "It is now contended that the county had no authority to make the compromise in question, or any compromise whatever. We are not of that opinion. The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise, questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation; it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chenango County v. Birdsall, 4 Wend. 453."

The above undoubtedly answers your question in regard to compromise before judgment. The facts in the case show that the county had previously obtained a judgment against the plaintiff but same was set aside on appeal so that at the time of the compromise there was no valid judgment in force. The language of the above quotation seems to indicate that the Court's power to compromise is limited to cases in which the claims are doubtful.

In a Kentucky case, Shipp v. Rodes, 293 S. W. 543, and which opinion quotes the Missouri Case just above cited, we find the general rule set out as follows on page 546:

> "It is argued by counsel for appellant that the subject-matter of these suits cannot be compromised, but we understand the rule to be well established that pending litigation to recover on claims that are unliquidated and uncertain in amount may be compromised by the state or any of its political subdivisions at any time before final judgment."

Some thirty-five authorities from various jurisdictions, including the Missouri case, are cited.

A search fails to reveal any cases in which the County Court or county fiscal agent has compromised a final judgment. However, in all the cases where the county court has acted in good faith, compromises have been upheld and there is no reason for belief that if a county court compromised a judgment where complete recovery is doubtful that said compromise would not be upheld. Shipp v. Rodes, 293 S. W. l. c. 546, sustains this view in the following language:

> "The taxpayer has the right to show, if he can, that the fiscal court did not act in good faith and that it acted in fraud on the rights of the county when it made the compromise agreements, and the question now before us is whether the allegations in his reply constitute any basis for his conclusion that the compromise agreements were fraudulently entered into for the purpose of shielding Rodes and Bradley and assisting them to defraud the county out of what justly belonged to it. We say if these

things can be shown it follows as a matter of course that the compromise agreements were not entered into in good faith and would have no binding effect and the court should disregard them."

CONCLUSION.

From the foregoing authorities it is our opinion that the County Court may in good faith compromise claims against delinquent officials where there is a dispute as to the amount due, and that it may compromise judgments where complete recovery is doubtful.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:RV

COMMISSIONS: Governor has no power to withdraw commissions once issued.

COUNTY SURVEYORS: County surveyors may be removed for delinquencies in office by general statutory method.

November 30, 1939

FILED
85

Honorable Lloyd C. Stark
Governor of the State of Missouri
Jefferson City, Missouri

Dear Governor Stark:

We are in receipt of your letter of November 20th enclosing copy of a letter from members of the Butler County Court. You request an opinion as to your power to revoke the commission of the County Surveyor of Butler County, Missouri, for alleged misconduct and failure to perform his official duties as such surveyor.

The question of the right of the executive authority to revoke commissions previously issued arose in the case of State ex rel. Vail v. Draper, Auditor, 48 Mo. 213. In that case, which was a petition for mandamus on the part of one Vail to compel the State Auditor to pay his salary as Circuit Judge, it appeared that the Governor had erroneously issued a commission to Vail when one Dinning was actually possessed of title to the office. In deciding that the Governor had no further powers in regard to a commission already issued, the court stated, in part, l. c. 215:

> "When Governor McClurg, acting upon evidence which he doubtless deemed satisfactory, of Vail's election, issued a commission to him, the executive function, so far as commissioning a judge for that circuit was concerned, was exhausted. The commission invested Vail with the title, and was <u>prima facie</u> evidence of his right to the office. It gave him the possession, and he could only be deprived of it or ousted upon due process, in the manner prescribed by law. He exercised its duties and privileges by color of law, and that was sufficient till some other person legally established a better and a higher right.
>
> After the governor had issued his commission, and Vail had qualified and been inducted into office, it was incompetent for any subsequent

> governor, upon any evidence whatever, to attempt to nullify or revoke that commission and devolve the office upon another. It is true that Governor Brown acted upon the certificate of Mr. Rodman, the former Secretary of State, and the evidence of Dinning's right was doubtless to him considered conclusive; still, after his predecessor had acted in the course of his official duties upon the same subject, we do not think that by any executive action Vail could be ousted or deprived of his prima facie right to the office. Such a proceeding would be the exercise of judicial rather than of executive powers. If an error was committed in the issuance of the commission to Vail, and Dinning was the party justly and fairly entitled to the office, the courts furnished the proper and appropriate mode for seeking redress. He should have proceeded at once by quo warranto and settled his claims. This remedy the law points out. To santion any other course would lead to anarchy and disorder, and we should have the spectacle of two judges holding rival courts, each claiming obedience and authority, and both deriving their power from identically the same source. Such a state of things ought not to exist."

In the latter part of the opinion, the court stated that quo warranto was the proper procedure to try the validity of the office.

Other authorities sustaining the above position are found in 46 C. J., p. 954, Section 69.

There appears to be no specific method set out in the statutes for the removal of a County Surveyor, so that Article II, Chapter 68, R. S. Mo. 1929, providing the manner of removal of county and township officers in general, will govern. Sections 11202, 11203 and 11207 are the applicable sections, and are set out in their order, as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided.

When any person has knowledge that any official mentioned in section 11202 of this article has failed, personally, to devote his time to the performance of the duties of such office, or has been guilty of any willful, corrupt or fraudulent violations or neglect of any official duty, or has knowingly or willfully failed or refused to perform any official act or duty which by law it was his duty to do or perform with respect to the execution or enforcement of the criminal laws of this state, he may make his affidavit before any person authorized to administer oaths, setting forth the facts constituting such offense and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney or deposit it with the prosecuting attorney, furnishing also the names of witnesses who have knowledge of the facts constituting such offense; and it shall be the duty of the prosecuting attorney, if in his opinion, the facts stated in said affidavit justify the prosecution of the official charged, to file a complaint in the circuit court as soon as practicable upon such affidavit, setting forth in plain and concise language the charge against such official, or the prosecuting attorney may file such complaint against such official upon his official oath and upon his own affidavit.

> If any official against whom a proceeding has been filed, as provided for in this article, shall be found guilty of failing personally to devote his time to the performance of the duties of such office, or of any willful, corrupt or fraudulent violation or neglect of official duty, or of knowingly or willfully failing or refusing to do or perform any official act or duty which by law it is made his duty to do or perform with respect to the execution or enforcement of the criminal laws of the state, the court shall render judgment removing him from such office, and he shall not be elected or appointed to fill the vacancy thereby created, but the same shall be filled as provided by law for filling vacancies in other cases. All actions and proceedings under this article shall be in the nature of civil actions, and tried as such."

These sections appear to provide an adequate remedy to be pursued by the County Court of Butler County under the facts as given to you.

In view of the foregoing, it is our conclusion that you, as the chief executive authority, have no power to revoke commissions once issued by you or your predecessor, and that the proper method for the removal of a County Surveyor who has been guilty of misfeasance or nonfeasance in office is under the general statutory method for removal of officers.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

DEDICATION:
ROADS:

County Court can enforce easement in platted streets for public uses unless there be an abandonment of the easement.

January 20, 1939

FILED
86

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We acknowledge your letter of November 15, 1938, which reads as follows:

"The opinion of your office is requested on the following:

Approximately fifty years ago a section of land immediately North of Hannibal was subdivided into lots, blocks, streets and alleys and a public warf on a bay connected with the Mississippi river. This settlement was known as Scipio. It was never incorporated and no settlement of any consequence was ever made. The plat of this section was duly filed in the office of the Recorder of Deeds of this county donating the streets and alleys to the public. Recently, and within the last six months, this property was purchased by a resident of this city from the McCooey estate which had owned it for many years having purchased this property at a tax sale. The present owner of the property has proceeded to fence across the streets and alleys and in brief has enclosed practically the entire area so that none of the streets or alleys are accessable to the public. A request was recently made of the County Court by a person owning land to the East of this section that the County Court take proper means to force the opening of the plated streets and it is because of this that the opinion of your office is requested."

In the case of Evans vs. Andres 42 S. W. (2d) 32, defendant was enjoined from erecting fences or obstructions across plotted streets, and the facts were similar to your facts, except that the plaintiff therein was not Phelps County, But was an aggrieved abutting property owner. In that case the court construed Section 11185 R. S. Mo. 1929, as the same relates to a county's title to streets dedicated as the streets of Scipio were dedicated, and at l. c. 35, the court said:

> "The title of the county, under section 11185, supra, was not an absolute fee, but merely an easement for a special purpose, as by a common-law dedication, which easement, we think, might be lost by nonuser for such period of time as in legal contemplation would be construed as an abandonment, in which case the title would revert to the then owners of the abutting property. While this is true, the burden of proving loss of an easement by nonuser is upon defendant."

19 Corpus Juris, page 989, Section 246 reads as follows:

> "The owner of an easement whose right has been invaded and injured or destroyed has a right of action therefor. * * * * *"

Section 7915 R. S. Mo. 1929 provides:

> "All streets and alleys in unincorporated towns and villages shall be under the control of the county court, and governed by the laws relating to roads and highways."

Section 7916 R. S. Mo. 1929 provides:

> "The road overseer and county highway engineer shall have the same control over and their

duties in relation to streets and alleys in said towns and villages shall be the same as in relation to roads and highways on public roads."

Section 7932 R. S. Mo. 1929 provides:

"* * * * * * * * * Any person or persons who shall willfully or knowingly obstruct or damage any public road * * * * * * * * * * * * * * * * by fencing across or upon the right of way of the same * * * * * * * * * shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine or imprisonment. The road overseer of any district or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day of (if) such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

In the case of State ex rel. vs. Bunler, 90 Mo.,,560 l. c. 569, 3 S. W. 68, the Supreme Court construed Section 7932, supra, and said:

"But the question remains, what is here meant by the term 'roads' in his district? Does it mean roads actually laid out, constructed, used and recognized as such, or does it mean roads that have only a nominal existence, de jure, without any visible or tangible existence de facto? We apprehend that, under a fair construction of the statute, the actually existing traveled and recognized public roads of his district are what are here contemplated by the statute.

> We do not imagine that the statute ever intended to impose upon the road overseers the onerous and difficult duty of searching the records and proceedings of the county court, and, at his peril, pass upon and determine the regularity and validity of the various proceedings by which the different public roads in his district had been created, changed or vacated. On the contrary, we apprehend that it is his duty to accept the actually existing and recognized public roads in his district at the date of his appointment, or that may thereafter be established during his term of office, as the roads committed to his care, and which, under the law, he is bound to keep in good repair, as provided by the statute. The duty of deciding between roads de facto and roads de jure, we apprehend, in general devolves upon the court, in proper cases, rather than upon mere ministerial officers of the law. * *"

In State vs. Franklin 113 S. W. 652, 133 Mo. App. 486 l. c. 492, that court said:

> "We strongly approve what was said on this subject by the St. Louis Court of Appeals, speaking through Judge Goode, in State ex rel. v. Vandalia, 119 Mo. App. 406: 'The Attorney-General of the State, or the prosecuting attorney of the county in which the nuisance exists, may proceed in equity in behalf of the sovereignty of the State, for its abatement. This is the rule independent of any statute touching the matter as has been adjudged in many cases. * *"

Then at l. c. 493 the court continued:

> "Both on reason and authority, it is quite clear that the maintenance of the obstructions in the public highway by the defendant Franklin and the neglect of the town to perform its duty to proceed for the abatement of the nuisance, justi-

fied the State in employing its visitorial power for the correction of the abuse. The petition states a cause of action. The right to prosecute the suit either as one in equity or under the statute quoted is not affected by the provisions of section 9674, Revised Statutes 1899. * * * *"

CONCLUSION

We interpret your question to be as follows: "Where the village of Scipio in Marion County in about 1889 was laid out and streets were plotted under the provisions of what is now Chapter 67 R. S. Mo. 1929, can the County Court or Prosecuting Attorney of Marion County force one who has enclosed with fences practically the whole plotted town to remove the fences and make the streets available to the public?"

According to the Evans vs. Andres case, supra, the filing of the plat gave to Marion County an easement for public use in the plotted streets of Scipio and unless that easement has been abandoned by nonuser it continues as an easement for the benefit of Marion County. Abandonment by nonuser depends entirely on what adverse possession the party fencing and claiming ownership can show, as the burden of proving an abandonment of streets dedicated for public uses is upon him, the matter could only be finally determined by a judgment of a court of proper jurisdiction.

Pursuant to Section 7932, supra, the one obstructing a public road by fencing can be prosecuted for a misdemeanor. After statutory notice to remove fences obstructing a public road the person who persists in the obstruction, throws himself open to a damage suit.

The Buhler case, supra, holds that it is the duty of the County Court to search and determine if Marion County still has an easement in the streets of Scipio, and if they determine the matter in the affirmative, then a right of action will lie to protect the easement of the County.

State vs. Franklin, supra, holds that the Prosecuting Attor-

ney, where one obstructs a public road of a plotted city, may bring an action in the name of the State to abate the obstruction as a public nuisance, independant of any statutory action which might lie.

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:WW

CRIMINAL COSTS: A dismissal for nolle prosequi is the same as an acquittal in regard to payment of costs.

January 26, 1939

FILED 86

Mr. Elmer A. Strom
Prosecuting Attorney
Cape Girardeau County
Jackson, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which is as follows:

"In approving fee bills covering costs of criminal cases the matter has arisen relative to the construction of the Statutes involving the payment of costs by the County in cases where enforcement officers, such as constables, sheriff, highway patrolmen, have filed complaints which later resulted in the dismissal and nolle prosequi of the case and wherein criminal costs have been made.

"The question has arisen as to whether the State, in felony cases where the punishment is solely by imprisonment in the penitentiary, and the County, where the punishment is other than imprisonment in the penitentiary, are liable to pay the costs. The matters in which we make inquiry involve the violation of public laws such as traffic violations and other general violations rather than violations which we ordinarily consider as being personal to the party injured.

"The above inquiry does not include those cases which involve an acquittal but merely where the facts later warranted an outright dismissal."

Section 3826, R. S. Mo. 1929, reads as follows:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary, and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed two dollars per day for each juryman and the officer in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

Section 3827, R. S. Mo. 1929, reads as follows:

"When the defendant is sentenced to imprisonment in the county jail, or to pay a fine, or both, and is unable to pay the costs, the county in which the indictment was found or information filed shall pay the costs, except such as were incurred on the part of the defendant."

Section 3828, R. S. Mo. 1929, reads as follows:

"In all capital cases, and those in which imprisonment in the penitentiary

> is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

It will be noticed that under Section 3838, supra, the statute sets out "acquitted". In the only case construing the word "acquitted", the Kansas City Court of Appeals in the case of The State ex rel. Tudor v. The Platte County Court, 40 Mo. App., l.c. 506, said:

> "The controversy is whether the state or county is liable for relator's costs and the case depends upon a construction of the criminal costs statute; and in passing on the question we shall consider the case as though the defendant had been acquitted. The nolle prosequi amounted to an acquittal in the sense of the statute."

Under the ruling in this case nolle prosequi means acquitted as far as the costs are concerned. In the case of State v. Lonon, 56 S. W. (2d) 378, 381, par. 3, the court said:

> "Considering the inherent power of a court over its judgments and orders, during the term at which such judgments and orders were entered, and the fact that a nolle or a dismissal of a criminal charge is not a bar to a subsequent prosecution, we announce the following rule of law on the point before us as consistent with well-established principles of law and not detrimental to defendant's rights. An order of dismissal or a nolle prosequi in a criminal case may be set aside

> during the term at which the order is made; an alias capias ordered issued and defendant tried on the original information or indictment. There is nothing in this record tending to show that defendant's rights were in any way prejudiced by the order setting aside the dismissal. The point is, therefore, ruled against the defendant."

Under this ruling the court held that a dismissal and nolle prosequi had the same effect as to trial of defendant under original indictment and information. The same could be said as to dismissal, acquittal or nolle prosequi as to the payment of costs under Section 3828, supra.

For your information I am enclosing a copy of an opinion rendered to Honorable T. J. Harper, Prosecuting Attorney of Stone County, on January 12, 1934, which held that neither the state nor county is liable for costs of preliminary hearing when defendant is discharged.

I am also enclosing an opinion rendered to the Honorable Forrest Smith, State Auditor, on January 22, 1934, which held that where a case is "continued generally" without any statement as to whether or not it was continued upon the application and costs of the state, that the state would not be liable for the costs incurred by the defendant at the term in which the case was "continued generally", but that the court would have a right under Section 3653, R. S. Mo. 1929, to adjudge the costs against the state if the order "continued generally" was made upon the application of the state. In other words, the opinion held that the order "continued generally" should be construed the same as an acquittal and the costs, if assessable against the state, should be paid by the state.

CONCLUSION

In view of the above authorities it is the opinion

of this department that in felony cases where the punishment is solely by imprisonment in the penitentiary and which cases are dismissed in the circuit court, the state is liable for the costs, but where the punishment is other than imprisonment in the penitentiary and the case is dismissed in the circuit court, the county must pay the costs. This, of course, does not apply in personal prosecutions where the party injured is attempting to recover a fine, penalty or forfeiture as set out in Section 3829, R. S. Mo. 1929.

It is further the opinion of this department that where the defendant is acquitted by a jury or dismissed or entry of nolle prosequi made by the prosecutor, it should be considered the same as an acquittal as set out in Section 3828, supra.

Respectfully submitted

W. J. BURKE
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

WJB:DA

COUNTY COURTS: Marion County Court can only hold sessions in the county seat of Palmyra.

March 8, 1939

FILED
86

Mr. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

This will acknowledge your request for an opinion under date of March 2nd, which reads as follows:

> "The County Court of Marion County has always held it's sessions in the Circuit Court building in the city of Palmyra; Palmyra, of course, being the county seat of Marion County. The County Court are desirous of knowing if they can legally hold meetings for the convenience of tax payers and those having business with the Court in the Court House at Hannibal. Also, is it permissible for the County Court to meet at other designated places in Marion County other than at the Court House in Palmyra? This latter would be occasioned by the periodical necessity of inspecting roads throughout the County proper."

Section 2083, R. S. Mo. 1929, reads as follows:

> "Four terms of the county court shall be held in each county annually, at the place of holding courts therein, commencing on the first Mondays in Feb-

> ruary, May, August and November. The county courts may alter the times for holding their stated terms, giving notice thereof in such manner as to them shall seem expedient: Provided, that in counties now containing or that may hereafter contain seventy-five thousand or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat, the terms of said court shall be held monthly and alternately at the county seat and such other place as may be provided for the holding of such court, and each monthly term shall commence on the first Monday in each month."

The proviso in this section contains the following: "75,000 or more inhabitants, and where county courts are now or may hereafter be held at more places than one and at other places than the county seat." This proviso would not apply to the County of Marion for the reason that under the last decennial census of 1930, the population of Marion County was only 33,493. It also would not apply to Marion County for the reason that at the time of the enactment of the section, nor at this time the Legislature by an enactment had not passed a law which entitled the County of Marion to have more than one county seat.

Under Section 2083, supra, the county court can only hold sessions during the terms mentioned therein and at the place of the county seat. Any sessions outside of the terms mentioned therein or sessions at any other place would invalidate any of the proceedings of the county court. This was so held in the case of State of Missouri vs. Eubanks 166 Mo. App. 681, l.c. 682, 683, 684 and 685, where the court said:

> "Huntsville is the county seat of Randolph county. In 1885, the Legislature provided for holding four terms of the county court at Moberly, with like power and jurisdiction coextensive

with said county, as pertains to similar courts of record in the state; and establishing a county clerk's office at Moberly, with a deputy clerk to be in charge of such office. * * * * * * * * * * * and all business begun in said county court, at Moberly, shall be proceeded with to final determination therein, unless removed out of said court according to law; but the parties to any matter or cause of action pending in said county court, at Moberly, may, by agreement in writing, signed by the parties or their attorneys, and filed in said court, remove the same into the county court at Huntsville in said county, and parties to any matter or cause of action pending in the county court at the city of Huntsville, in said county, may, in like manner, remove the same into the county court at Moberly in said county, and said matter or cause of action, when so removed, shall be proceeded in as if it had originated in said court into which it is soremoved; and in every such case the clerk of the county court may transfer the original papers on file in said matter or cause, with a certified copy of the record of entries in the same, into said court into which said matter or cause of action has been so removed, and the record in said cause shall show such removal and transfer.' * * * * * * * * * * * While the act of the Legislature provided for four terms of the county court to be held at Moberly, having concurrent jurisdiction with the county court established at Huntsville, the county seat, in all matters pertaining to the jurisdiction of county courts, it made two separate courts, so that proceedings instituted in one court gave that court jurisdiction to the exclusion of the other. In short, there were two

> separate county courts established in Randolph county, having concurrent jurisdiction. That is to say, the judges of the county court were required, in addition to holding court at Huntsville, to hold four terms at Moberly. Whereas, the two courts, having concurrent jurisdiction over certain matters, were nevertheless separate and distinct courts, located at different places, with distinct offices for the keeping of records.
>
> Section 6 of the act establishing the courts provides that all business begun in either of said courts shall be proceeded with to a final determination, unless removed out of said court 'according to law.' What was meant by removal according to law? The act nowhere explains, and we know of no general law providing for the removal of business from one county court to another in the same county. * * * * * *
>
> Besides, the people have the right to know when and where the public business is to be transacted, and they could not know that such business, begun today at Moberly, would be resumed tomorrow at Huntsville if the change be made by hand, and not by entry of record."

Under the above case, the court held that even though the Legislature had provided for the county court to hold its sessions at Moberly and at the city of Huntsville in the enactment, providing for the two county seats, it provided that any matter begun in either of the county courts should be consummated in that county court and not be removed to the other county court for consummation. The enactment providing for the county court to be held in the city of Moberly and city of Huntsville was enacted by the Legislature in 1885. At that time and as at the present time, the city of Moberly is the real county seat, but the law provided for the county court to meet in Huntsville, providing any matter be-

gun in Huntsville should be consummated in Huntsville and the same at the county court in Moberly. Under the holding, in this case, any act of the county court of Marion County must be begun and passed upon while in session at the county seat in Marion County.

Section 2, Article IX, Constitution of Missouri, reads as follows:

> "The General Assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law; and no county seat shall be removed unless two-thirds of the qualified voters of the county, voting on the proposition at a general election, vote therefor; and no such proposition shall be submitted oftener than once in five years. All additions to a town which is a county seat shall be included, considered and regarded as part of the county seat."

The prohibition in the above section does not prohibit the Legislature in providing for the holding of terms of the county court in a county at a place other than the county seat. This was so held in the case of State ex rel Hughes 104 Mo. 459, 16 S. W. 489.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the county court of Marion County can only hold its sessions in the circuit court building in the city of Palmyra, and that the county court can not legally hold meetings for the convenience of taxpayers, and those having business with the court, in the courthouse at Hannibal, or any other place except the county seat.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

WJB:RT

ELECTIONS: Failure to provide proper accomodations for voting -

April 10, 1939

FILED
86

Mr. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Stillwell:

We wish to acknowledge your request for an opinion under date of April 7, wherein you state, as follows:

"On Tuesday, April 4th, there was held in this county an election for County Superintendent of Schools. As your office no doubt knows, well over half of the votes in the entire county were cast at Hannibal. There was only one voting precinct in the city of Hannibal, and it was impossible for the one voting place to accomodate those desiring to vote. In other words, many people refused to vote because it necessitated standing in line in some instances for well over an hour. I am asking the opinion of your office as to whether or not the impossibility of eligible voters voting because of the inadequacy of polling precincts in the city of Hannibal would in any way invalidate the election and make possible the calling of a special election for this most important office. Complaints are reaching this office in increasing numbers as to the unfairness to those desiring to vote not being able to do so and for this reason I would deeply appreciate your immediate attention to this request."

20 C. J. Section 204, page 172, states as follows:

> "An election will not be declared void on the ground of insufficient accomodations for the electors at the polling place where it does not appear that the conditions at the polling place resulted in the deprivation of the right of any voter or affected, or was likely to have affected, the result of the election."

We have made a search of the authorities, and the only case we have found in point is that of Crouch vs. Ozanne 12 Australia Commonwealth Law Reports 539, l.c. 543, wherein the court said:

> "It is charged that at the Bellarine booth there was insufficient accomodation for the electors--that in a small room the electors were so crowded together that it was impossible for them to vote, the result being that persons went away without voting. The room does seem to have been very small, but the petitioner has entirely failed to satisfy me that there was anydeprivation of the right of any voter on account of those conditions. It is true that some few persons apparently went away at one time, but there is nothing to show that they did not come back again to vote. There is nothing to show their votes were not recorded, and, when one looks at the proportion of votes recorded at that particular place, it certainly amounts to a very fair average of the votes given throughout the electorate generally--that is to say, taking the proportion between the number of elec-

> tors on the roll and the number of votes recorded. I find that at Bellarine there were 1,487 electors enrolled and there were 1,003 voting papers issued. Making allowances for any few irregularities or informalities that may have taken place in the marking of the voting papers, the proportion of votes may be taken generally to be indicated by the ballot papers issued. When I find that out of 1,487 voters on the roll 1,003 voted, it certainly does not indicate to me that there could have been any substantial number of persons prevented from voting by reason of the condition of the polling booth, It was a necessary part of the petitioner's case to show that this condition of the polling booth which he complained of did affect the result, or was likely to have affected the result, of the election. In my opinion there is nothing whatever to indicate to me that the result of the voting at that particular place was in any way substantially influenced by the condition of things which is complained of."

From the facts presented to us in the instant case, there is no showing that any voter was deliberately deprived of his vote, or that the lack of accomodations affected the result of the election. At most, the facts disclose a refusal on the part of the voters to be inconvenienced by reason of a lack of accomodations.

We are, therefore, of the opinion that unless the facts disclose that there was adeliberate intent on the part of election officials to deprive voters of an opportuhity to vote by failing to provide satisfactory accomodations, or that the result of such unsatisfactory accomodations was such that it affected the outcome of the election, the election is valid.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

MW:RT

MUNICIPAL CORPORATIONS: Any charter provision which is not a mere detail of the running of a city and in conflict with the State Constitution or State Law is void.

July 24, 1939

FILED
86

Hon. Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of July 17th, 1939, which reads as follows:

"The city of Hannibal operates under a special charter granted by the legislature of this state in 1873. As you probably know, Hannibal ccntains approximately two-thirds of the population of Marion county. In the past, and, if I am not mistaken, since the adoption of the special charter, the citizens and property owners of Hannibal have paid county road tax in the same manner as land owners residing in the county outside the corporate limits of Hannibal. Marion county has provided and cared for the poor residing in Hannibal and have provided them with food, shelter and medical attention at the County Infirmery at Palmyra. Also Marion county, since the adoption of the charter, has defrayed the expenses of the indigent insane in the various state hospitals, from Hannibal. Under and by virtue of Section One of the city Charter found on Page 62 of the Revised Ordinances of the City of Hannibal for 1934, it is provided that the citizens of Hannibal shall be exempt from all county

tax for the support of the poor or for the maintaince or construction of any roads or bridges outside of the limits of the city of Hannibal in the county of Marion. It further provides that the city shall provide for the maintainance and support of it's own poor. The question has arisen and the opinion of your office is requested on the following:

"1. Is this provision of the city charter constitutional?
2. Are citizens of Hannibal exempt from the county tax for the construction and maintainance of roads outside the corporate limits of the city?
3. Is Hannibal, proper, responsible for it's own poor?

"It is my thought that this charter provision is inconsistent with the constitional provisions of the state of Missouri, providing for equal taxation of all of it's citizens.

"I am sending under separate cover the latest revision of our city ordinance and request that you return it to me when it has served it's purpose. I am quite anxious to have this opinion at your earliest possible opportunity."

Section 1, Article 8, page 62 of the charter of the city of Hannibal reads as follows:

"The City of Hannibal shall at its own proper expense, make, maintain and keep in repair all streets, roads and bridges within the limits of the city, and provide for the maintenance and support of its own poor, and in consideration thereof the citizens of Hannibal shall be exempt from all county tax for the support of the poor, or for the construction or

> maintenance of any roads or bridges in any part of Marion County, outside of the limits of said city, or for paying for any right of way for the same, and if the County Court of Marion County shall make any expenditure for the support of the poor, or for the construction, maintenance or repairs of any road or bridge, or the right of way for the same in any part of said city, and pay for the same out of the county funds, said county shall pay to the Treasurer of the City of Hannibal for the use of said city, a sum of money which shall bear the same proportion to the amount so expended as the assessed value of all property subject to county taxation in the City of Hannibal shall bear to the assessed value of similar property in the remainder of the city (county)."

This part of the charter of the city of Hannibal was approved, and went into effect March 21st, 1873.

1.

Section 7370 R. S. Missouri, 1929, reads as follows:

> "Any county which now has or may hereafter have within such county a city having a special charter and which city now has or may hereafter have a population of not less than 10,000 inhabitants and not more than 30,000 inhabitants shall, out of the funds of such county, provide for the care of the poor in said county, including poor of such city or cities, and no such city shall hereafter be exempt from any tax

> for the support of the poor of such county. No money shall hereafter be refunded to any such city by any such county on account of any money expended by said county for the support of the poor of said county."

According to the decennial Federal census of 1930, the city of Hannibal had a population of 22,761, and by reason of this population comes within section 7370, supra. By reason of the amount of population bracketed in section 7370, supra, it appears that this section was specifically enacted by the legislature to nullify section 1, of the city charter of Hannibal, as above set out.

By reason of section 7370, supra, by implication section 1, of article 8, page 62 of the charter of the city of Hannibal is void and of no effect, and the constitutionality of the same is not at issue. If the constitutionality of the section was at issue, it would be based upon unequal taxation. That the charter provision above set out is void, is upheld in the case of State ex rel People's Motorbus Company of St. Louis v. Blaine, 58 S. W. (2d) 975, par. 1, 332 Mo. 582, where the court said:

> "Paragraph 1 of section 1 of article 1 of the charter of the city of St. Louis provides that the city shall have power 'to assess, levy and collect taxes for all general and special purposes on all subjects or objects of taxation.' There can be no question but what this language of the charter is sufficiently broad to authorize the city to levy any kind of tax which is not inhibited by some other provision of the charter or by some constitutional or statutory provision. The charter of the city must be consistent with and subject to the Constitution and laws of the state. Ex parte Siemens v. Shreeve, 317 Mo. 736, 296 S. W. 415."

Section 7370, supra, has not been passed on by the courts of this state as to its constitutionality. The foregoing answers the first question in your request, which reads as follows:

> "Is this provision of the city charter constitutional?

II.

Your second question was:

> "Are citizens of Hannibal exempt from the county tax for the construction and maintainance of roads outside the corporate limits of the city?

Section 7890 R. S. Missouri, 1929, reads as follows:

> "The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

This section was enacted in the First Extra Session Laws of 1921, page 172.

According to the decennial Federal census of

1930 the population of Marion county was 33,493 and comes within section 7890, supra.

This section being a later statutory enactment nullifies that section of the charter of Hannibal, section 1, article 8, in reference to payment of a road tax levy outside of the city and the charter provision is void. It could also be attacked on the question of unconstitutionality as to unequal taxation.

It was held in State ex rel v. Blaine, supra, that the charter provision must not be in conflict with the state constitution or state laws. It was also held in the case of Siemens v. Shreeve, 296 S. W. 415, l. c. 417, par. 4-6, where the court said:

> "Important restraining provisions, however, appear in clauses of section 16, art. 9, of the Constitution of 1875, the very section that permits cities having a population of more than 100,000 inhabitants to frame charters for their 'own government' and under which this charter was framed, limiting the exercise of this power to the formation of such charters only as shall be 'consistent with and subject to the Constitution and laws of the state,' and 'always be in harmony with and subject to the Constitution and laws of the state.' Both the grant and the limitation must be given effect. If the limitation is construed to mean that the charter must be consistent with every provision of the Constitution and every law of the state, then the limitation simply nullifies the grant. Kansas City v. Oil Co., 140 Mo. 458, loc. cit. 470, 41 S. W. 943. On the other hand, to treat the charter as 'out of, and beyond, all legislative influence,' would be to nullify the express constitutional limitation. State ex rel. Kansas City v. Field, 99 Mo. 352, loc. cit. 355, 12 S. W. 802."

Also, in the case of Tremayne v. City of St. Louis, 6 S. W. (2d) 935, l.c. 941, par. 8, where the court said:

> "But the charter provisions, in order to avoid conflict, do not have to accord with the state law in mere matters of detail. The charter provisions must not be out of harmony (in the public and otherwise) with the general laws of the state, and the public policy therein announced. Kansas City v. Oil Co., 140 Mo. loc. cit. 469, 41 S. W. 943."

According to the holding in the above case, and taking into consideration the facts set out in your request, it is very apparent that the charter provision is not a mere matter of detail, but wholly sets up a new method of taxation.

III.

Your third question is as follows:

> "Is Hannibal, proper, responsible for it's own poor?"

Section 9986 R. S. Missouri, 1929, partially reads as follows:

> "It shall be the duty of the county treasurer to separate and subdivide the revenues of such county in his hands, and as they come into his hands, in compliance with such order of court and the provisions of this chapter; and it shall be his duty to pay out the

> revenues thus subdivided, on warrants issued by order of the court, on the respective funds so set apart and subdivided, and not otherwise; and for this purpose the treasurer shall keep a separate account with the county court of each fund, which several funds shall be known and designated respectively as the pauper fund, * * * ."

Under this section it is the duty of the county treasurer to set aside a fund for keeping paupers of the county.

Section 12950 R. S. Missouri, 1929, reads as follows:

> "Poor persons shall be relieved, maintained and supported by the county of which they are inhabitants."

This section in itself nullifies that part of the city charter of Hannibal, supra, as to the keeping of poor persons by the city of Hannibal. That it is nullified is upheld in the cases of: State ex rel People's Motorbus Company of St. Louis v. Blaine, 58 S. W. (2d) 975, par. 1, 332 Mo. 582; Siemens v. Shreeve, 296 S. W. 415, l.c. 417, par. 4-6; and Tremayne v. City of St. Louis, 6 S. W. (2d) 935, l.c. 941, par. 8, herein set out.

Section 12961 R. S. Missouri, 1929, reads as follows:

> "The several county courts shall set apart from the revenues of the counties such sums for the annual support of the poor as shall seem reasonable, which sums the county treasurers shall keep separate from other funds, and pay the same out on the warrants of their county courts."

This section is practically the same as section 9986, supra.

CONCLUSION

In view of the above authorities, it is the opinion of this department that section 1, of the city charter of Hannibal, which appears in the revised ordinances of the city of Hannibal for 1934, under section 8, on page 62, has been nullified by the above sections of the statute of Missouri, 1929. It is unnecessary for this department, even if we should decide to give our opinion on the constitutionality of the same, to enter into that matter. This department does not pass on the constitutionality of statutes or charters, as we believe this is a matter for the courts to decide.

It is further the opinion of this department that the citizens of Hannibal are not exempt from the county tax for the construction and maintenance of roads outside the corporate limits of the city.

It is further the opinion of this department that the city of Hannibal proper, is not primarily responsible for its own poor and that the county should provide for the poor out of the general county revenue funds, after allotment to the pauper fund.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WJB:RW

TAXATION AND :
REVENUE : Sale for taxes for 1932, barred by statute of limitations from sale in 1938, absent suit for taxes or judgment thereon or action under Senate Bill #94. Collector failing to exercise statutory remedy of collecting taxes is liable on his bond for the same.

September 13, 1939

FILED
86

Mr. Chas. M. Strong
Macon County Collector
Macon, Missouri

Dear Mr. Strong:

We desire to acknowledge your request for an opinion on September 11, 1939, which is as follows:

> "The previous collector of Macon County failed to advertise for tax sale in 1937 several pieces of property which had 1932 taxes delinquent, but advertised and offered them for sale in 1938.
>
> "Since he failed to advertise these taxes, are they outlawed, and if so, should they be charged to the previous collector by the county court.
>
> "If they are not outlawed, will the sale this fall be the second or third sale?"

Section 9952, Laws of Missouri, page 429 is as follows:

> "Between the first of January and the first of July in the year 1934 and annually thereafter, and immediately upon the effective date of this act, the county collector shall make out and record, in a book to be provided for that purpose, a list of lands and lots, returned and remaining delinquent for taxes, including therein the delinquent taxes of all cities and incorporated towns having authority to levy and collect taxes under their respec-

tive charters or under any law of this state returned delinquent to the county collector, separately stated, describing such lands or lots as the same are described in the tax books and said delinquent returns, as corrected under sections 9938 and 9942, and charging them with the amount of delinquent tax and naming the years delinquent, separately stated, and in addition thereto a penalty of ten per centum on such tax delinquent for the preceding year and an additional annual ten per centum on taxes for each year prior to the preceding year, and shall certify to the correctness thereof, with the date when the same was recorded, and sign the same by himself, or deputy, officially; provided however, if taxes are paid on land or lots delinquent for the preceding year at any time prior to sale thereof as in this act provided, the per centum of penalty added shall not exceed one per centum per month or fractional part thereof or ten per centum annually. It shall be the duty of the county clerk and county collector to compare the collector's record of such list of delinquent lands and lots as corrected with the corrected 'delinquent land list' made pursuant to sections 9938 and 9942, and the county clerk shall certify in the 'delinquent land list' on file in his office that same has been properly recorded in the collector's office and shall attach a certificate at the end of the record of such list of delinquent lands and lots in the collector's office that such record contains a true copy of the 'delinquent land list' on file in his office. And where the words 'back tax book' are now used in laws pertaining to the collection of taxes on delinquent lands, real estate and/or lots, the record of the list of delinquent lands and lots in the collector's office under the provisions of this act shall be held to be (where applicable and except as to city or town 'back tax book') such 'back tax book', and the recording of same by the collector and certification by the county clerk as herein provided,

shall be construed as a making of such 'back tax book' of delinquent real estate, lands and lots. Said collector shall be charged with the taxes, penalty and interest shown on such record of the list of delinquent lands and lots."

Section 9952a thereof is as follows:

"All lands and lots on which taxes are delinquent and unpaid shall be subject to sale to discharge the lien for said delinquent and unpaid taxes as provided for in this action the first Monday of November of each year, and it shall not be necessary to include the name of the owner, mortgagee, occupant or any other person or corporation owning or claiming an interest in or to any of said lands or lots in the notice of such sale; provided, however, delinquent taxes, with penalty, interest and costs, may be paid to the county collector at any time before the property is sold therefor. The entry of record by the county collector listing the delinquent lands and lots as provided for in this act shall be and become a levy upon such delinquent lands and lots for the purpose of enforcing the lien of delinquent and unpaid taxes, together with penalty, interest and costs."

Section 9962b thereof is as follows:

"All lots, tracts and parcels of land upon which taxes assessed or levied prior to the taking effect of this act remain due and unpaid at the date when such taxes would have become delinquent as provided in the act under which they were assessed and levied, and which taxes are not merged in judgment prior to the effective date of this act, shall be deemed to be delinquent under the provisions of this act, and the same proceedings shall be had to enforce the payment of such unpaid taxes, with interest, penalty and costs, and payment en-

forced and liens foreclosed under and by virtue of the provisions of this act and the same rights of redemption shall attach. For the purposes of foreclosure under this act, the date of delinquency shall be construed to mean the date when the taxes first became delinquent; provided however, that nothing herein contained shall be construed to affect the right of the county collector to proceed to final judgment and foreclosure for taxes upon which suit had been instituted prior to the effective date of this act, but not in final judgment, nor to prejudice the rights of collection of any costs or commissions attaching in such cases which were valid under the tax law existing at the time of institution of such suits. As to taxes merged in judgment at the effective date of this act the foreclosure of the tax lien and proceedings relative thereto shall be had under the provisions of the law as such law existed prior to the passage of this act, and as to suits for delinquent taxes instituted, but not merged in judgment, at the effective date of this act the collector shall have the right to proceed to final judgment and foreclosure of the tax lien under the provisions of the law as it existed prior to the passage of this act, or such collector may, in his discretion, dismiss such suits and proceed to foreclosure of the tax lien under the provisions of this act, subject to the preservation of rights to all valid costs and commissions that may have already attached in such character of suits under the law as it existed prior to the passage of this act."

Section 9961, Laws of Missouri 1935, at page 405 is as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 59, Revised Statutes of Missouri, 1929, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption

> of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five (5) years delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five (5) years shall be deemed to have been in compliance with the provisions of said act in so far as the time at which such sales are to be had is specified therein, Provided further, that in suits or actions to collect delinquent drainage and/or levee assessments on real estate such suits or actions shall be commenced within five years after delinquency, otherwise no suit or action therefor shall be commenced, had or maintained."

Section 9985, Laws of Missouri 1935, at page 409 is in part as follows:

> " * * * * Provided, however, that no collector shall be required to give bond in excess of the sum of seven hundred fifty thousand dollars, conditioned that he will faithfully and punctually collect and pay over all state, county and other revenue for the four years next ensuing the first day of March, thereafter, and that he will in all things faithfully perform all the duties of the office of collector according to law. * * * *"

CONCLUSION

Unless suit has been filed or judgment obtained for taxes on real estate as provided in Section 9962b supra, or unless the same has been subjected to sale for such taxes under the provisions of Section 9952a supra and subsequent sections, a statute of limitations provided in Section 9961, supra applies.

Therefore, it is the opinion of this department that absent any action under the above laws of procedure, under the above statute of limitations, it is too late to offer land for sale

for taxes for the year of 1932, for the first time, on the first Monday in November, 1938. It is further the opinion of this department that under such circumstances the collector, failing to follow the statutory procedure, and permitting taxes to be barred by said statute of limitations, becomes liable for such taxes on his bond.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM/ww

JUSTICES OF THE PEACE: May perform marriage ceremonies only in their respective townships.

October 7, 1939

FILED
86

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, dated August 28, 1939, as follows:

> "There seems to be a growing practice in this county for Justices of the Peace to perform wedding ceremonies outside the township for which they are elected.
>
> May I please be advised by your department whether or not a justice of the peace is within his rights in performing a marriage ceremony outside the township from which he is elected."

Section 2976, R. S. Mo. 1929, authorizes justices of the peace to perform marriage ceremonies, and is as follows:

> "Marriages may be solemnized by any judge of a court of record or any justice of the peace, or any licensed or ordained preacher of the gospel, who is a citizen of the United States or who is a resident of and a pastor of any church in this state."

Section 2136, R. S. Mo. 1929, provides for the election of two justices of the peace in each municipal township, and we quote at length from this section to show the limitations placed upon such offices by the legislature.

> "Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; but in case there shall be in any such township an incorporated town or city having a population of over two thousand inhabitants, and less than one hundred thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city; * * * * * and who shall be a resident of and keep and maintain his office in the district for which he is elected."

In the following section, 2137, which is amended by Laws of Missouri, 1939, at page 343, a provision is made for the appointment of an additional justice of the peace who shall reside at least five miles from any other justice of the peace of such township.

Article II, Chapter 10, R. S. Mo. 1929, fixes the jurisdiction of justices of the peace as regards their judicial functions. We note from Section 2176, which is the last section in said article, that in case of the incapacity of any justice in any township to perform his duties or dispose of the business pending before him, only another justice in the same township may act for him. Although we find in said Article II several sections extending his jurisdiction within the bounds of the county, it is apparent that this extension relates only to his powers to issue summons where one defendant resides in his township or to subpoena witnesses anywhere in the county in a matter pending in his court. This position is sustained in United States Mutual Accident Company v. Reisinger, 43 Mo. App. 571. All of the jurisdictional sections are set out in the opinion, and we find the following in the opinion of the court in regard to same:

> "The sections, too, of the articles following the foregoing, relating to summons, how issued and by whom to be served, as well as the form of the same, all show

> how carefully the jurisdiction of the justice is limited to his county."

Furthermore, in a case by our Supreme Court, St. Louis v. Sommers, 148 Mo. l. c. 401, it is said:

> "The solemnization of a marriage is in no sense a judicial act. * * * * * * * * It may be performed anywhere within his jurisdiction, * * * * * " (Italics ours.)

It becomes necessary for us to consider, therefore, the extent of the non-judicial jurisdiction of a justice of the peace. A justice of the peace receives a fee of two dollars for solemnizing marriages, as provided by Section 11778, R. S. Mo. 1929, and such act is, therefore, an official act. Douglas County v. Vinsonhaler, 118 N. W. 1058.

The jurisdiction of justices of the peace in performing both their judicial functions and official acts has been discussed in several late cases by our courts. In Altergott v. O'Connor, 6 S. W. (2d) 1012, we find the following quotations from other authority and jurisdictions cited with approval by the court:

> "Kelley's Justice Treatise, sec. 5, page 7, says:
>
> 'A justice elected for one district or township has no right or authority to establish his office and exercise his official functions within the limits of another district or township.'
>
> *
>
> The Supreme Court of Kansas in Phillips v. Thralls, 26 Kan. 780, upon a similar question said:
>
> 'One purpose contemplated in the organization of these courts was to have neighborhood courts convenient to every individual for the settlement of minor disputes. If one justice may move his

court out of his township to any other place in the county, all may; and we may have the spectacle of all the justices of all the townships in a county congregating in the county seat, and holding office there. Thus would one of the beneficient purposes of these inferior courts be defeated.'

The Supreme Court of the state of Kentucky in the case of Wheeler v. Schulman, 165 Ky. 185, 176 S. W. 1017, in deciding that a justice had a right by injunction to prevent any justice from holding court in his district, said (165 Ky. 189) loc. cit. 1019:

'Manifestly, if one justice of the peace may maintain a court within a district for which he was not elected, every other justice in the county could do likewise, and the anomalous situation would be presented, of eight justices' courts, in full operation in one district of the county, while the other districts of the county would substantially be left barren of whatever benefits such courts may bestow."

* *

In Nelson Clements v. City of San Antonio, 34 Tex. 25, the case of Foster v. McAdams, supra, is followed, and the court said:

'The justice of the peace elected for one precinct has no right or authority to establish his office and exercise his official functions within the limits of another precinct; and if he should attempt to do so, his acts would be void.'

The same question was before the Supreme Court of Georgia in Block v. Henderson, 82 Ga. 23, 8 S. E. 877, 3 L. R. A. 325, 14 Am. St. Rep. 138. The syllabus, which is well written says:

> 'When a justice of the peace went outside the limits of his district and undertook to hold his court, he had jurisdiction neither of the subject-matter nor of the person, and no waiver or agreement made before him outside of his jurisdiction could confer jurisdiction upon him.'
>
> In Hart v. Grove, 76 Okl. 179, loc. cit. 180, 184 P. 572, the court, in discussing the act of a justice of the peace outside the state, said:
>
> 'He (meaning the justice) can perform his official acts only in his own township.'
>
> *
>
> Outside of court the justice or the judge is but a man, and outside of the district for which he was appointed or elected his judgments have no more force than if rendered by a mere bystander.'"

To the same effect are Jackson v. McKee, 28 S. W. (2d) 407, State Bank of Sugar Creek v. Anderson, 36 S. W. (2d) 138, McKenna v. Wittman , 25 S. W. (2d) 541, Travalant v. Kelley Motor Company, 16 S. W. (2d) 709.

It is our conclusion, therefore, that a justice of the peace has no non-judicial jurisdiction outside the township for which he is appointed or elected, and that he cannot lawfully perform marriage ceremonies outside the boundaries of such township.

Respectfully submitted,

ROBERT L. HYDER
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

RLH:VC

STATE HIGHWAY COMMISSION: The word "axle" as used in Section 7788 R. S. Missouri, 1929, does not mean "rocker arm" which makes several axles.

December 20, 1939

FILED 86

Mr. Louis V. Stigall
Chief Counsel
State Highway Department
Jefferson City, Missouri

Dear Sir:

We are in receipt of your request dated December 8th, 1939, for an opinion, which request reads as follows:

"There is considerable question among manufacturers of trucks as to the interpretation of Section 7788, R. S. Mo., 1929, so far as it affects the distribution of the total gross weight of the vehicle where two wheels contacting the pavement some two or three feetapart are attached to the frame of the truck by a common rocker midway between the wheels. The destructiveness to the highway is no greater, of course, than if these two wheels on a side were attached to the frame of the truck by a separate or individual axle. The statute provides that:

'* * * * and no motor vehicle having a greater weight than 16,000 lbs. on one axle * * * shall be operated on the highways of this state * * *.'

"Does this prohibit the distribution of more than 8,000 lbs. to the two wheels on one side of the truck which are attached

to the frame work by a common rocker, or may each wheel on each side of the truck be considered as carried on a separate axle?

"It is somewhat difficult to describe the various methods of attaching wheels, axles and rocker arms in common use by truck manufacturers today. Mr. Homer Dennis of our maintenance department has a considerable quantity of manufacturers' descriptive literature, pictures and diagrams which he would be glad to show you in order to give a better understanding of what the question is."

Section 7788 R. S. Missouri, 1929, reads as follows:

"No motor vehicle, except a combination of tractor and semi-trailer, the gross weight of which, including load, is more than 24,000 pounds, and no combination of tractor and semi-trailer, the gross weight of which, including load, is more than 38,000 pounds, and no motor vehicle having a greater weight than 16,000 pounds on one axle, and no motor vehicle having a load of over 600 pounds per inch width of tire upon any wheel concentrated upon the surface of the highway (said width in the case of rubber tires, both solid and pneumatic, to be measured between the flanges of the rim), shall be operated on the highways of this state: Provided, a combination of tractor and semi-trailer shall be considered a vehicle of six (6) wheels for the purpose of computing the distribution of the load."

It will be noticed under this section that no motor vehicle, except a combination of tractor and semi-trailer should weigh more than 24,000 pounds, including load, and a combination of tractor and semi-trailer should not weigh more than 38,000 pounds including the load.

It will also be noticed that under this section no motor vehicle should have a greater weight than 16,000 pounds on one axle. According to Webster's New International Dictionary, the definition of axle is as follows:

> "The pin or spindle on which a wheel revolves, or which revolves with a wheel."

Section 7788, supra, does not say or describe the part that is attached to the chassis, but specifically says "axle".

It will also be noticed under section 7788, supra, that no motor vehicle should have a load of over 600 pounds per inch width of the tire upon any wheel concentrated upon the surface of the highway. As to the intention of the legislature, whether or not the term, "16,000 pounds on one axle" should apply to two wheels on two separate axles which are attached to a rocker and then attached to the chassis of the motor vehicle, one should take into consideration that part of section 7788, supra, pertaining to the pounds per inch upon the pavement. In your request you state the "destructiveness to the highway is no greater of course, than if these two wheels on a side were attached to the frame of the truck by a separate or individual axle." It is common knowledge that when a platform scale is used to ascertain the weight placed upon the highway on one wheel only it will usually show a greater weight than if separate platform scales are placed under each of the wheels of the motor vehicle. Although the total weight of a motor vehicle might show 20,000 pounds

if separate platform scales are placed under each wheel, yet, if only one platform scale is placed on one of the four wheels of the motor vehicle, it will show a greater weight in comparison to the total weight of platform scales placed under each of the four wheels.

The purpose of 7788, supra, was for the protection of the highways, and it was the intention and purpose of the legislature in enacting section 7788 to prevent unnecessary injury to the roadway.

In construing a statute it is necessary that one look at the purpose of the act, and in construing the intention of the legislature in the above section 59 C. J. page 952 states as follows:

> "The intention of the legislature is to be obtained primarily from the language used in the statute. The court must impartially and without bias review the written words of the act, being aided in their interpretation by the canons of construction. Where the language of a statute is plain and unambiguous, there is no occasion for construction, even though other meanings could be found; and the court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning," citing Gendron v. Dwight Chapin & Co., (App.) 37 S. W. (2d) 486; Betz v. Kansas City So. R. Co., 284 S. W. 455, 314 Mo. 390; Grier v. Kansas City, C. C. & St. J. Ry. Co., 228 S. W. 454, 286 Mo. 523.

Also, in the case of Betz v. Columbia Telephone Co., 24 S. W. (2d) 224, l.c. 228, the court said:

" * * * Courts can not interpolate in a statute where omission is not plainly indicated. State ex rel. Cobb v. Thompson (Mo. Sup.) 5 S. W. (2d) 57. To get at the true meaning of the language in a statute the court must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made. Pembroke v. Huston, 180 Mo. 627, 636, 79 S.W. 470. It is a useful and safe rule of construction to resolve any ambiguity or obscurity in a statute in favor of such reading as will best meet the demands of natural justice, so far as that can be done without violence to settled legal principles. Plum v. Kansas City, 101 Mo. 525, 533, 14 S. W. 657, 10 L. R. A. 371; 25 R. C. L. sec. 258."

Under the above holding it cannot be said that one can construe section 7788, supra, to mean that the legislature meant that in considering the weight upon the "axle" that it should be construed the total weight upon a rocker arm to which is attached two separate axles. The statute is unambiguous and specifically states "axle" and not to be construed against having more than one wheel upon a common rocker.

CONCLUSION

In view of the above authorities, it is the opinion of this department that Section 7788, supra, limits the total weight upon any one axle to 16,000 pounds and should not be construed to mean 16,000 pounds upon any common rocker and each wheel on each side of the truck should be considered as carried on a separate axle and be allowed

to carry a weight not exceeding 16,000 pounds.

Respectfully submitted,

W. J. BURKE
Assistant Attorney General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

PRINTING: $1.00 for each description is the maximum amount the County Court can pay for printing under Section 9952b, Laws of Mo. 1935.

December 21, 1939

FILED
86

Honorable Walter G. Stillwell
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Sir:

This Department is in receipt of your letter of December 15th, wherein you make the following inquiry:

> "The Hannibal Labor Press, a local Weekly newspaper under an oral understanding with the County Court published the list of land which was sold on the first Monday in November for delinquent taxes. At the time The Labor Press was requested to print the list there was no rate mentioned either by the publisher or the County Court so that the compensation to be paid was not discussed. After publication was duly made The Labor Press tendered a bill to the County Court which was based on a 'per square' basis. My attention has been called to Section 9952B, Laws of Missouri, 1935, page 403 and I have expressed the opinion to the Court that they are only obligated to pay One Dollar per description for the three publications. The Labor Press is insisting that they be paid on a 'per square' calculation which in substance amounts to about three times more than the allowance made in the above section."

The section referred to in your letter is 9952b, Laws of Missouri, 1935, pages 403-404. It is only necessary to quote the pertinent part as follows:

> "* * * The county collector shall, on or before the day of sale, insert at the foot of such list on his record a copy of such notice and certify on said record immediately following such notice the name of the newspaper of the county in which such notice was printed and published and the dates of insertions of such notice in such newspaper. The expense of such printing shall be paid out of the county treasury and shall not exceed the rate fixed in the county printing contract, if any, but in no event to exceed one dollar for each description, which cost of printing at the rate paid by the county shall be taxed as part of the costs of the sale of any land or lot contained in such list."

Applying the facts which you present in your letter we readily conclude and agree with the opinion that you have heretofore expressed to the court that in no event the charge for the printing of the matters referred to in Section 9952b to exceed one dollar for each description.

Therefore, we are of the opinion that the County Court is authorized to pay the maximum of one dollar for each description, in the event there is no rate fixed in the county printing contract.

Respectfully submitted

APPROVED:

OLLIVER W. NOLEN
Assistant Attorney-General

W. J. BURKE
(Acting) Attorney-General

OWN:EG

TAXATION: County Clerk or Deputy in the office of County Clerk only can collect dog tax fee. The law itself is in operation upon publication of the notice of the favorable election by the county court.

No 31

January 27, 1939

FILED 87

Mr. C. E. Swinney
Clerk of the County Court
Linneus, Missouri

Dear Mr. Swinney:

We wish to acknowledge receipt of your request for an opinion under date of January 13th, 1939, which reads as follows:

"The dog tax law has passed in Linn County and it evolves upon me to provide methods of payment of taxes and distribution of tags under Section 12873-4.

"Since it will be inconvenient for dog owners to come to my office to pay the tax and obtain tags, I am wondering if I could appoint an Agent in each township to accept same and provide payment for making this collection. In providing this payment I am willing to permit them to retain the 10¢ each for licenses and tags provided this fee will remain in my possession instead of being turned to the County Treasury.

"Will I be permitted to retain fees collected upon sale of dog tax licenses and where necessary to recompense my Agents for the sale of tags and collection out of my fees?

"Further, I should like to know at what time tags should go on sale for the collection of this tax."

Sections 12872, 12873 and 12874, of Article 12, Chapter 88, R. S. Missouri, 1929, was amended by Sections 12872, 12873, 12874, 12874a, 12874b and 12874c Laws of Missouri, 1937, Page 224. Section

12874 reads as follows:

"County clerks shall issue licenses to applicants and shall deliver to the applicants a metallic plate having the number corresponding to that of the license stamped thereon and shall deliver to such party a certificate from the book furnished to him by the Secretary of State, which said certificates, as well as the margin or part thereof remaining in the book after cutting out the certificate, shall contain the number of the license, the year for which the same is granted, the name and residence of the owner of the dog, and the sex, color and description of the dog for which the license is paid and the amount of the tax paid therefor. Such clerk shall retain out of the money received for each license issued the sum of ten cents, which shall cover all his services under this article, and he shall pay the balance and all other sums received by him under the provisions of this article, less the cost of license tags, record books, blank applications and affidavits and the cost of transmitting the balance to the treasurer of the county. The treasurer of the county shall set any and all sums so received apart in a separate fund to be known as a 'county dog license fund,' and such fund shall be used only for the purpose of compensating persons who have suffered loss or damage through injury or killing by dogs of any live stock or poultry owned by them and located in said county at the time of such injury or killing, in an amount not to exceed the market value thereof at the time of such injury or killing. The county court of each county in this state is authorized to expend and draw county warrants against such fund only as hereinafter provided. Provided, that this act shall not be construed to prevent suits at law for damages cause to live stock or poultry by dogs."

It will be noted that the statute specifically sets out that the county clerk shall issue licenses to applicants. The statute does not provide for the appointment of deputies to collect the license fee outside of the office of the county clerk. The statute also provided that the clerk shall retain out of the money received the sum of ten cents, which shall cover all his services under the article and he shall pay the balance and all other sums received by him under the provisions of this article, less the costs of license tags, record books, blank applications and affidavits, and the cost of transmitting the balance to the treasurer of the county. Under this statement, first the county clerk shall retain the amount of the fee, which is ten cents, and then retain the actual costs of the license tags etc, but the balance must be transmitted to the treasurer of the county and not be retained by the county clerk.

Section 11811 Laws of Missouri, 1937, page 442, reads as follows:

> "It shall be the duty of the clerks of county courts to charge and collect in all cases every fee accruing to their offices by law, except such fees as are chargeable to the county, and such clerk shall, at the end of each month, file with the county court a report of all fees charged and collected during said month stating on what account such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of such clerk. It shall be the duty of such clerks upon the filing of said report to forthwith pay over to the county treasury all moneys collected by them during the month and required to be shown in said monthly report, taking a duplicate receipt therefor, one of which shall be filed in his office and every such clerk shall be liable on his official bond for all fees collected and not accounted for by him and paid into the county treasury as herein provided."

It will be noticed by the above section that it is the duty of the clerks of the county courts to collect

the fees and make a monthly report, which is to be filed with the county court, stating the amount of the fees and from whom collected. In reading this section and the original section 12874 supra, together, it would be necessary that the county clerk only issue the tags and collect the fee.

Under the original section 12874, supra, the fee of ten cents is to be retained by the county clerk and not by any deputy. In order to receive fees it is necessary that the statute be followed and in the case of State ex rel vs. Wilder, 197 Mo. loc. cit. 32 the court in holding that costs and fees should be collected did not follow the statute, and the court said:

> "For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows."

The same theory is followed in the payment of claims or fees against the county. Also, in the case of Fischbach Brewing Co. v. City of St. Louis, 95 S. W. (2d) 335, loc. cit. 338, the court said:

> "In determining the meaning and intent of a statute it is proper to consider the time of its enactment, the surrounding facts and circumstances, the purpose for which the law was enacted, the cause or necessity which induced its enactment, the prior condition of the law, the mischief sought to be remedied, contemporaneous and prior historical events which may have influenced the enactment; in other words, the judicial interpreters of the law should put themselves as near in the position of the makers of the law as possible in order to more correctly ascertain their intent in its enactment. Sutherland on Statutory Construction (2d Ed.) Section 456, p. 864, Section 471, p. 883."

Also 59 C. J. 961, on the construction of statutes the court said:

> "In construing a statute to give effect to the intent or purpose of the

legislature, the object of the statute must be kept in mind, and such construction placed upon it as will, if possible, effect its purpose, and render it valid, even though it be somewhat indefinite. To this end it should be given a reasonable or liberal construction; and if susceptible of more than one construction, it must be given that which will best effect its purpose rather than one which would defeat it, even though such construction is not within the strict literal interpretation of the statute, and even though both are equally reasonable. Where there is no valid reason for one of two constructions, the one for which there is no reason should not be adopted. The legislature cannot be held to have intended something beyond its authority in order to qualify the language it has used."

Also, in the case of State vs. Thompson, 5 S. W. (2d) 57, loc. cit. 59, the court said:

"A statute is not to be read as if open to construction as a matter of course. It is only in the case of ambiguous statutes of uncertain meaning that the rules of construction can have any application. Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

Section 12881 R. S. Missouri 1929 reads as follows:

"* * *If the majority of the votes cast upon the subject be in favor of license tax on dogs, the county court shall spread the result of such election upon its records and give notice thereof by publication in some newspaper printed and published in such county and such law shall become operative from the time such publication is made."

CONCLUSION.

In view of the above authorities it is the opinion of this department that under sections 12873 and 12874, as set out in your request, the county clerk cannot delegate the authority to persons outside of the county clerk's office to collect dog taxes and issue tags for dogs and allow them to retain the ten cents fee which is allowed the county clerk.

It is further the opinion of this department that the balance of the dog license fee, after the deduction of the ten cents to the county clerk and after the deduction of the costs of the tag and the issuing thereof, and the cost of transmitting the balance to the county treasurer, should be paid in monthly to the county treasurer.

In answer to your inquiry as to the time tags should go on sale for the collection of the dog tax I am enclosing an opinion rendered by this office on November 18th, 1938, to Edward V, Long, Prosecuting Attorney of Pike County, which states the method of the publication of the law and the procedure for declaring the dog tax law in effect. This opinion states the procedure and form of publication.

Respectfully submitted,

WJB:RW
Enc. 1

W. J. BURKE
Assistant Attorney General.

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General.

COUNTY COURTS:
COUNTY WARRANTS:
ROAD DISTRICTS:

Warrants issued by the county court for general road districts which are in excess of anticipated revenue are void and the road district is not liable. Treasurer is liable for paying warrants out of revenue for years other than for which it was issued unless there a surplus.

February 14, 1939

FILED
81

Mr. W. W. Sunderwirth
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an official opinion from this department which is as follows:

"The County Court of Cedar County issued warrants in 1935-36-37-38 in excess of the annual anticipated revenue for those years for the purpose of sponsoring road projects in some of the general (not special) road districts within the county. The indebtedness is so great in some of the districts that the revenue for the next ten years, at 25¢ as provided under Section 22, Article 10 of the Constitution of Missouri, will not pay the debt. For example, District No. 1 is indebted in the sum of $903.00, while their annual anticipated revenue is approximately $135.00. The form of the warrants is the same as the one I have attached to this letter.

"I would like to have your answer to the following questions, as litigation on the outstanding warrants here is probable.

"1. Who should be named parties de-

fendant?

"2. What court has jurisdiction? (The warrants being less than $250.00.)

"3. Are these warrants a legal obligation of the district?

"4. If the 1936 warrants are paid out of the 1938 revenue, what is the treasurer's liability, if any? (The 1936 warrants being contracted in excess of the 1936 revenue.)

"5. Does the writing of these warrants constitute the appropriating of money not authorized by law?

"6. If a judgment was obtained, how could it be paid if the revenue of the year the warrant was issued was issued

"7. Have you any suggestions as to how the situation should be handled?"

From your letter it appears that the county court of your county has issued warrants for obligations of various general road districts in the county in excess of the amount of revenue available for such district for the year in which the obligation is incurred for which the warrant was issued.

It also appears from your letter that you are taking the position that the amount of revenue raised in each general road district is all that can be spent by the county court for that district.

Road moneys for general and special road districts are raised by virtue of Sections 7890 and 7891, R. S. Missouri, 1929, which are as follows:

"The county courts in the several counties of this state, having a

population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

Section 7891:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund,' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be: Provided, further, that the part of said special road and bridge tax arising from and paid upon

> property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

It will be noted that Section 7890, supra, does not limit the county court to spend in a district only the amount of taxes collected from that district. The first proviso of Section 7891, supra, does provide that all that part or portion of the tax raised under said section which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be. The taxes raised by Section 7890, supra, may be spent by the county court in any road district in the county except those taxes which are raised from lands in special road districts. However, such taxes, if they are not demanded of the county court by the special road district, may be spent by the county court in any district in the county.

Section 8042, R. S. Missouri, 1929, provides as follows:

"In all counties in this state where a special road district, or districts, has or have been organized, or where a special road district, or districts, may be organized under this article, and where money shall be collected as county taxes for road purposes, or for road and bridge purposes, by virtue of any existing law or laws, or subsequent law or laws that may be enacted, upon property within such special district, or districts, or where money shall be collected for pool or billiard table licenses, upon business within such special road district, or districts, the county court shall, as such taxes or licenses are paid and collected, apportion and set aside to the credit of such special road district, or districts, from which said taxes were collected, all such taxes so arising from and collected and paid upon any property lying and being within such special district, or districts, and also one-half of the amount collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district; and the county court shall, upon written application by said commissioners of such special road district, or districts, draw warrants upon the county treasurer, payable to the commissioners of such special road district, or districts, or the treasury thereof, for all that part or portion of said taxes so collected upon property lying and being within such special road district, or districts, and also for one-half the amount so collected for pool and billiard table licenses, so collected from such business carried on or conducted within the limits of such special road district, or districts."

Under this section the courts have held that special road districts are entitled, upon timely application therefor, to receive all moneys collected as taxes for road and bridge purposes upon property within their boundaries. State ex rel. v. Barry County, 302 Mo. 280, 258 S. W. 710.

These sections authorize the special districts to receive the moneys raised for taxes on lands in their districts but they do not prohibit the county court from spending more than that amount in such districts. The "county road and bridge fund" taxes raised by the provisions of Section 7890, supra, may be spent in any general road district in the county, except such of said taxes that have collected in the special road district which have been demanded by such road district as is provided by said Section 8042.

The boundary of a general road district is controlled by the county court. This is by virtue of the provisions of Section 7868, R. S. Missouri, 1929, which provides as follows:

> "The county courts of all counties, other than those under township organization, shall, during the month of January, 1918, with the advice and assistance of the county highway engineer, divide their counties into road districts, all to be numbered, of suitable and convenient size, road mileage and taxable property considered. Said courts shall, during the month of January biennially thereafter, have authority to change the boundaries of any such road district as the best interest of the public may require."

By this section the county court is authorized in every biennial period to change the boundary lines of the various road district in its county. It would seem, therefore, that the lawmakers never intended that a general road

district would become obligated under the statutes as they are now written.

By a reading of Article III, chapter 42, Sections 7868 to 7897, inclusive, of the Revised Statutes of Missouri, 1929, it will be seen that the county court has general supervision over the road overseers in the county, and by said Section 7868, by changing the boundaries of the districts the court could establish new districts or abolish old districts.

As the lawmakers have failed to provide that the "county road and bridge fund" raised by said Section 7890 shall be spent in the district from which such taxes are collected, except the taxes which are raised from such road districts when timely demand has been made therefor as provided by said Section 8042, there is no doubt that the county court may spend the taxes from this fund in any general road district in the county regardless of the fact that the spending of such money in a general road district would be in excess of the amount of taxes raised in that district for that year. Section 12, Article X of the Constitution of Missouri, provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose; * * * * * * * * * "

We do not think that the general road districts are affected by the provisions of this section, but the county court which has supervision over such districts is controlled by said section and it is not authorized to obligate the "county road and bridge fund" authorized by Section 7890, supra, or "the special road and bridge fund" author-

ized by Section 7891, supra, in an amount exceeding in any one year the income and revenue provided for such year for said funds. We think that the provisions of Section 12 of Article X of the Constitution cited above control the county court as to the spending of these funds. Therefore, the county court may issue warrants on these two funds or either of them for a general road district even though the amount is in excess of the anticipated revenue that will be derived from taxes on property in such general road district and still the court would not be violating the foregoing provisions of the constitution. However, the county court is limited by those provisions to the amount it may spend from these funds on all of the districts, both general and special in the county, and any obligation entered into and/or warrants issued in payment of such obligations in excess of that amount, is null and void.

From an examination of the statutes relating to general road districts it will be seen that the overseer is not authorized to enter into contracts for the district, or for the county court for the districts.

It is a general rule of law in this state that an official whose office is created by the statute must look to the statute for his powers and duties. Therefore, the overseer of the general road district, or the general road district which is not a body corporate, is not authorized to sue and to be sued. All contracts for the general road district must be entered into by the county court and if a suit is brought on such contract the county should be made the party defendant or plaintiff as the case may be.

On the question of the limitation of officials entering into contracts and binding the county therefor, we find that in the case of Layne-Western Co. v. Buchanan County, Mo., 85 Federal (2d) 343, l.c. 349, the court said:

> "* * * * It is held that every person dealing with a public officer in the state is required at his peril to ascertain at the time a contract is entered into that it is within the scope of the authority which the law

> conferred upon the officer. * * "
> Citing Missouri authorities.

Therefore, a person dealing with the county court must ascertain at the time of the contract that the court is not violating the provisions of Section 12, Article X of the Constitution of Missouri or any other statute which relates to the subject matter upon which the court is contracting and if such person fails to so ascertain the powers of the officials in connection with the contract he does so at his peril.

Again at l.c. 349, the court, in the Buchanan County case, supra, said:

> "Warrants issued in payment for work done under a void contract have been declared void in a taxpayer's suit. Hawkins v. Cox, 334 Mo. 640, 66 S. W. (2d) 539; Hillside Securities Co. v. Minter, 300 Mo. 380, 254 S. W. 188, 189. And in Hanick v. Marion County, 312 Mo. 73, 278 S. W. 730, 732, recovery on contract fully completed by the contractor (plaintiff) was denied because it was not let upon competitive bids.* * * * * * ** * "

CONCLUSION

With the foregoing preliminary statements in mind, we will answer your questions in the order submitted.

I.

Who should be named parties defendant? In answer to this question we will say that if a person has a suit on warrants described in the first paragraph of your letter that the county should be made the party defendant. However, you will note from our preliminary statement it would seem that a person would not have a cause of action on such warrants.

II.

What court has jurisdiction? We think Section 12108 R. S. Missouri, 1929, answers this question and it is as follows:

> "All actions whatsoever against any county shall be commenced in the circuit court of such county, and prosecuted to final judgment and execution therein, unless removed by change of venue to some other county, in which case the action or actions so removed shall be prosecuted to final judgment and execution in the circuit court of such other county."

III.

Are these warrants a legal obligation of the district? In answer to this question we will say from what we have stated above, these warrants are not legal obligations of the general road district.

IV.

If the 1936 warrants are paid out of the 1938 revenue, what is the treasurer's liability, if any? (The 1936 warrants being contracted in excess of the 1936 revenue.) The 1936 warrants being issued in payment of obligations which were incurred in excess of the revenues for that year are void and the treasurer would be held liable for the payment of the same out of 1938 revenues. In support of this rule we refer you to the case of Cook v. Putnam County, 70 Mo. 668, wherein the rule is stated:

> "A county treasurer who pays a warrant when there is no money in the fund on which it is drawn, cannot recover the amount from the county, and it does not matter that the payment was made at the instance of the

> county court and upon their promise to make good the amount, nor that the warrant was received from the treasurer and canceled by the court."

V.

Does the writing of these warrants constitute the appropriating of money not authorized by law? In answer to this question we find the rule stated in 15 Corpus Juris, page 586, section 289, in the following language:

> "* * * By an appropriation is meant the setting apart or the voting of a sum of money to a particular object, * * * * * * "

Therefore, the setting apart of the money and voting the same and issuing a warrant therefor would constitute an appropriation of the money and if it is in excess of the amount allowed by law, then the writing of these warrants would constitute the appropriation of money not authorized by law.

VI.

If a judgment was obtained, how could it be paid if the revenue of the year the warrant was issued was exhausted? In answer to this question, as we have stated herein a judgment could not be obtained against the various districts, and if any judgment at all were obtained it would be against the county. A judgment could not be obtained against an obligation which has been incurred in violation of the provisions of Article X, section 12 of the Constitution hereinbefore cited. The Supreme Court, in the case of Hillside Securities Co. v. Minter, 300 Mo. 380, l.c. 398, in speaking of a contract which was entered into by the county court without authority, said:

> "To permit recovery <u>under such contract</u> for the reasonable value of the work done thereunder by denying injunction

> sought by a taxpaying citizen, would be to permit the county to do indirectly that which it is forbidden to do directly and would furnish a ready means of evading the law. Such course of action may not be sanctioned."

However, if for any cause a judgment were obtained, then under the general rule as to obligations of the county, such a judgment might be paid from the road revenues of the year in which such judgment is obtained.

VII.

Have you any suggestions as to how the situation should be handled? As to this question, I think that the suggestions we have heretofore made will take care of the answer.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

_____

(Acting) Attorney General

TWB:DA

ELECTIONS:
MAJORITY: Majority of the elected members present constitutes a quorum when they pass on election contests.

June 22, 1939

FILED
88

Honorable L. C. Thedinger
State Representative
Jefferson City, Missouri

Dear Mr. Thedinger:

This is in reply to yours wherein your submitted a question of whether or not it requires a constitutional majority or a majority of the members present to pass on the election of a member of the House of Representatives.

Section 17 of Article IV of the Constitution provides in part as follows:

> "Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; * * * * * * * * * * * * "

It seems from this section of the Constitution that your question might be determined by a rule unless there is a constitutional provision prohibiting that body from making such a rule. This department is not informed on whether or not the House of Representatives has made any rule on this question.

Section 18 of Article IV of the Constitution provides as follows:

> "A majority of the whole number of members of each house shall constitute a quorum to do business; but a smaller number may adjourn

> from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may provide."

It would seem from this section that if a majority of the members of the House are present that the House could then do business which came before it. We find one limitation on this rule, however, in the Constitution which is Section 31 of the same article, that is, when a bill comes before that body before it can become a law it must have a majority vote of the members elected to the House. That section is as follows:

> "No bill shall become a law unless on its final passage the vote be taken by yeas and nays, the names of the members voting for and against the same be entered on the journal, and a majority of the members elected to each house be recorded thereon as voting in its favor."

We find the rule of law applicable to the question similar to the one which you have submitted stated in Volume 59 Corpus Juris, page 92 at Section 66, which provides as follows:

> "A session of the legislature may transact business so long as a quorum is present. Where a quorum is not shown to have been present to vote for the election of an officer, he fails to establish the right to such office, and one who receives less than a majority of the votes cast in filling a vacancy is not elected."

And Section 53 of the same volume at page 55 has this to say on the question of the determination of the election and qualifications of the members of the General Assembly:

> "Under constitutional provisions to the effect that each house shall have power to judge of the qualifications and elections of its members, each branch of a state legislature has the sole power to judge of the election and qualification of its own members and may take such proof and incur such expenses as may be reasonably necessary for it to decide a contest of office. * * "

Since the Constitution provides that a majority of the members elected shall constitute a quorum to do business and since the Constitution also provides that the members of each House shall pass on the qualifications of the election of its members and since the Constitution only provides that the constitutional majority shall vote on a bill, then it would seem that if a majority of the members elected are present it would constitute a quorum to do business, then a majority of that quorum would have a right to pass on the election contest.

CONCLUSION.

From the foregoing it is the opinion of this department that if a majority of the members elected to the House of Representatives are present which constitutes a quorum of that body, then they may pass on the election contest which is before that body. The vote of the majority of those present will be decisive on the question.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

TWB:DA

SCHOOLS:
BOARD OF DIRECTORS:
SCHOOL SITES:

Board of directors are not authorized to change the school site without consent of the voters.

April 10, 1939

FILED
89

Mr. Gene Thompson
Prosecuting Attorney
Oregon, Missouri

Dear Sir:

This is in reply to your letter wherein you request an opinion on the following statement:

> "May a school board grant a right-of-way of a portion of a school building site for a state road?
>
> "In this particular instance it would require the moving of the building to another location within the present site, more adjoining land will be added to the present site so the amount of land will be as much as at present.
>
> "Can the school board make this grant without submitting the proposition to the vote of the district at the annual meeting, under the opinion on page 284, Revised School Laws of 1931?"

We assume that the school district to which you are referring is a common school district and will treat this opinion accordingly.

The school board is a creature of the statute and it must look there for its authority. In our research on the question of the authority of the board to dispose of district properties, we find in the case of Farmers' and Merchants' Bank v. Chula School Dist. No. 16 et al., 63 S. W. (2d) 829, 830, by a recent opinion, the court said:

> "The school district did not have power to sell its property or authority to dispose of its public revenue save in the manner provided in chapter 57, R. S. Mo. 1929 (section 9194 et seq. (Mo. St. Ann. sec-9194 et seq., p. 7066)). An examination of the applicable statutes discloses that the Legislature did not intend to invest the board of directors of a school district with authority to execute an instrument such as the one here involved. * * "

By granting a portion of the district property for a right-of-way, we think this act would come within the classification of disposing of district property, the use of which the district no longer requires. For authority to do this act we think that the board of directors must look to the electors of the district. We are supported by this view by subsection 7 of Section 9284, R. S. Mo. 1929, which is as follows:

> "The qualified voters assembled at the annual meeting, when not otherwise provided, shall have power by a majority of the votes cast:
>
> "Seventh--To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds."

It will be seen by this subsection that the lawmakers did not intend for the board of directors to dispose of any of the property of the school district unless authorized by a vote of the electors of the district.

This question also arises in your request and that is what sort of a title does the district hold to the school district. In considering the question, we are also assuming that the district holds the title in fee to these lands in

which case the electors have authority to dispose of it as they may deem proper, however, if the district holds the land for school purposes only, then the rule would be otherwise.

This opinion is also limited to cases in which only a portion of the school properties are disposed of. If the district proposes to abandon a certain school site, then Section 9269, R. S. Mo. 1929, applies which would prohibit the abandonment of the site until another site is provided.

You state in your request that by making the change suggested it would necessitate the moving of the school building to another location on the present site and the acquisition of additional lands. We assume that you intend to expend district funds for the purpose of carrying out these acts.

These are additional reasons why we think that the lawmakers have intended that such matters be submitted to the voters.

In case the right-of-way for a road is granted and in case additional grounds are added to the present site we think that this would be in effect changing the site of the school as contemplated by subsection 11 of Section 9284, R. S. Mo. 1929, which question is authorized to be voted upon at an annual school meeting, and subsection 11 is as follows:

> "Eleventh--To change the location of schoolhouse site when the same for any cause is deemed necessary: Provided, that in every case a majority vote of the voters who are resident taxpayers of said district shall be necessary to remove a site nearer the center of said district; but in all cases to remove a site farther from the center of said district, it shall require two-thirds of the legal voters who are resident taxpayers of such school district voting at such election."

In speaking of the powers of the voters of a common school district as to the location of the schoolhouses, the Supreme Court, in State ex rel. v. Jones, 155 Mo. l.c. 576, said:

> "The statute vests in the qualified voters of the district of country districts, and in the directors of the city districts, full and complete discretion as to the location of the school houses (sec. 7979, 8001 and 8085, R.S. 1889), and in the directors the power to sell school property no longer needed for the use of the district (secs. 8088 and 8878, R.S. 1889)." (In this case the sections of the statute referred to were cited, one of which is now Section 9284, R. S. Mo. 1929)

On the question of what is a schoolhouse site, we find the term defined in the case of Board of Education of Oklahome City v. Woodworth, 214 P. 1077, Words & Phrases, Vol. 6, Third Series at page 968:

> "The term 'school site,' in its common acceptation, and as commonly understood, refers to a parcel of ground sufficient in size upon which to erect a school building, and a yard surrounding the same to be used as a playground for the children while at school."

The term "site" or the words "location and site" in Words & Phrases, Second Series, page 177, are frequently used in the same sense. The case of Board of Supervisors v. Essex County, 96 N. Y. Sup. 840, 842, holds to this effect.

In our research on the question of whether or not the change of a boundary line of a district would be the changing of the site of the district, we find no cases in Missouri on this question, but we find one case, namely, Holbrook v. Faulkner, 55 N. H. 311, 315, wherein such a question was under consideration by the court. In that case it seemed that a board of county commissioners acquired jurisdiction

of a case concerning school district property when a change of the location of the district was involved. In that instance it seems that certain lands had been added to straighten the west line of the schoolhouse property and the court held that the commissioners had jurisdiction of that case on a petition to change the location. In other words, it held that the acquisition of additional lands for the purpose of straightening the boundary line of the district was such a change of location of the district property that the county commissioners had jurisdiction to hear the petition.

So in your question, by adding lands to the district as you propose will be done in case the board is authorized to convey the right-of-way, then we think such act would come within the classification of changing the location of the schoolhouse site which must be authorized only by a vote of the electors of the district. On the powers of a board of directors, we find that the court, in the case of Buchanan v. Hannibal School District, 25 Mo. App. 85, 88, said:

> "* * * * The powers of the corporation itself, as well as the powers of its directors, are minutely prescribed and limited by law. Not the directors, but the entire corporate body, is constituted the judge of the necessity, or propriety, of changing a school site. The statute provides that: 'The qualified voters assembled at the annual meeting, when not otherwise provided by law, shall have power * * * Eleventh, to change the location of a school house site, when the same, for any cause, is deemed necessary, provided that, in every case, a majority vote of the voters of said district shall be necessary to remove a site nearer to the center of the district, but in all cases to remove a site further from the center of said district it shall require two-thirds of the legal

voters of said school district.' Laws 1883, 185, 186. It is nowhere otherwise provided by law, and that is, therefore, the sole mode in which it can be done. * * * * * * * * * "

CONCLUSION.

From the foregoing it is the opinion of this department that the board of directors of common school districts may not convey a part of the school site for right-of-way purposes or change the location of the present school site without being authorized to do so by a proper vote of the electors of the district.

Respectfully submitted

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

TWB:DA

CIRCUIT CLERKS: Sections 11677 and 11678 R. S. Mo. 1929 are still in effect.

January 24, 1939

FILED
90

Mr. Joe Turnbow
Clerk, Circuit Court
Johnson County
Warrensburg, Missouri

Dear Sir:

We acknowledge receipt of your letter of January 14th, as follows:

> "I am writing for an opinion from your office on Sections No. 11677 and No. 11678, in regard to clerks compensation for recording certain papers and his compensation for the same.
>
> I would like to know if, in your opinion, these sections are still in force, and if clerks can still charge for services under these sections."

Section 11677 R. S. Mo. 1929 provides:

> "In all civil actions any party interested therein may, upon payment of the fees, have any or all of the following papers recorded in the office of the clerk of the circuit court in the county in which such action is brought: Petitions, summons, affidavit for publication of notice to nonresident or unknown

> defendants, sheriff's or other officer's, return of service to summons, proof of publication of notices to nonresident or unknown defendants, answers, motions, notices of sale of property involved and proof of its publication, return of sale by any sheriff, commissioner, or other officer, in case of sale of real estate, affidavit of commissioner, notice to parties by commissioner in partition, and any other paper or pleading tending to show the service on the defendants for their appearance in such case."

Section 11678 R. S. Mo. 1929 provides:

> "All clerks of the circuit court shall receive as compensation for recording papers under section 11677 of this article the sum of ten cents per one hundred words, to be retained by said circuit clerks, and said clerks are not required to account for same in their annual or quarterly settlements."

Salaries of circuit clerks are governed by Section 11786, Laws of Missouri 1937 page 445, and said section after determining the amounts of salaries for circuit clerks in the various counties provides as follows:

> "Provided, it shall be the duty of the Circuit Clerk, who is ex-officio Recorder of Deeds, to charge and collect for the county in all cases every fee accruing to his office as

such Recorder of Deeds and to which he may be entitled under the provisions of Section 11804 or any other statute, such Clerk and ex-officio Recorder shall, at the end of each month, file with the County Clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such Circuit Clerk and ex-officio Recorder of Deeds, upon the filing of said report, to forthwith pay over to the County Treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the County Clerk, and every such Circuit Clerk and ex-officio Recorder of Deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the County treasury as herein provided; Provided, further, that the Clerks of the Circuit Courts shall be allowed to retain in addition to the sums allowed in this Section, all fees earned by him in cases of change of venue from other counties; Provided, further, that until the expiration of their present term of office, the persons holding the office of Circuit Clerk shall be paid the maximum amount as now provided by law, in the manner provided by this Act."

Section 11786, supra, appears in R. S. Missouri 1919 as Section 10995 and after determining the amount of salaries of circuit clerks in the various counties provides as follows:

"Provided, it shall be the duty of the

> circuit clerk, who is ex officio recorder of deeds, to charge and collect for the county in all cases every fee accruing to his office as such recorder of deeds and to which he may be entitled under the provisions of section 10112 or any other statute, such clerk and ex officio recorder shall, at the end of each month, file with the county clerk a report of all fees charged and accruing to his office during such month, together with the names of persons paying such fees. It shall be the duty of such circuit clerk and ex officio recorder of deeds, upon the filing of said report, to forthwith pay over to the county treasurer, all moneys collected by him during the month and required to be shown in such monthly report as hereinabove provided, taking duplicate receipt therefor, one of which shall be filed with the county clerk, and every such circuit clerk and ex officio recorder of deeds shall be liable on his official bond for all fees collected and not accounted for by him, and paid into the county treasury as herein provided."

Other than the difference in the amounts paid the clerks in the various counties, the essential difference between the 1919 and 1937 provision, at least for the purpose of this opinion, is that the latter provides that the circuit clerks may retain in addition to the sum allowed him by said section "all fees earned by him in cases of change of venue from other counties."

No reference is made to fees allowed circuit clerks under Sections 11677 and 11678, supra.

The statutes providing compensation of circuit clerks have been confusing by reason of the manner in which they

have been set up in the various revisions. A thorough discussion of these statutes, which is too lengthy to set out in this opinion, is found in the case of Perkins vs. Burks et al 78 S. W. (2nd) 845 l.c. 849, 850. The court after discussing the history of the legislation said:

> "It is only possible to clear up the meaning of these sections by going to the Laws of 1915 for the original enactment. When this is done, it is clear that section 10995, R. S. 1919, now section 11786 R. S. 1929, is the only statute which provides for the compensation of circuit clerks."

The essential difference between 1929 and the 1937 provision is the same as that between the 1919 and 1937 provision, viz., the provision as to retention of fees earned by the clerks in cases of change of venue.

It is to be noted that the Perkins case, supra, declares that Section 11786 R. S. Mo. 1929 "is the only statute which provides for the compensation of circuit clerks". What the court meant was that Section 11786, supra, was the only general statute applicable to the compensation of circuit clerks.

The above court did not have before its consideration Sections 11677 and 11678, supra, which were passed in 1921 and appears in the laws of that date, Sections 1 and 2, page 197. It is thus evident that in 1921 the two sections were passed as an exception to the 1919 Act. The question arises whether the 1937 Act repeals Sections 11677 and 11678, supra, by implication.

It is a well settled rule of statutory construction that the law doesn't favor repeals by implication, and in the case of State vs. Bader 78 S. W. (2nd) 835, l.c. 839, 336 Mo. 259 the rule is stated as follows:

> "The law does not favor repeals by implication. If by any fair interpre-

> tation all the sections of a statute can stand together, there is no repeal by implication. ' Gasconade County v. Gordon, 241 Mo. 569, 145 S. W. 1160, 1163."

In the case of State ex rel St. Louis Police Relief Association vs. Igoe 107 S. W. (2nd) 929 l.c. 9, 340 Mo. 1166 the court stated the rule:

> "There is no express provision in the 1929 act repealing section 8979. It follows, therefore, that the later act did not repeal the former statute unless it did so by necessary implication. We need not cite authorities to the effect that repeals by implication are not favored by the law. The question of repeal is one of intention and the presumption is against the intention to repeal where express terms are not used. State ex rel. Moseley et al. v. Lee et al., 319 Mo. 976, 5 S. W. (2d) 83, 88; State ex rel Heimburger v. Wells, 210 Mo. 601, 109 S. W. 758; State ex rel. Boyd v. Rutledge 321 Mo. 1090, 13 S. W. (2d) 1061, 1065."

There is no express provision in the 1937 Act, supra, repealing Sections 11677 and 11678, and they are readily harmonized so that a repeal by implication is not favored.

An examination of Sections 11677 and 11678 also reveals that the fees accrue to the office as circuit clerk and not as Recorder of Deeds within the meaning of Section 11786, supra, providing that "every fee accruing to his office as such Recorder of Deeds * * * shall be 'paid into the county treasury as herein provided'".

From the foregoing, we are of the opinion that Sections

11677 and 11678 of R. S. Mo. 1929 are still in effect and that circuit clerks can still charge and retain said fees for services under said sections.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General
MW:RT

FEES. CORONERS INQUEST: Fees allowed to Doctor for post-mortem. Autopsy. W tness fee.

February 15, 1939.

Honorable W. G. Tracy
Prosecuting Attorney
McDonald County
Anderson, Missouri

FILED
90

Dear Mr. Tracy:

This office is in receipt of your request for an opinion, which is as follows:

> "I am writing you in regard to an autopsy done at Pineville, Missouri a short time ago, by Dr. S. B. Buck of Anderson, Missouri. The County Court allowed Dr. Buck $13.00 for his services. He demands that he be paid for an autopsy instead of a postmortem examination, stating that there is a difference between a postmortem examination and an autopsy.
>
> "The fee of $25.00 for the autopsy was agreed upon by the Coroner and myself before the autopsy. Dr. Buck, also, claims fees for five trips on different days that he made to Pineville at the request of the Coroner, the inquest having been postponed on this account. The Doctor, also, says that his testimony should be classified as that of an expert.
>
> "Will you please advise me as to what fees he should be allowed."

Section 11631, 1929 R. S. Mo., providing for the allowance of a surgeon's fee, by the County Court, for a post-mortem examination at an inquest, is as follows:

"When a physician or surgeon shall be called on by the coroner, or any magistrate of the county acting as the coroner, to conduct a post-mortem examination, the county court of said county shall be authorized to allow such physician or surgeon to be paid out of the county treasury any sum as a fee not exceeding ten dollars, to such physician or surgeon who may be engaged in said examination."

Section 11632, provides for the certification of the costs to the County Court and, is as follows:

"The coroner or other officer holding an inquest, as provided for by this chapter, shall present to the county court a certified statement of all the costs and expenses of said inquest, including his own fees, the fees of jurors, witnesses, constables and others entitled to fees for which the county is liable; and the county court shall audit and allow the same, and shall make a certified copy of the same, without delay, and deliver such copy to the county treasurer, which copy shall be deemed a sufficient warrant or order on the treasurer for the payment of the fees therein specified to each person entitled to such fees. The county treasurer shall pay to each person on demand, or to his legal representatives, the fees to which he is thus entitled, and shall take the proper receipt therefor, and produce the same in his settlements with the county court as vouchers for the money so paid out by him."

Section 11633, provides for the allowance of such costs by the County Court only under certain conditions and, is as follows:

> "No costs or fees to the coroner shall be allowed by the county court, in any case of the view of or inquest on a dead body, unless it appears to the court that the coroner, either before or during the view or inquest, had reasonable cause to believe that such body was that a person who had come to his death by violence or casualty, or who, being unknown, was found dead within such county; but where any such inquest or view has been held by the coroner, on a notification by some person, without reasonable cause to suppose that such dead body was that of a person unknown, or who had come to his death by violence or casualty, the person giving such notification, without reasonable cause, as aforesaid, shall be liable to pay all the costs, fees and expenses of such view or inquest."

The section providing for an autopsy under a certain condition is 11639 and, is as follows:

> "Whenever an inquest shall be held, and the coroner shall have good reason to believe that the deceased came to his death by poison administered by the hand of some person other than the deceased, he may, at the request of the jury, cause chemical analysis and microscopical

> examination of the body of the deceased, or any part of it, to be made; and the testimony of medical and chemical experts may be introduced for the purpose of showing how and in what manner the deceased came to his death; and the coroner shall certify to the county court of his county the fact of such analysis or examination, and testimony of such medical or chemical experts, and that the same was, in his opinion, necessary to an examination into the cause of the death of the deceased; and the court shall allow such fees or compensation for such analysis, examination or medical or chemical testimony of experts as shall be deemed by said court to be just and reasonable."

Section 11644, provides for a continuance of an inquest and, is as follows:

> "When an inquest shall be continued by the coroner, it shall be his duty forthwith to call before him all witnesses summoned in the case, and verbally notify such as may attend to appear before him, to testify at the inquest on the day set for the continuance of the same, which verbal notice shall be in all respects as valid as a summons, and the coroner shall take note of the names of the witnesses so notified. No further summons shall thereafter issue to any witness so notified, and such notification shall have the same effect as an original summons, and may be the basis for an attachment of the witness."

The question of costs and fees is purely statutory. The Supreme Court has construed such question in Houts vs. McCluney, 102 Mo. 13, 16; 14 S. W. 766, wherein it says:

> "In the first place, no costs are allowed by the common law. They are, with us, creatures of the statute. They must be paid in the amounts and in the manner specified in the statute. Sections 5156 and 5613 are clear and unambiguous. They make the county liable for the fees allowed the coroner, jurrors, witnesses and the constable in all inquests where the coroner has reasonable cause to believe that the person over whose body the inquest is held, came to his death by violence or casualty."

CONCLUSION

Therefore, it is the opinion of this department that a doctor, except when coroner, may be allowed a fee for a post-mortem not exceeding ten dollars, by the County Court, as provided in Section 11631, supra.

An autopsy may be made and payment allowed therefor for the cause specified in Section 11639, supra, in whatever sum the county court deems just and reasonable. Likewise the County Court should allow just and reasonable compensation for the testimony of medical or chemical experts who testify to the results of such autopsy.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. W. BUFFINGTON
(Acting) Attorney General

SVM:LB

TAXATION : Cities of the third class must collect their
AND REVENUE : taxes on real estate under the provision of Senate Bill No. 94 of the Laws of Missouri for 1933. Section 9953b of Senate Bill No. 311 of the 60th General Assembly does not apply to cities of the state except the City of St. Louis in the capacity of a county.

August 17, 1939.

Mr. A. W. Tyner
City Collector
Poplar Bluff, Missouri

FILED
90

Dear Mr. Tyner:

We desire to acknowledge your letter of August 11th, which is as follows:

"After reading (Perfected) Senate Bill Number 311 of the 60th General Assembly I am at a loss to understand Section Number 9953B.

"Question: Do cities of the third class come under this section? Or in other words does Section Number 9963C of the laws of 1933 allow cities of the third class to handle their delinquent lands and lots sales under Section Number 9953B in order to protect them from an inadequate bid. If cities of the third class do not come under this new amendment (Section No. 9953B) and have no way of protecting them from inadequate bids it is an unfair act, as I have been forced to sell at the third offering for sale, at a bid of only one dollar many pieces of property for the taxes that was well worth all the state, county and city taxes that was assessed against the property.

"Since the Jones Munger Delinquent Tax Law was passed in 1933 I have advertised and sold city property that was delinquent for taxes just the same way and under the same law as the County Collector has. Please give me, or if

possible get for me, some authoritative opinion, so that I may be governed according to the law."

Section 9953b of Senate Bill No. 311 of the 60th General Assembly of Missouri is, in part, as follows:

"It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and appoint a suitable person or persons with discretionary authority to bid at all sales to which Section 9953a is applicable, and to purchase at such sales all lands or lots necessary to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids. Such person or persons so designated are hereby declared as to such purchases and as title holders pursuant to collector's deeds issued on such purchases, to be trustees for the benefit of all funds entitled to participate in the taxes against all such lands or lots so sold. Such person or persons so designated shall not be required to pay the amount bid on any such purchase but the collector's deed issuing on such purchase shall recite the delinquent taxes for which said lands or lots were sold, the amount due each respective taxing authority involved, and that the grantee in such deed or deeds holds title as trustee for the use and benefit of the fund or funds entitled to the payment of the taxes for which said lands or lots were sold. The costs of all collectors' deeds, the recording of same and the advertisement of such lands or lots, shall be paid out of the county treasury in the respective counties and such fund as may be designated therefor by the authorities of the City of St. Louis. All lands or lots so purchased shall be sold and deeds ordered executed and delivered by such

trustees upon order of the County Court of the respective counties and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, and the proceeds of such sales shall be applied, first, to the payment of the costs incurred and advanced, and the balance shall be distributed pro rata to the funds entitled to receive the taxes on the lands or lots so disposed of. * * * "

Section 9963c of Senate Bill No. 94 (Jones-Munger Law) of the Laws of Missouri 1933 is, as follows:

"In all counties that have adopted or may hereafter adopt township organization, wherever the word 'collector' is used in this act, as to such counties such designation shall be construed to mean 'treasurer and ex-officio collector' or in Section 9962 may be township collector. Where applicable it shall also refer to the collector, or other proper officer, collecting taxes in any city or town. Where applicable the word 'county' as used in this act shall be construed 'City' and the words 'county clerk' shall be construed 'city clerk, or other proper officer.'"

This department rendered an opinion to the State Tax Commission construing Senate Bill No. 94, supra, with respect to cities of different classes. A copy of that part of said opinion relating to cities of the third class, holding that City Collectors must collect the taxes under the procedure provided in said Senate Bill No. 94, is enclosed herein.

Section 9953b, supra, provides that "It shall be lawful for the County Court of any County, and the Comptroller, Mayor and President of the Board of Assessors of the City of St. Louis, to designate and

appoint a suitable person or persons * * * to protect all taxes due and owing and prevent their loss to the taxing authorities involved from inadequate bids." Other parts of said section clearly show that it was the intent of the legislature that such section should only comprehend counties and the City of St. Louis in the capacity of a county.

The dual powers and rights of the City of St. Louis as a city and quasi county or political subdivision of the state is construed by the Supreme Court in the case of Lovins vs. City of St. Louis, 84 S. W. (2nd) 127, 130, in the following language:

> "The predominant character and phase of St. Louis as a city in every corporate sense, to which reference was made in a preceding paragraph, is established and embraced only in the scheme set out in sections 20, 21, and 22 of said constitutional amendment (R. S. 1929, pp. 130-131). Neither grant nor limitation of appeal appears therein. The sole and only section found in the amendment which confers upon St. Louis any rights, powers, or functions as a quasi county or political subdivision of the state is section 23 (R. S. 1929, p. 131), of which the relevant part reads: 'The city, as enlarged shall be entitled to the same representation in the General Assembly, collect the state revenue and perform all other functions in relation to the State, in the same manner, as if it were a county as in this Constitution defined.' Under the maxim ejusdem generis 'All other functions' must be interpreted as comprising functions of the same general nature as those specified in connection with that phrase, and the intended functioning means normal action in relation to the matter specified and others of the same nature. A county, as a governmental unit composed of the people resident within its prescribed territory, can only function concerning affairs com-

mitted to it as a governmental unit. It has nothing to do with the purely corporate or nongovernmental affairs of the city as such and no functions concerning them to perform. The city of St. Louis, in so far as its county functions extend, is coequal in that respect with all other counties in the state but no different therefrom. Constitutionally, while St. Louis in its entirety is of a dual nature, it is in no sense either a super-city proper or a super-county. It is the declared purpose of said section 23 that the charter of the city shall always be in harmony with the Constitution and subject to the laws of the state."

CONCLUSION

Therefore it is the opinion of this department that cities of the third class must collect their taxes on real estate under the provision of Senate Bill No. 94 of the Laws of Missouri for 1933. Section 9953b of Senate Bill No. 311 of the 60th General Assembly does not apply to cities of the state except the City of St. Louis in the capacity of a county.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

January 6, 1939.

FILED
91

United States Treasury Department
Washington, D. C.

Gentlemen:

Pursuant to Paragraph 11 of "Information for State Agencies Regarding the Unemployment Trust Fund, etc." issued December 1, 1936, I advise that upon the adoption of a proper regulation by the Commission, it is my opinion that the Chairman of the Commission, or in his absence, either of the other members of the Commission, may be by such regulation designated as the individuals to execute such requisitions, and it is my opinion that when so designated any of them have duly constituted authority under the Missouri Unemployment Compensation Law to execute such requisitions.

Committee Substitute for Senate Bill No. 36, passed by the 59th General Assembly and approved by the Governor on June 17, 1937, provides for a system of Unemployment Compensation and Employment Service. By Sec. 4 (a) it is provided:

> "There is hereby created a commission to be known as the Unemployment Compensation Commission of Missouri."

By Sec. 3 (e) it is provided:

> "'Commission' means the Unemployment Compensation Commission established by this Act."

Sec. 5 (a) provides:

> "It shall be the duty of the commission to administer this Act. * * *"

By Sec. 12 (c) it is provided:

> " * * * The Commission shall from time to time requisition from the Federal Unemployment Trust Fund such amounts, not exceeding the amounts standing to the Missouri account therein, as it deems necessary for the payment of benefits for a reasonable future period. * * *"

Section 5 (d) of the Missouri Unemployment Compensation Law provides in part:

> " * * * The commission may delegate to any such person such power and authority as it deems reasonable and proper for the effective administration of this Act, and may in its discretion bond any person handling moneys or signing checks thereunder. * * *"

The persons there referred to are identified in the preceding sentence as "officers, accountants, attorneys, experts, and other persons as may be necessary * * * under this Act." The specific duty of actually executing the requisition for funds is but one of the many steps in the proper administration of the Missouri Unemployment Compensation Law, and under the foregoing provision authority to execute such requisitions may be delegated by the Commission to a given officer or employee.

If by regulation the Commission by a proper vote authorizes and directs the Chairman of the Commission, a member of the Commission, or any officer of the Commission, to execute such requisitions, it is my opinion that such individual is the proper individual to execute requisitions for funds.

I have examined the regulation of the Commission forwarded to me, a copy of which is hereto attached and made a part of this opinion, and am of the opinion that it is sufficient to designate the Chairman of the Commission, or, in his absence, either of the other members of the Commission, as the proper individuals to execute such requisitions.

Respectfully

Roy McKittrick

REGULATION NO. _____

REQUISITION OF TRUST FUNDS

Section 5 (a) of the Missouri Unemployment Compensation Law provides:

> "It shall be the duty of the Commission to administer this Act; and it shall have power and authority to adopt, amend, or rescind such rules and regulations * * * as it deems necessary * * *."

Section 12 (c) of said law provides:

> "Moneys shall be requisitioned from the Missouri account in the Federal Unemployment Trust Fund solely for the payment of benefits and in accordance with regulations prescribed by the Commission."

Whereas, it is necessary that the individuals authorized to execute requisitions from the Unemployment Trust Fund be designated. The Commission accordingly prescribes that

(1) The Chairman of the Commission is hereby authorized to execute requisitions for trust funds from the Treasury Department at such times and in such amounts, not exceeding the amounts standing to the credit of the Missouri Account in the Federal Unemployment Trust Fund as will be necessary to pay benefits for a reasonable future period on such forms as are approved by the Secretary of the Treasury of the United States.

(2) In the event of the absence of the Chairman of the Commission, either of the other two Commissioners are hereby authorized to execute such requisitions.

Approved for adoption this_____day of December, 1938.

_____

_____

_____

CHATTEL MORTGAGES: Kansas Certificate of Title must be stamped by recorder of deeds if requested by the mortgagee when the chattel mortgage is executed in the State of Missouri.

November 8, 1939

FILED
91

Mr. John G. Utz
Recorder of Deeds
Buchanan County
St. Joseph, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 3, 1939, which reads as follows:

"The Commerce Loan Company of St. Joseph, Mo., loaned money on an Automobile, while the owner resided in St. Joseph, but has a Kansas Certificate of Title on same.

"Should this Kansas Certificate of Title carry notice of Mortgage, just the same as the Missouri Certificate of Title, which are presented for Certification of Mortgages, when mortgages are filed in Missouri?"

Section 3097a Session Laws of 1939, page 278, reads as follows:

"It shall be the duty of the recorder of deeds, on request of the mortgagee, or his assignee, to certify on the certificate of title to the mortgaged motor vehicle, that such chattel mortgage has been filed showing the date, the amount of the mortgage and the name of the payee. When such chattel mortgage is released it shall be the duty of the recorder to so show on the certificate of title. For services here-

in provided the recorder shall receive a fee of twenty cents (20 Cts.). A mortgage on a motor vehicle shall not be notice to the whole world, unless the record thereof is noted on the certificate of title to the mortgaged motor vehicle, as herein provided. Provided,however, that the provisions of this section shall not apply to chattel mortgages given to secure the purchase price of any part thereof or to a motor vehicle sold by the manufacturer or their distributing dealers, or to a chattel mortgage given by dealers to secure loans on the floor plan stock of motor vehicles." (Underscoring ours.)

It will be noticed that this new section is included in Article 3, Chapter 22, R. S. Missouri, 1929, which applies to chattel mortgages, and not to motor vehicles. It will also be noticed that this section is not mandatory upon the part of the mortgagee, for the reason that it reads, "on request of the mortgagee or his assignee." This section has been enacted for the protection of the mortgagee and the only application that it may have to motor vehicles is for the benefit of a mortgagee of a motor vehicle. The general chattel mortgage law, Section 3097 R. S. Missouri, 1929, does not specifically mention motor vehicles, and does provide, "when acknowledged or recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world." The new section specifically states that unless the certificate of title is stamped by the recorder of deeds in compliance with the section, the filing and recording would <u>not</u> be notice to all the world.

Section 3097 R. S. Missouri, 1929, further provides:

"* * * unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a non-resident of the state, then in the office of the recorder of deeds of the county or city where the proper-

ty mortgaged was situated at the time of executing such mortgage or deed of trust * * * ."

Under this phrase an automobile being considered as movable property, even when owned by a non-resident of the state, may be used as security for a loan in a different county other than the residence of the mortgagor or the permanent location of the personal property securing the loan. This phrase specifically says "where the property mortgaged was situated at the time of executing such mortgage or deed of trust."

It will also be noticed under Section 3097A, supra, that it does not mention specifically a Missouri certificate of title issued by the Motor Vehicle Commission of the State of Missouri, but merely mentions "certificate of title." Certificate of title is mentioned in two places in the section and does not specifically say as to any particular state.

CONCLUSION

Since Section 3097a, Session Laws of 1939, page 278, was enacted specifically for the benefit of the mortgagee and since automobiles are movable personal property, it is the opinion of this department that when a chattel mortgage is given upon an automobile owned by a resident of the City of St. Joseph, but the resident has a Kansas certificate of title on same, it is mandatory upon the recorder of deeds to stamp the Kansas certificate of title if requested by the mortgagee of the automobile, so that the mortgage acknowledged and recorded or filed in the county of Buchanan be notice thereof to all the world. Upon the face of the request it appears that the resident of St. Joseph may be attempting to violate the Missouri State Motor Vehicle Laws, but it is possible that a resident of St. Joseph may own a car which is used in a business located in the State of Kansas. In such a case a Missouri certificate of title would not be necessary and yet the owner who lives in the State of Missouri may pledge the automobile as security for a loan.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

APPROVED:

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

RECORDER OF DEEDS: Court only fixes reasonable amount for recorder
COUNTY COURT : to retain out of excess fees for deputy hire.

March 25, 1939

FILED
92

Hon. C.G. Vogt
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

This will acknowledge receipt of your letter of March 7, 1939, which reads as follows:

> "Our Recorder has had a rush of business since the 1st of Dec. 1938 recording leases. He put on extra help in December and raised his chief deputy from $100.00 to $150.00. Last year was the first time any surplus has come out of the recorders office to the County. The court allowed expense of the extra help but refused to allow the raise to the deputy for the reason that she was not worth more to the county than she was to the recorder and for the further reason that there are 3 other lady deputies in the court house no one of which get in excess of $100.00 per month. I decided the court was within its right in the decision. I am now asking you at the instance of the recorder if you will give your opinion or if you have a similar instance where you can send us a copy of opinion in a case at point."

Nodaway County has a population of over 20,000, and as such, the office of recorder of deeds is a separate office. Assuming that there has been no election combining said office with that of circuit clerk (Laws of 1933, page 360, Sections 11528, 11538). It being a separate office, the statutes relating to said county are Sections 11542 and 11568, R.S. Missouri, 1929.

Section 11542 authorizes recorders of deeds to appoint deputies. With reference to these deputies' compensation, Section 11568 provides:

> "The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county."

In State ex rel. v. King, 136 Mo. 309, the court had a similar question before it. There the question was: Could the county court refuse to make an allowance out of surplus recording fees for deputy hire. The court said at l.c. 318:

> "The constitution, while placing a limit upon the amount of fees ministerial officers of a county are allowed to retain, makes such amount 'exclusive of the salaries actually paid to his necessary deputies.' Section 13, article 9. The statute which was in force when the constitution was adopted limits the fees a recorder is entitled to retain to $4,000 per year, and provides that all fees received by him over and above that amount 'for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury.'

"Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court?

"The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute can not be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then the word 'may' can not be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well recognized rule of construction that the word 'may' should be interpreted to mean 'shall' when referring to a 'power given to public officers, and (which) concerns the public interest and the rights of third persons, who have a claim de jure that the power shall be exercised in this manner.' Such an interpretation is demanded 'for the sake of justice and the public good.' Steines v. Franklin Co., 48 Mo. 178, quoting from Newburgh Turnpike Co. v. Miller, 5 Johns. Chy. 113.

"There can be no doubt that the public interest demands that the work required of a recorder should be done promptly, carefully, and well. A public officer is, by right, entitled to compensation for the labor performed, and it should also be measured to some extent by the responsibilities assumed. The statute

> regulates the amount of the fees the recorder is entitled to collect, and the presumption is that he fairly earns what he is allowed to charge. Four thousand dollars was fixed as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceed that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid.
>
> "In construing a statute which provided that when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, 'the county court may make a reasonable allowance to the deputy,' the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. Bradley v. Jefferson Co., 4 G. Greene, 300. See, also, Washington Co. v. Jones, 45 Iowa 261."

This case would seem to settle the point that the county court must allow deputy hire to the recorder when the press of business of the office is such that help is needed. It also impliedly holds that the county court, in fixing the deputy hire that they 'deem necessary', may only do so in a reasonable amount.

The county court, under the above statutes, does not fix the salary of the deputy recorder, but only fixes the amount allowed to be retained by the recorder out of excess recording fees in order to compensate him for the salary he paid to his deputy. This amount could not be in excess of that actually paid the deputy. (Section 13, Article IX, Missouri Constitution).

CONCLUSION

Therefore, it is our opinion that the county court does not determine the salary to be paid a deputy recorder, but only fixes the amount the recorder may retain to compensate him for the salary he (the recorder) paid his deputy. The determination of this amount is in the discretion of the county court, subject only to the limitation that it be reasonable.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED By:

W. J. BURKE
(Acting) Attorney General

LLB:VAC

BUILDING PERMIT S: Assessor may not revoke a building permit issued under and by virtue of Article 2, Chapter 112 R. S. Mo. 1929

March 16, 1939.

FILED
93

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Mr. Wallach:

I desire to acknowledge your request for an opinion on March 8, 1939, which is as follows:

> "We would greatly appreciate it if you would be kind enough to have your office furnish us an opinion on the following matter:
>
> Can the Assessor of the County whose duty it is to issue building permits, revoke the permit for any reason after it has been issued?
>
> If the Assessor should for any cause revoke the permit, would he be liable on his bond?
>
> "This information is requested because some taxpayers of St. Louis County have requested that the building permit for the erection of the Lucas & Hunt Tenement Project be revoked on the theory that the building does not conform with State laws.
>
> "Thanking you, we are"

Article 2, Chapter 112 R. S. Mo. 1929 and Section 13749 thereof, is as follows:

"In every county in this state that now has or may hereafter have an assessed valuation of all taxable property therein of thirty-five million dollars, or more, and adjoining cities which now have or may hereafter have a population of three hundred thousand inhabitants, or more, the county court shall, by an order of record, have power to order the issuance of building permits by the assessor of such county, to the owner or duly authorized agent of any building or buildings of whatsoever kind, to be erected, constructed, enlarged, altered, or repaired within such county, and no work (except minor repairs) shall be done upon any structure, building or buildings, of whatsoever kind, by any person, corporation, association, or copartnership of persons, without a permit first obtained from the assessor of such county." (Underscoring ours)

Section 13750 is, in part, as follows:

"Whenever any person, corporation, association, or copartnership of persons, after the county court has made the order specified in the foregoing section, shall erect, construct, enlarge, alter or repair any building or buildings, before proceeding therewith, the owner, or authorized agent thereof, shall make application to the assessor of such county, at his office, and obtain from him a permit for that purpose; * * * "

Section 13751 is, in part, as follows:

> "Applications for permits shall be made in writing by the owner or duly authorized agent, upon forms or blanks to be furnished by the assessor, at the expense of the county, and shall clearly and fully state the contemplated work to be done; * * * the owner thereof, or duly authorized agent, shall be required to furnish the assessor, if demanded by him, for his examination and inspection, the plans and specifications and general drawings of such building or buildings, and the assessor shall have the power to require the production of evidence in support thereof; which said application shall remain on file in the assessor's office, and shall be used and referred to by the assessor in arriving at the true value to be assessed on the real estate, upon which such building or buildings are to be erected, constructed, enlarged, altered or repaired."

Section 13755 R. S. Mo. 1929, is as follows:

> "It shall be the duty of the assessor, after the applicant has furnished the assessor all the necessary information required hereunder, to issue a permit to the applicant, and file the application, required to be made, in his office, and use and refer to the same in making his assessment, as provided in section 13751."

Under the provisions of Section 13755, supra, the assessor has the duty, after the applicant has furnished the assessor all the necessary information required thereunder, to issue a permit to the applicant, but we are unable to find any provision in said Article 2, supra, giving to such assessor an express or implied power to revoke such permit.

CONCLUSION

Therefore, it is the opinion of this department that an assessor may not revoke a building permit issued under and by virtue of Article 2, Chapter 112 R. S. Mo. 1929.

Respectfully submitted,

S. V. MEDLING
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

SVM:LB

UNEMPLOYMENT COMPENSATION FUND AND ADMINISTRATION FUND:

Depositories and securities.

August 28, 1939

FILED 93

Honorable Harry G. Waltner, Jr.
Chief Counsel
Unemployment Compensation Commission
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of August 15, 1939, which reads as follows:

> "We have been requested by the Social Security Board to obtain the opinion of the Attorney General as to the securing of funds administered by this Commission by the deposit of collateral, and as to whether or not this practice is in accordance with the State Law. I am therefore requesting your opinion on this subject and so that you may be more familiar with the manner in which this is handled I outline to you the following facts:
>
> "The Commission by appropriate action selects one or more banks as the depository for the funds in the clearing account and the benefit payment account of the Unemployment Compensation Fund. In making this selection, the Commission only considers those banks which have theretofore been determined by the State Treasurer to be state depositories by virtue of the awarding to them of a contract for the deposit of state funds. Upon such selection being made, a depository agreement is entered into between such bank and the Commission,

which contract is in substantially the same form as the contract entered into between the State Treasurer and the Depository in respect to general funds of the State. The depository then deposits bonds in an amount required by the Commission to secure the deposit of funds, or more properly speaking, the payment of warrants issued by the Commission against such deposits. The amount established by the Commission and the type of securities required are as set out in Section 11469, R. S. Missouri 1929, as revised in 1937 and found at page 521, Laws of Missouri 1937. Any withdrawal of security or exchange of security is made only upon the written approval of the Commission. Because the Commission has no facilities to properly safeguard the bonds which are deposited to secure the funds and also as a matter of convenience to the depositories involved, the Commission has designated Robert W. Winn, State Treasurer, as escrow agent in respect to the securities deposited by one of the banks, and the Federal Reserve Bank of St. Louis as escrow agent for the deposit of the securities made by the other depository.

"In respect to the Unemployment Compensation Administration Fund, the procedure is different. When grants for the payment of the cost of administering the Unemployment Compensation Law are made by the Social Security Board, such funds are immediately transmitted to the State Treasurer. The State Treasurer then handles such funds as other state funds, securing such deposits generally by the collateral supplied by the bank covering all state funds which the bank or banks may have. The general depository contracts entered into by the Treasurer with the depositories cover these funds as well as other state funds and the collateral securing

> this special fund is treated in exactly the same manner as the collateral securing all state funds. It is my understanding that no separate collateral account is maintained by the state treasurer in respect to this particular fund. The requiring of collateral, the authorization of exchange of collateral is handled by the Governor, the Attorney General and the State Treasurer in the same manner as is handled for all other state funds, such collateral in fact being in most cases covering other state funds as well as the Unemployment Compensation Administration Fund."

The above discloses the present procedure by which the Unemployment Compensation Commission deposits various funds, and also shows the requirements by the Commission of the depositories as to security for said funds.

We shall first consider the handling of the Unemployment Compensation Fund.

Section 12, page 595, Laws of 1937, of the Unemployment Compensation Act, as amended by the 60th General Assembly in Senate Bill No. 346, requires the moneys received under this fund and known as a clearing account and a benefit account, which is all of the above Unemployment Compensation Fund, as we read the Act, with the exception of the Unemployment Trust Fund account, which this Section 12 has provided is to be deposited with the Secretary of the Treasury of the United States of America, shall be deposited in any public depository in which general funds of the state may be deposited. This provision, in part, reads as follows:

> "Except as herein otherwise provided, moneys in the clearing and benefit accounts may be deposited by the treasurer, under the discretion of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund."

Unquestionably, from a reading of Section 12, supra, it was the intention of the Legislature that this fund should be placed in a depository which may be used by the state for the deposit of general revenue funds.

Therefore, it becomes the duty of the Commission, under this provision, to select for this particular fund one or more depositories that have been selected and are being used by the state for the deposit of general revenue funds and no other.

After the selection of a depository by the Commission, the actual deposit therein must be secured by collateral. This is specifically required by Section 12 (b) of Senate Bill No. 346 as passed by the 60th General Assembly, which became effective July 1, 1939. The pertinent portion of Section 12 (b) reads as follows:

> " * * * All moneys payable to the fund, upon receipt thereof by the commission, shall be forwarded to the treasurer who shall immediately deposit them in the clearing account. * * * The benefit account shall consist of all moneys requisitioned from the Missouri account in the federal unemployment trust fund. Except as herein otherwise provided, moneys in the clearing and benefit accounts may be deposited by the treasurer, under the discretion of the commission, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the funds. All funds required by this Act to be deposited in any state depository shall be secured by said depository to the same extent and in the same manner as is or may hereafter be required by Section 11469, R. S. Missouri 1929, and all the amendments thereto; Provided, that the Commission shall do those acts directed to be done by

> the Governor, Attorney General and State Treasurer, or any of them, under said section, which are not inconsistent with the other provisions of this Act. * * *"

Section 12 (b), supra, specifically refers to Section 11469, R. S. Mo. 1929, and directs that all funds deposited shall be secured to the same extent and in the same manner as required by Section 11469, R. S. Mo. 1929, and all amendments thereto.

Section 11469, R. S. Mo. 1929, was amended, page 521, Laws of 1937, and now reads as follows:

> "For the security of the funds deposited by the Treasurer under the provisions of Articles 1 and 2 of this Chapter, the Governor, the Attorney General and the Treasurer shall require of said selected and approved banks or banking institutions as security for the safe-keeping and payment of said deposits, (1) bonds or other obligations of the United States, or (2) bonds or other obligations of the State of Missouri, or (3) bonds of any city in this state having a population of not less than two thousand, or (4) the bonds of any county in this state, or (5) the approved registered bonds of any school district situated in any city, town or village in this state, or (6) the approved registered bonds of any special road district in this state, or (7) the state bonds of any state, or (8) the bonds of any Federal Land Bank, or (9) the bonds of any Federal Intermediate Credit Bank, or (10) the bonds of the Federal Farm Mortgage Corporations, or (11) the bonds of the Home Owners Loan Corporation, or (12) the bonds or other obligations of the Reconstruction Finance Corporation, or (13) the bonds of the Federal Home Loan Banks, or (14) securities issued under the provisions

of the Tennessee Valley Authority Act and guaranteed by the government of the United States, or (15) securities issued under the provisions of the Federal Housing Act and guaranteed by the government of the United States, or (16) any bonds or other obligations guaranteed as to payment of principal and interest by the government of the United States to an amount at least equal in value to one hundred per centum of the amount of the deposits with said banks or banking institutions, less $5000.00 where the depository is insured by the Federal Deposit Insurance Corporation; which bonds shall be delivered to the State Treasurer and receipted for by him and retained by him in the vaults of the State Treasury of this state or in the vaults of such banks or trust companies or other safe depository as the Governor, Attorney General and Treasurer may agree upon; and if in any case, or at any time, such bonds are not satisfactory security to the Governor and Attorney General, for deposits made under Articles 1 and 2 of this Chapter, they may require such additional security to be given as shall be satisfactory to them, which said bonds, or any part thereof, may from time to time be withdrawn on the written consent of the Governor, Attorney General and Treasurer; and the Governor, Attorney General and State Treasurer shall, from time to time, inspect such bonds and see that the same are actually kept in the vaults of the State Treasury, or in the vaults of such banks or bank, trust company or trust companies, other than the bank or banks, trust company or trust companies, selected as the state depositories, as the Governor, Attorney General and State Treasurer may have duly agreed upon; provided, that a sufficient amount of said bonds to secure said deposits shall always be kept in the Treasury or in such selected depository, and in the event that such bank or banks or banking institutions of deposit shall fail to pay such deposits, or any part thereof, on the check or

> checks of the State Treasurer, then it shall be the duty of the State Treasurer to forthwith convert such bonds into money and disburse the same according to law, upon the warrants drawn by the State Auditor upon the funds for which said bonds are security. Any banking institution making deposits of bonds with the State Treasurer under the provisions of Articles 1 and 2 of this Chapter may cause such bonds to be endorsed or stamped, as they may deem proper, so as to show that they are deposited as collateral, and are not transferable except upon the conditions of Articles 1 and 2 of this Chapter. The Treasurer shall have authority to employ an additional clerk to assist in carrying out the provisions of this section at a salary not to exceed One Hundred Fifty ($150.00) Dollars per month."

Therefore, in view of Section 12 of the Unemployment Compensation Act, as amended by the 60th General Assembly, this fund must be secured in the same manner as is required of state funds under Section 11469, supra. The Commission, under Section 12, supra, is required to do those acts directed to be done by the Governor, Attorney General and State Treasurer under Section 11469, supra, which are not inconsistent with the other provisions of the Unemployment Compensation Act. To comply with Section 11469, supra, the Commission should require the depository selected to give security in an amount equal in value to one hundred per centum of the amount of the deposit with the depository, less the sum of $5,000.00 when guaranteed by the Federal Deposit Insurance Corporation. This security must consist of bonds as provided in Section 11469, supra. Such security given shall be retained by the Commission in the vaults of the State Treasury, or in the vaults of such bank or trust company, or other safe depository, as the Commission may agree upon. When necessary, the Commission shall require additional security.

We shall next consider the proper manner of handling the Unemployment Compensation Administration Fund.

Section 13 (a) of the Unemployment Compensation Act (Laws of 1937, page 597), in part, reads as follows:

> " * * * The fund shall consist of all moneys appropriated by this state, and all moneys received from the United States of America, or any agency thereof, including the Social Security Board and the United States Employment Service, or from any other source, for such purpose. All moneys in this fund shall be deposited, administered and disbursed, in the same manner and under the same conditions and requirements as is provided by law, for other special funds in the state treasury. * * *."

Under the foregoing provision, this fund shall be treated as other state funds. The State Treasurer shall secure such fund, as other state funds, when deposited. This should be done, as we have already shown, by requiring the security of the character and in the amount as provided in Section 11469, supra.

Respectfully submitted

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

ARH:HR

CONSTABLES: Deputy constables in St. Louis County must be approved by a majority of the Circuit Judges and are not entitled to fees but are paid a salary.

November 9, 1939

11-16

FILED 93

Hon. Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

Dear Sir:

We are in receipt of your request for an opinion, under date of November 3, 1939, which reads in part as follows:

"This office desires an opinion as to the constitutionality, and effect, of an act passed at the last Session of the General Assembly, relating to salaries and fees of Constables and their deputies in counties of not less than 200,000, and not more than 400,000 inhabitants, found on page 683 of the Laws of Missouri, 1939.

"Since the enactment of this law, several questions have arisen which require an interpretation of the Act and it's relation to other statutes. * * "

1

Your first inquiry reads as follows:

"Is the law relative to the appointment of deputy constables constitutional?

The title to the Act repealing and re-enacting Section 11777 R. S. Mo., 1929, appearing in Session Laws of 1939, page 683, reads as follows:

"AN ACT to repeal Section 11777, Revised Statutes

of Missouri, 1929, relating to the fees of constables and to re-enact a new section in lieu thereof relating to the same subject matter and providing for the collection of fees by constables and the disposition thereof, the payment of salaries to constables and their deputies in counties which now have or which may hereafter have not less than 200,000 and not more than 400,000 inhabitants; declaring this to be a Revision Bill with an emergency clause."

After reading the title of the Act, it appears the intention and purpose of the legislature was to place constables and deputy constables of counties containing not less than 200,000 and not more than 400,000 inhabitants on a salary basis and that all fees should be paid into the county treasurer. Even if the classification by population only applies to St. Louis County alone it has been held that it is not special or class legislation. Thomas v. Buchanan County, 51 S. W. 2d 95, 330 Mo. 627. In that case at paragraph 9, the court said:

"The next point made by certain of the respondents is that the law is local and special in violation of subdivisions 2, 15, and 32 of section 53, article 4, of the Constitution, in that it singles out Buchanan county and attempts to regulate its affairs, creates a special board of estimate, and makes the county court a purchasing agent. It is true the only county in the state which, at this time, has a population between 95,000 and 150,000, is Buchanan county. But this does not make the law local, because the act applies as well to all counties which may hereafter have that population. In other words, the class is fixed, but the counties that fall within it may change as their population fluctuates. That such legislation is not local is established by numerous decisions of this court: Davis v. Jasper County, 318 Mo. 248, 253, 300 S. W. 493, 495; State ex rel. Moseley v. Lee, 319 Mo. 976, 993, 5 S. W. (2d) 83, 90."

Since the purpose was to place the constable and his deputies on a salary basis the Act contained the power of appointment of the deputies under the approval as to numbers and salary by a majority of the judges of the Circuit Court

of that county. All of the procedure set out in Section 11777, as re-enacted was a part of the plan to place the constable and his deputies on a salary basis. It is true the title to the Act does not mention the appointment and approval of the deputies, yet it is a part of the purpose of the act and is germane to the subject matter contained in the Act.

In the case of State v. Terte, 23 S. W. (2d) 120, par. 1, 324 Mo. 402, the court said:

> "On the other hand, we resolve the doubt, if any, in favor of validity, if the challenged legislation is germane and relates either directly or indirectly to the main subject. State v. Miller, 45 Mo. 496; State ex rel. v. Mead, 71 Mo. 266; De Both v. Coal & Mining Co., 141 Mo. 497, loc. cit. 503, 42 S. W. 1081; St. Louis v. Tiefel, 42 Mo. 578; State ex rel. v. Slover, 134 Mo. 10, 31 S. W. 1054, 34 S. W. 1102; State ex inf. v. Firemen's Fund Ins. Co., 152 Mo. 1, loc. cit. 45, 52 S. W. 595, 45 L. R. A. 363; State v. Doerring, 194 Mo. 398, loc. cit. 347, 92 S. W. 489; O'Connor v. Transit Co., 198 Mo. 622, loc. cit. 633, 97 S. W. 150, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; State v. Smith, 233 Mo. 242, loc. cit. 255, 135 S. W. 465, 33 L. R. A. (N. S.) 179; State v. Brodnax et al., 228 Mo. 25, loc. cit. 53, 128 S. W. 177, 137 Am. St. Rep. 613; State v. Peyton, 234 Mo. 517, loc. cit. 524, 137 S. W. 979, Ann. Cas. 1912D, 154; St. Louis v. Liesing, 190 Mo. 464, loc. cit. 489, 89 S. W. 611, 1 L. R. A. (N. S.) 918, 109 Am. St. Rep. 774, 4 Ann. Cas. 112; Cunningham v. Railroad (Mo. Sup.) 215 S. W. 5, loc. cit. 9; Nalley v. Ins. Co., 250 Mo. 452, loc. cit. 467, 157 S. W. 769, Ann. Cas. 1915A, 283.
>
> "In Ewing v. Hoblitzelle, 85 Mo. 64, we said: 'Where all the provisions of a statute fairly relate to the same subject, have a natural connection with it, are the incidents or means of accomplishing it, then the subject is single, and if it is sufficiently expressed in the title the statute is valid.' In State ex rel. v. Miller, 100 Mo. loc. cit. 445, 13 S. W. 677, 678, Black, J., said: 'In adopting a title, the Legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject-matter covered [illegible]ct; mere matters of detail need not be stated [illegible]e.'"

Also, in the case of Massey-Harris Harvester Co. v. Federal Reserve Bank, 104 S. W. (2d) 385, par. 6-8, 340 Mo. 1133, 111 A. L. R. 133, the court said:

> "Plaintiff says that 'the subject of the legislation is "Promissory notes and checks" and not "banks and banking"'; and that 'there is nothing in the title to indicate the liability of banks is to be regulated, or that banks are to be authorized to accept anything but money in payment of such instruments, or that they might send such instruments direct to the debtor for collection'; but that this act 'after providing that the instruments described in the title may be sent for collection direct to banks on which they are drawn or at which they are payable, then proceeds to add another subject, namely, the liability of the forwarding bank.' This is to narrow a construction of the title. The reasonable construction of the subject stated in the title is: 'Collection by banks or trust companies of checks, notes or other negotiable instruments drawn upon other banks located at a different place'; and the purpose is clearly stated to authorize banks or trust companies to make collection of such instruments from banks upon which they are drawn by forwarding them direct to such banks. While the word 'collection' is not used in the title, certainly the only reasonable construction is that it means 'forwarding' for collection, because that is the usual and commonly known purpose for which banks are 'forwarding' such instruments to other banks. The legal effect of the method authorized is so closely related to prescribing the method as to be practically part of it. Our rule of construction of this section of the Constitution is that if 'every provision of the act fairly relates to, and has a natural connection with, the subject expressed in the title * * * it is unimportant "that some provisions of the act are not specifically named in the title, or that, by refinement of terminology, the minutiae of the act itself can be separately catalogued"' Graves v. Purcell, 337 Mo. 574, 85 S. W. (2d) 543, 550. * * * "

It is very noticeable in the Act that where the classifi-

cation sets out the population of not less than 200,000 and not more than 400,000 inhabitants it is preceded by the phrase "which now has or may hereafter have."

It is not the policy of this department to pass upon the constitutionality of statutes enacted by the legislature, for the reason that that opinion solely rests with the Supreme Court of the State of Missouri, but, in reading the title to this Act, and reviewing the authorities above set out, it appears that the title contains enough information to allow the legislature to set out the method of the appointment of the deputy constables, for the reason that it pertains to salary, which is the main purpose of the Act itself.

It also appears that the Act itself is not class legislation under the authorities above set out, even though it does apply only to St. Louis County, for the reason that the Act specifically states "which now has or may hereafter have."

II

Your second inquiry reads as follows:

"Can the constable appoint deputies other than those provided by re-enacted Section 11,777, page 683, Laws, 1939?

Section 11777, Laws of Missouri, 1939, page 683, is practically the same as Section 11777 R. S. Missouri, 1929, except that it provides for the payment of a salary of the constable and his deputies and not compensation by way of fees. The other additional part of Section 11777, as re-enacted, provides as follows:

"
* * * In lieu of all fees such constables shall receive a salary not to exceed $2,700.00 per annum, payable pro rata at the end of each month out of the Treasury of said County and each Deputy Constable as shall be approved by a majority of the judges of the circuit court shall be paid a salary not to Exceed $125.00 per month, the amount of compensation of the Constables and Deputy Constables shall be fixed by a

majority of the judges of the circuit court within the limits herein before set forth. Provided However, No constable shall appoint any deputy constable as in this act provided except upon the approval of the majority of the judges of the Circuit Court who shall not approve the appointment of more than twenty-eight (28) deputy constables, and provided further that a majority of the judges of the Circuit Court shall approve at least two (2) deputies for each constable; and provided further that for extraordinary emergencies the Circuit Court may approve, subject to the provisions of this act the temporary appointments of such additional deputy constables as may be deemed necessary in the judgment of the majority of the court to meet said emergencies."

It will be noticed that Section 11777, as set out in 1939 Session Laws, refers to the phrase "in this act provided", meaning the act that places a constable or deputy constable on a salary basis. This Act is the re-enactment of Section 11777 as contained in Article 2, Chapter 84, of the Revised Statutes of Missouri, 1929. This Act applies to only counties as "in this act provided" which means in counties of not less than 200,000 nor more than 400,000. It will also be noticed that immediately after setting out the classification of not less than 200,000 and not more than 400,000. The act proceeds to read as follows:

"

* * * the Constables in such counties shall collect the fees authorized by law for their services, and shall at the end of each month file with the county clerk a report of all fees which they collected during said month, stating on what account or in what case such fees were charged and collected, together with the names of the persons paying or who are liable for same, which said report shall be verified by the affidavit of said constable. It shall be the duty of the constable upon the filing of the said report to forthwith pay over to the County Treasurer of such county all moneys collected by said constable or his deputies, * * * ."

The above language of Section 11777 as re-enacted is very

plain and unambiguous, and it becomes the duty of the constable or deputy constables, and it is mandatory that they collect the fees and make their report to the county clerk and pay the same over to the county treasurer.

Section 11754, appears in Article 1, Chapter 82, R. S. Missouri, 1929, and reads as follows:

> "Every constable may appoint deputies who shall possess the same qualifications as the constable, who shall take the same oath of office and for whose conduct he shall be answerable, which appointment and oath shall be filed in the office of the clerk of the county court; said deputy or deputies, so appointed, shall devote his time to the duties of such office, provided, no such deputy or deputies shall be appointed who is or may be directly or indirectly connected with or engaged in the mercantile business, or a member of any firm engaged in such business, or a member of or connected with any collection agency, credit house, installment house or loan agency where money or moneys are sought to be collected by suit; and any service of writ, process or execution in any court by such pretended deputy shall be void."

This is the general section referring to all constables, and sets out the manner of their appointment, and the qualification; but, under Section 11777, as re-enacted, an exception is made to Section 11754, supra, in that the county of St. Louis coming within the classification of not less than 200,000, and not more than 400,000 inhabitants, the deputy constable may be appointed by the constable, but the appointment must be approved by a majority of the judges of the Circuit Court of St. Louis County.

Section 11777, as re-enacted, does not repeal the general law as to the appointment of deputies as set out in 11754, supra, and it was not the intention to repeal that section or it would have been mentioned in the repealing section of the re-enactment Act of 11777.

In conclusion, will say, that it is the opinion of this department that a constable elected in any township in the county of St. Louis can only appoint deputies in accordance with Section 11777, page 683, Laws of Missouri, 1939.

III

Your third inquiry reads as follows:

"Do the constables of St. Louis County have the authority to appoint deputies under Section 11,754 R. S. 1929?"

In view of our opinion in your second question, it is the opinion of this department that the constables of St. Louis county do not have authority to appoint deputies under Section 11754 R. S. Missouri, 1929.

It is further the opinion of this department that inasmuch as Section 11754, supra, is not repealed by Section 11777, as re-enacted, but is only repealed so far as the re-enactment conflicts with the general law. The original general act 11754, R. S. Missouri, 1929, still is in effect as far as the qualifications of the deputy constables appointed under section 11777 as re-enacted.

IV

Your fourth inquiry reads as follows:

"Does the provision in re-enacted Section 11,777 limit the number of deputies to 28 for the Township, or for the County?

That part of Section 11777, as re-enacted in 1939, which affects your fourth question reads as follows:

"Provided However, No constable shall appoint any deputy constable as in this act provided except upon the approval of the majority of the judges of the Circuit Court who shall not approve the appointment of more than twenty-eight (28) deputy constables, and provided further that a majority of the judges of the Circuit Court shall approve at least two (2) deputies for each constable; * * ."

It will be noticed by this part of Section 11777, as re-enacted, that the constable cannot, under any circumstances, appoint any deputy constable, except upon the approval of the majority of the judges of the Circuit Court. It says specifically "any deputy constable as in this act provided." The wording of this Act is plain and unambiguous, in that it is mandatory for constables in counties within this classification to appoint deputy constables with the approval of the judges of the Circuit Court, as set out in the Act, and he cannot appoint deputies in any other manner. All of this coming under the clause "as in this act provided." It will also be noticed by that part of the Act hereinabove set out, that the judges of the Circuit Court cannot approve the appointment of more than twenty-eight deputy constables. The judges of the Circuit Court are bound by that limitation and are not specifically limited to any township, but the limitation is set concerning the appointment of not more than twenty-eight deputy constables. It does not say "not more than twenty-eight deputy constables in any township", and in reading the next following provision it is mandatory upon the judges of the Circuit Court to approve at least two deputies for each constable. By setting out that the Circuit Court cannot approve more than twenty-eight deputy constables, and thereafter setting out that it shall be the duty of the Circuit Court to approve at least two deputies for each constable, it clearly shows that the limitation of twenty-eight deputy constables applies to the whole county and the mandatory amount of two deputy constables for each constable applies to each township. It is very noticeable that where the Circuit Court is limited to the approval of not more than twenty-eight deputy constables, it does not say "for each constable."

In view of the above sections specifically pointed out it is the opinion of this department that the re-enactment section 11777 limits the number of deputies to twenty-eight for the county, and also compels the Circuit Court to approve at least two deputies for each constable.

V

Your fifth inquiry reads as follows:

"Section 3837 provides that when an officer is

a witness in a trial, or before a coroner, or grand jury, more than five miles from his residence, he may receive a fee as a witness, what disposition must be made of the witness fees allowed to constables and their deputies in St. Louis County? Must those fees be turned into the treasury under Section 11,777, or are witness fees the personal property of the constable or his deputies as the case may be?"

Section 3837, Session Laws of Missouri, 1939, page 357, partially reads as follows:

"Provided, that the provisions of this section shall not apply to any officer who is a witness in any case where the residence of such officer is five miles from the place where the trial or coroner's inquest is held, or where the grand jury is in session."

Section 3837, R. S. Missouri 1929, was partially construed in the case of State ex rel. v. Kimmel, 256 Mo. 611, l. c. 627, where the court said:

"Section 5388, Revised Statutes 1909, is reproduced in part in the return. That part of it not repreduced prescribes that no officer, appointee or employee holding a state, county, township or municipal office, including police officers and policemen elected or appointed, shall receive any fee or compensation as a witness for testifying before a coroner's inquest, grand jury or in any criminal case. It goes on to provide that such persons shall be compelled to attend the trial of all criminal cases, inquests and grand juries when legally subpoenaed, barring from its provisions officers who reside five miles from the place where the trial or inquest is held or where the grand jury is in session. * * * * * * * * * * * * * * "

It can be plainly seen by the above holding that the court recognized that where an officer, either of the state, county, township or municipal office, was compelled to render service in his <u>official capacity</u>, this section forbids the

officer from receiving any fee or compensation before certain tribunals. The section also had the proviso, as above set out, which recognized the fact that where an officer was acting as a witness in certain tribunals more than five miles from his place of residence it was not part of his official duties and he should be allowed to claim witness fees and accept the same. This section is not conflicting with that part of Section 11777, Laws of Missouri, 1939, page 683, where it states that all fees should be turned into the county treasury. That part of the section merely means official fees and not fees earned in the officer's official capacity. The Legislature has recognized that fees earned in an officer's official capacity, but not part of his official duty, should be claimed and retained by that official in his own right. In the case of clerks of the circuit court under Section 11786, under the Session Laws of Missouri, 1933, page 369, the Legislature recognized that clerks of the circuit court elected in that circuit should be entitled for their own use all fees earned by them in cases of change of venue coming from other counties, the distinction being that the officer, or as in this case the constable or deputy constable, is performing a duty not included as his official duty. The same theory may be had on justices of the peace who are allowed to retain fees earned by them in performing marriage ceremonies which is not part of their official duty.

CONCLUSION.

In view of the foregoing authorities it is the opinion of this department that under Section 3837, Session Laws of Missouri, 1939, page 357, that a constable, or his deputy, is entitled to the fees personally when he is a witness in a trial or before a coroner or grand jury more than five miles from his place of residence and that the fees he so receives are not to be turned into the county treasury as provided under Section 11777, page 683, Session Laws of Missouri, 1939.

VI.

Your sixth inquiry reads as follows:

"Does the provision in Section 11,791 R. S. 1929 providing a fee of $1.00 'for every trial in a

> criminal case, or confession' apply to constables in connection with his attendance during the trial of a criminal case, and must that fee be turned into the treasury? If allowable, our thought is that it must be."

In answer to this inquiry I am enclosing a copy of an opinion rendered by this office on April 11, 1934, to the Honorable George B. Padget, Prosecuting Attorney, Daviess County, Gallatin, Missouri, which holds that a constable is entitled to a fee of One Dollar ($1.00) for every trial in a criminal case or confession in the justice court wherein he is the attending officer in the court. By being the attending officer in the court, it is part of his official duties and is not a fee to be allowed to the officer personally but must be turned into the office of the county treasury in compliance with that part of Section 11777, page 683, Laws of Missouri, 1939, which partially reads as follows:

> "* * * * * * In lieu of all fees such constables shall receive a salary not to exceed $2,700.00 per annum, payable pro rata at the end of each month out of the Treasury of said County * * * "

And further said section provides that the constables shall collect the fees authorized by law for their services and shall, at the end of each month, pay the same into the office of the county treasury and shall receive a salary in lieu of all fees.

CONCLUSION.

In view of the foregoing authorities it is the opinion of this department that a constable is entitled to claim a fee of One Dollar ($1.00) for every trial in a criminal case for a confession in the justice court wherein he is the attending officer in the court, but that said fee, which is in payment of an official duty, should be paid into the office of the county treasurer at the end of each month.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney-General

TYRE W. BURTON
(Acting) Attorney-General

WJB:RW

JUSTICE OF THE PEACE: A justice of the peace in St. Louis County must account for and pay over to the county treasurer the fee of $2.00 he receives for solemnizing a marriage.

December 11, 1939

Honorable Stanley Wallach
Prosecuting Attorney
St. Louis County
Clayton, Missouri

FILED 93

Dear Sir:

This will acknowledge receipt of your letter of December 4, 1939, as follows:

> "This office desires an opinion from your office relative to the meaning of Section 2369, Laws of Missouri, 1939, page 341.
>
> The question is, was it the intention of the legislature to require the various justices of the peace in St. Louis County to pay over to the Treasurer of the County, the fees collected for their services for the solemnization of marriages?"

A justice of the peace is authorized to solemnize marriages (Section 2976 R. S. Mo. 1929) and is allowed a fee of Two Dollars ($2.00) for each solemnization (Section 11778 R. S. Mo. 1929).

Section 2369, Laws 1939, page 341, provides:

> "Each justice of the peace shall pay over all fees collected for his services to the treasurer of the county in which he is elected every thirty days, accompanied by a statement thereof sworn to by him, and all other costs collected by said justice of the peace shall be paid by him every

> thirty days, accompanied by like sworn statement, to the constable of his district, who shall be responsible for the same and pay over the same to the parties entitled thereto, as is now required by law in cases of costs collected by or paid to said constable."

It will be noted this section divides the collections of the justice into two classes - fees and costs. We are not concerned with the costs here. The section requires the justice to pay over "all fees collected for his services" to the county treasurer every thirty days.

Section 2367, Laws 1939, page 341, provides for each justice in certain counties to give a bond conditioned that he account for and pay to the proper officer "all the money received by him by virtue of his office."

This portion of the bond condition has reference to the fees and costs required to be accounted for in Section 2369, supra.

The question here is determined by ascertaining whether the Two Dollars ($2.00) a justice is entitled to charge for solemnizing a marriage is one collected by him for "his services" as a justice and "received by him by virtue of his office."

Section 11778, R. S. Mo. 1929, fixes the fees of a justice in the following language: "Justices of the peace shall be allowed fees for their services as follows: For solemnizing a marriage .... $2.00." In other words, performing marriages is a part of the services of a justice of the peace for which a fee is fixed.

A justice of the peace is only entitled to perform marriages by reason of the fact that he holds the office of a justice of the peace. In State v. National Surety Co. 39 S. W. (2nd) l.c. 583 (Tenn.) it is stated, "'Act done virtute officii are where they are within the authority of

the officer.'" In State ex rel v. Goss 296 S. W. 431 (Mo. Sup.), the point for determination was whether the compensation of a circuit judge as jury commissioner could be considered in determining the fees a probate judge can retain. A probate judge is entitled to retain in fees a sum equal to the salary of the circuit judge "for all duties by virtue of the office" of circuit judge. The court on this point said, l.c. 432:

> "It is argued that 'the service of a judge as a jury commissioner is not a duty by virtue of the office of circuit judge.' The words 'by virtue,' as used, mean 'because of; through; in pursuance of.' Stroud's Judicial Dictionary; New Standard Dictionary; Webster's New International Dictionary. The circuit judge is not appointed or elected to the position of jury commissioner. No commission as jury commissioner is issued to him. He takes no oath of office as jury commissioner, but performs this ministerial duty under his oath as circuit judge. To be jury commissioner one must be circuit judge. When the term of office of the circuit judge expires he ceases to be jury commissioner. We think 'the service of a judge as jury commissioner is a duty by virtue of the office of circuit judge,' and so rule."

That case, in principle, is authority for the instant question and it is clear under the rule there announced that the fee a justice is permitted to receive for solemnizing a marriage is one received "by virtue of his office."

The case of St. Louis v. Sommers 148 Mo. 398 is no authority for the instant question, due to the dissimilarity in the statutes involved. The statute in that case concerned the "fees and costs collected in said courts," while the statutes under consideration here concern "all fees" and "all

the money" with no qualification be made as to the source that can be said to confine it to fees received in a judicial capacity.

CONCLUSION

Therefore, it is our opinion that a justice of the peace in St. Louis County must account for and pay over to the county treasurer the fee of Two Dollars ($2.00) he receives for solemnizing a marriage.

Very truly yours,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General

LLB:RT

TAXATION AND EXEMPTION: Municipal corporation which purchases tax certificates must pay all taxes due to the date of the issuance of the deed before the collector is authorized to execute and deliver the deed. Such city will be exempt from paying taxes assessed on such property but not yet due.

November 17, 1939

11-27

FILED 94

Mr. Edgar H. Wayman
City Counselor
City of St. Louis
St. Louis, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit the following request:

> "Your opinion is requested upon the question whether the City, before it is entitled to have delivered to it a deed to the properties purchased, must pay the taxes which accrued against the property both prior and subsequent to the taxes for which the property was sold, and this opinion is requested of you because of the fact that the State has some interest in those taxes. * * * * * * * * * * * "

Section 6 of Article X of the Constitution of Missouri, which is applicable to your proposition, provides as follows:

> "The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile of more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charit-

> able; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies: Provided, That such exemptions shall be only by general law."

The rule of law, as it applies to tax exemption statutes, is announced in State ex rel. v. Trustees of William Jewell College, 234 Mo. 299, 308, in the following language:

> "It is urged that exemption statutes are to be strictly construed. Generally speaking, such is the rule. But we take it from the cases that there has been a well recognized exception to the rule. Perhaps a better wording would be to say that the courts have never been over anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service. * * * * "

And in the case of Grand River Drainage District v. Reid, 111 S. W. (2d) 151, the court held:

> "A constitutional provision which exempts realty and personalty of municipal corporations from taxation should be reasonably construed, when invoked by governmental agency which performs a public service."

Your request particularly involves the question of just when the exemption privileges apply to property purchased by a tax exempt corporate body. You state that the City of St. Louis acquired certain real estate at a sale of delinquent lands for taxes in 1937 and now holds the certificates which were delivered to it by the Collector of the City of St. Louis. You also state that the

City of St. Louis is now ready to make application for the deeds which are to be issued by virtue of the provisions of Section 9957c, Laws of Missouri, 1933 at page 440, which section provides in part as follows:

> "Every holder of a certificate of purchase shall before being entitled to apply for deed to any tract or lot of land described therein pay all taxes that have accrued thereon since the issuance of said certificate, or any prior taxes that may remain due and unpaid on said property, and the lien for which was not foreclosed by sale under which such holder makes demand for deed, and any purchaser that shall suffer a subsequent tax to become delinquent and a subsequent certificate of purchase to issue on the same property included in his certificate, such first purchaser shall forfeit his rights of priority thereunder to the subsequent purchaser, and such subsequent purchaser shall at the time of obtaining his certificate redeem said first certificate of purchase outstanding by depositing with the county collector the amount of said first certificate with interest thereon to the date of said redemption and the amount so paid in redemption shall become a part of said subsequent certificate of purchase and draw interest at the rate specified in said first certificate but not to exceed ten percent per annum from the date of payment. * * * * "

It will be noted by the foregoing provisions of said section that the holder of tax certificates issued at the tax sale does not take title to the property offered at the sale and purchased by him at the time he bids for the lands. Such purchaser is required to wait before he is entitled to the deed conveying the property

to him and before he becomes the owner. In other words, the owner of the certificate does not become the owner of the lands described in the tax certificate until after the redemption period has expired and until the collector executes and delivers a deed to him for the lands described on his certificates.

Again referring to Section 9957c, it very clearly appears that the collector is not authorized to deliver the deed to the lands which he has sold for taxes and for which he has issued the certificate until all taxes accruing since the issuance of the certificate or any prior unpaid taxes which are due have been paid. This requirement is imposed in addition to requiring the holder of the certificate to wait two years before he can make his demand for the deed. Even though the exemption statutes apply as you have suggested in your letter, we do not think that they could apply before the tax exemption body comes into possession of the property.

The collector must look to the statutes for his authority to execute and deliver the deed and the requirements of the statute must be met before he performs this act. Since said Section 9957c requires certain things to be done before the collector may issue the collector's deed, we think the city, or any other certificate holder, would be compelled to meet those requirements before it would be entitled to the deed which would make it the owner of the property sold for taxes.

We think this statement is substantiated by the rule announced in the case of State v. Minidoka County (Idaho), 298 Pac. 366, 370, wherein the Supreme Court of that state said:

> "It will be observed this case was tried before sheriff deed was executed or due. We do not think the taxes are a nullity unless and until the state is the absolute owner. It is stipulated, 'that if said lands were appraised as to value on this date, (October 19th, 1929) it would be appraised at the approximate sum of $8,500.' This sum is greatly

> in excess of the mortgage and interest. If the stipulation is well advised, it seems probable the lands were redeemed before sheriff's deed issued. If they were, the taxes should not be cancelled. If the land was not redeemed, then upon the issuance of the sheriff's deed the taxes and tax liens became a nullity and subject to cancellation. Taxes on farm lands, foreclosed for state loan, are not subject to cancellation until the sheriff's deed on foreclosure issues. Thereupon they are."

We also find where the Missouri Supreme Court has touched on this question in the case of Speed et al. v. St. Louis County Court, 42 Mo. 382, 383, wherein the court, in speaking of property being exempt on account of being government owned, said:

> "* * * * The property, to be exempt from taxation, must belong to the national government--the title and ownership must be vested in it."

After the City of St. Louis becomes the owner of the lands which it has bid in at the tax sale and for which it holds the tax certificates, then you contend that it would not be liable for taxes due and falling due on the same.

In your suggestions you have cited the foregoing provisions of the Constitution and some out-state authorities. We think that the rule, which is applicable to this question, is announced in Volume 61 Corpus Juris, page 418, Section 450, in the following language:

> "* * * On the other hand, taxes levied on private property and not paid are not a charge on the property subsequent to its acquisition by the state or city, the public property exemption operating to exempt property acquired by the state from any further liability for taxes assessed prior to the acquisition, although there are decisions to the contrary. The rule exempting property acquired

> by the state or city from any further liability for taxes assessed prior to the acquisition applies to lands acquired by condemnation proceedings or by mortgage foreclosure, subject, in the latter case, to the modification that the tax lien is not canceled until the owner's right to redeem is foreclosed. * * * * * * * * * * * * * * "

Again at page 402, Section 407 of said Volume 61 Corpus Juris, the rule is stated:

> "Property acquired by the state at foreclosure sale is exempt from tax charges, either present or past, under a constitutional provision to that effect, but not until the state has become absolute owner through delivery of the sheriff's deed. So long as the right to redeem exists, the tax lien is merely suspended and revives upon redemption."

In State v. Minidoka County (Idaho) 298 Pac. 366, l. c. 369, the court also said:

> "All the decisions recognize that the power of taxation is a sovereign power delegatory to local taxing districts to raise funds for one public purpose or another, but always in behalf of sovereignty for the public good. Only such taxes as distinguished from special assessments are involved herein.
>
> "In the absence of a constitutional provision therefor, the exemption of the state from taxation is generally put upon the ground that the sovereign cannot be so proceeded against by its taxing subdivisions,

> but the courts usually justify such condition by a discussion of the futility of taking money out of one pocket to put it into another (People v. Doe G. 1,034, 36 Cal. 220; State v. Locke, supra; Laurel v. Weems, supra), or of collecting taxes with which to pay taxes (Foster v. Duluth, supra; State v. Locke, supra), or by the doctrine of merger of such liens into the title in the state * * *
>
> "However, under a constitutional provision such as ours, such property is exempt from any charge of taxes either present or past. This upon the ground that the property itself is exempt, not merely that its owner, being sovereign, is beyond process."

In our research through the Missouri Reports on your question we do not find where such a question has been before the court, but since the exemption provisions of the Constitution of the State of Idaho are similar to those of the Missouri Constitution, we think the rules announced in the Minidoka County case, supra, are appropriate and applicable here.

We also think that if the property purchased for delinquent taxes by the City of St. Louis is exempt from taxation, it is exempt from the state taxes as well. This rule is announced in Volume 61 Corpus Juris, page 419, Section 453, as follows:

> "* * * * County property is exempt from taxation under a constitutional provision exempting 'property belonging to the State or to municipal corporations,' but it is exempt as 'property belonging to the State,' the county being regarded as a governmental agency of the state, and not as 'property belonging to municipal corporations'; and the exemption includes an exemption from

state taxes."

We think the rule is correct which you have suggested that is stated in 30 A. L. R., page 407, in the case of State of New Mexico v. Seon Locke. This rule is as follows:

> "Property which is acquired by the state in its sovereign capacity is thereupon absolved and freed of a further liability for the taxes previously assessed against it, and a subsequent sale thereof for such taxes is void."

According to the cases cited in the annotations in this case, the weight of authority is with this rule. However, it will be noted that the property must be acquired before the exemption privileges apply. As stated above, a condition precedent to the collector executing and delivering the deed is that certain taxes be paid.

The taxes which were assessed in June of this year and which will not be payable until in the fall of 1940 would come within the rule announced first above, that is, a city after becoming possessed of certain property would be exempted from paying taxes on property which had been assessed and not yet due at the time the deed was issued.

CONCLUSION.

From the foregoing it is the opinion of this department that the collector would not be authorized to execute and deliver a deed to the City of St. Louis for property which it has purchased at tax sales until all taxes due at that time have been paid.

We are further of the opinion that the city, after the receipt of the deeds, would be exempt from all taxes on the property which were assessed but not yet due.

Respectfully submitted

APPROVED:

TYRE W. BURTON
Assistant Attorney General

W. J. BURKE
(Acting) Attorney General

TWB:DA

TAXATION
MERCHANTS: Ad valorem tax due even though merchant commences business after first Monday in June and is pro-rated.

November 18, 1939

11-20
FILED
94

Ward & Reeves
Attorneys at Law
Caruthersville
Missouri

Gentlemen:

This will acknowledge receipt of your letter of November 7, 1939, which is as follows:

> "The County Court and the Assessor of Pemiscot County have asked us to write you with reference to an opinion on the following set of facts:
>
> A new mercantile establishment was opened between the 1st and 15th of August. What, if any, merchants and manufacturing tax should they pay for the year 1939? Should it be pro rated or should they pay for a full year?"

The statutes which govern the answer to this question appear in Article 17, Chapter 59, R. S. Mo. 1929, and amendments thereto. This Article provides for the imposition of an ad valorem tax on merchants equal to that levied on real estate, on the highest amount of all goods, wares and merchandise on hand at any time between the first Monday in March and the first Monday in June of each year (Section 10077 R. S. Mo. 1929). The tax report of the merchant is required to be made on the first Monday in June in each year (Section 10081, Laws of 1931, page 360).

It is at once apparent that these sections reach and apply to merchants that commence business on or after

January 1 and continue in said business to the first Monday in June in each year. Section 10101, Laws of 1935, page 407, reaches those merchants that commence business after the first Monday in June each year. This section provides:

> "When any person or corporation shall commence the business of merchandising in any county in this state after the first Monday in June, in any year, he shall execute a bond as provided for in section 10078, conditioned that he will, on the first day of January next succeeding, furnish to the collector of his county a statement, verified as herein required, of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant, and the said first day in January next succeeding; upon which statement he shall pay the same rate of tax as other merchants, to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year."

In determining the amount due from this latter merchant, the last clause of the above section is to be noted. This clause provides the merchant is to pay the same rate (the rate on real estate) as other merchants, "to be estimated as the time from the day on which he commenced business to the first Monday in June next succeeding shall be to one year".

We think this clause may best be explained by illustration.

Assume that a merchant commences business on September 3, 1939; that the largest amount of stock he had on hand was

on October 1, 1939, and this amount was One Thousand Dollars ($1,000.00), and that the rate on real estate is One Dollar ($1.00) per hundred dollars valuation. Under these facts, the merchant's tax would be $6.66 2/3. This sum is arrived at in the following manner: The period from September 3, 1939, to the first Monday in June 1940 (June 3, 1940) is exactly eight months. Eight months is two-thirds of one year. The tax as a whole would have been Ten Dollars ($10.00) and two-thirds of this figure is $6.66 2/3.

CONCLUSION

Therefore, it is our opinion that a merchant commencing business after the first Monday in June of any year is liable for an ad valorem tax, and the amount due computed in accordance with Section 10101, supra, is to be pro-rated.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

W. J. BURKE
(Acting) Attorney General
LLB:RT

SCHOOLS: Transportation of pupils.

April 14, 1939

FILED
96

Honorable W. B. Whitlow
State Senator
Jefferson City, Missouri

Dear Senator Whitlow:

This will acknowledge receipt of yours of April 7th last, requesting an opinion from this office, which letter is as follows:

> "I wondered if you could give me an opinion on the following question: 'In a consolidated high school district having no free transportation, as provided in Section 9197, who will pay for the transportation of the pupils in the district, or will the parents of the children have to pay for this transportation if they attend school?'"

In your letter, you refer to Section 9197, R. S. Mo. 1929, which is a general statute, that is, applying to all classes of schools. However, Section 9354, as amended by the Session Acts of 1933, page 388, by reason of its later enactment and its specific application to consolidated schools only, appears to be the applicable statute to your problem, at least so far as elementary pupils are concerned. Such section, as amended, reads as follows:

> "The question of transportation of pupils may be voted upon at the special meeting above provided for, if notice is given that such a vote will be taken. If trans-

portation is not provided for in any school district formed under the provisions of sections 9351 to 9358, inclusive, it shall then be the duty of the board of directors to maintain an elementary school within three and one-half miles by the nearest traveled road of the home of every child of school age within said school district: Provided, transportation of pupils or the maintenance of elementary schools within three miles and a half of each child of school age in the district shall not be required in consolidated districts now or hereafter organized under the provisions of sections 9351 to 9358, inclusive, where such consolidation has not placed said children further from an elementary school than they were prior to said consolidation: Provided however, no transportation shall be furnished if there be any school within three and one-half miles of such pupil but assignment shall be made as provided by Section 18 of an act of the 56th General Assembly, found on Page 344, Laws of Missouri, 1931. Provided, further, that when the average attendance in any elementary school for any month falls below ten, the school board shall have authority to close such elementary school for the remainder of the term and provide transportation for the pupils of such elementary school to some other elementary school or schools in said district. Such transportation shall be paid for out of the incidental funds of the district: Provided further, that if transportation is not provided for, any consolidated district may, by a majority vote at any annual or special meeting, decide to have

> all the seventh and eighth grade work done at the central high school building, provided fifteen days' notice has been given that such vote will be taken. Such seventh and eighth grade work at the central high school may be discontinued at any time by a majority vote taken at any annual or special meeting."

The set-up for consolidated school districts, as provided for by Sections 9351 - 9358 inclusive, contemplates the maintenance of a high school or central school therein. Consequently, the Laws of 1935, Section 16a, page 352, covers transportation for pupils attending the central or high school. Such Section provides in part as follows:

> "When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state superintendent of schools the amount paid for transportation, not to exceed three dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year."

A reading of the above sections, together with kindred sections pertaining to transportation, shows that provision can be made by vote of the qualified voters of the district for transportation for both high school and elementary pupils. However, in the absence of such action by the voters (which we understand to be the case in the district you mentioned by reason of the following in your letter, to-wit: "In a consolidated high school district having no free transportation"), transportation can not be furnished such high school pupils at the expense of the district, unless and until the qualified voters take the necessary action to vote and vote favorably for such transportation.

However, in the case of elementary pupils, it is not essential that transportation be voted for, but on the contrary, it is mandatory upon the Board of Directors to provide free transportation wherever the conditions exist relative to the maintenance of, or failure to maintain, elementary schools under the circumstances set forth in the provision of Section 9354 aforesaid.

Your letter does not acquaint us with any facts as to how any of the elementary schools are located with reference to any of the homes of any or all of the elementary pupils in the district, and consequently without such information, we are unable to specifically or definitely say what, if any, particular elementary pupil, or group of pupils, may be entitled to free transportation. However, anyone conversant with the facts relative to the maintenance of the elementary schools as they exist in the district you mention, can apply them to the provisions of the aforesaid Section 9354 and can, no doubt, reach a right conclusion as to whether or not transportation should be furnished at the expense of the district.

It would necessarily follow that if the facts or circumstances do not show the district to be obligated to pay for transportation, then the parents of the pupil, or someone for the pupil, if transportation is desired, would have to pay for or furnish same without charge.

Respectfully submitted,

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
JWB:RT

BOARDS: Board of Trustees of Confederate Home cannot compromise litigation.

April 12th, 1939.

4-17

FILED
97

Hon. Roy D. Williams,
Vice-President,
Board of Trustees For Confederate Home,
Boonville, Missouri.

Dear Judge:

We have your letter of recent date which reads as follows:

"As a member of the Board of Trustees of the Confederate Home, I desire to submit to you the following question:

Has the Board a right to compromise law suits in which the Confederate Home is interested?

The reason for this letter is that a Mr. Bowler left property to the Confederate Home. There is a contest of the will; many debts, and the attorneys for the respective interests are urging a compromise and have agreed, subject to the approval of the Board of Trustees of the Confederate Home.

By reason of the fact that we are unable to determine our legal capacity to act in the matter, the settlement is being held up.

> Could you write me, as Vice President of the Board, an opinion upon the subject."

Since the Board of Trustees of the Confederate Home is an agency set up by the statutes, we must look to the statutes for the power and authority of such Board.

Section 13928, Revised Statutes, 1929, as amended, Laws of 1933, page 398, provides in part as follows:

> "The control and management of the confederate soldiers' home, located at Higginsville, shall be vested in the board of trustees, composed of five members, * * * * * *."

What is meant by control and management? The two words are synonymous. Webster's Diction ary defines management as follows:

> "Act or art of managing; the manner of treating, directing, carrying on or using, for a purpose; conduct; administration; guidance; control."

In the case of State vs. Howard, 119 Mo. l. c. 46, we find the following definition of management:

> "Thus, 'management' means administration, control, etc., and one of the synonyms of management is government. The last word means control, and that means power or authority to check or restrain."

We must assume that the Legislature used the word management in its ordinary sense in Section 13928, supra, and that being true, it follows that said section was designed to place the administration of the Confederate Home in the Board of Trustees therein provided for. In other words, the Trustees were vested with the handling and control of the building and facilities furnished by the state for that institution, as well as with control over the inmates thereof. This intention is further evidenced by Section 13929, Revised Statutes, 1929, as amended, Laws of 1935, page 363, wherein it is provided as follows:

> "Said board of trustees shall have power and authority to make all necessary rules and regulations for the control and maintenance of said home and for the admission and discharge of the inmates thereof, and shall also provide for a superintendent who shall be a descendant of a soldier or a sailor who shall have served in the army or navy of the Confederate States of America, and for other necessary employees."

We therefore conclude that the general power vested in the Trustees as above set out, are not broad enough to authorize them to compromise litigation in which the institution is interested.

Section 13933, Revised Statutes, 1929, specifically authorizes the Trustees to accept gifts, donations and bequests from any private source, not to exceed in the aggregate $75,000.00, the same to be set apart and maintained as a permanent endowment fund for the maintenance of certain lands in connec-

tion with the institution.

We do not believe the power to accept bequests is broad enough to authorize the Trustees to compromise litigation in which a bequest is involved. The institution belongs to the State of Missouri. The trustees are merely commissioned by law as the agents of the state to manage it. To have authority to compromise a bequest to the institution and accept less than the amount bequeathed, would be to have authority to release a claim or chose in action in favor of the state. The Legislature has not given the Trustees such power.

CONCLUSION

It is therefore the opinion of this office that the Board of Trustees of the Confederate Home, located at Higginsville, Missouri, does not have authority to compromise litigation whereby they would agree to accept less of a bequest than the amount mentioned in a will which was involved in the litigation.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

HHK:RV

NEPOTISM: Wives of school directors who are first cousins to teacher's husband are not related by affinity within the terms of the Nepotism Act.

September 8, 1939

FILED
97

Honorable Bryan A. Williams
Prosecuting Attorney
Bollinger County
Marble Hill, Missouri

Dear Sir:

This Department is in receipt of your letter of August 28th, wherein you make the following inquiry:

> "Mayfield School Dist. No. 22
> Bollinger County, Missouri.
>
> "I would appreciate an interpretation under Art. XIV, Sec. 13, Nepotism, by any officer or employe, forbidden-Forfeits Office, in the following set of facts:
>
> "The wives of two of the directors in the above school district are first cousins by blood to the teacher's husband.
>
> "Would the contract made with the teacher be void under the law, and would the relationship as stated above be within the degree of 'first cousin' as defined under the law."

As you appear to be familiar with the terms of Article XIV, Section 13, Constitution of Missouri, commonly called the "Nepotism Act," we are omitting it from this opinion.

The courts of our State have never given us a rule to determine or compute the relationship under Section 13,

supra. There are two methods in computing the degrees of consanguinity, one by the canon law and the other by the civil law. Our Department has adopted the civil rule and has heretofore held that any degree of relationship as close as first cousins (and the same applies as to affinity) comes within the prohibition of the constitutional section.

The parties mentioned in your letter are "the wives of two of the directors in the above school district are first cousins by blood to the teacher's husband." This relationship, if there were no question concerning affinity, would bring the parties within the prohibited degree. The main question to be decided, as the relationship mentioned in your letter is purely by affinity, is the degree of affinity.

"Affinity" is defined in 2 C. J., 378, as follows:

> "The connection formed by marriage, which places the husband in the same degree of nominal propinquity to the relations of the wife as that in which she herself stands towards them, and gives to the wife the same reciprocal connection with the relations of the husband."

We shall omit any definition of "consanguinity" as it is not involved in the question.

Bearing in mind that the wives of the two directors are first cousins to the teacher's husband, what is the relationship by affinity to the teacher?

2 C. J., 378, makes the following statement:

> "Blood relations of the husband and blood relations of the wife are not related to each other by affinity. Nor does the term 'affinity' ordinarily include a person related to the spouse simply by affinity."

11th Ed., Vol. 1, page 301, of the Encyclopaedia Britanica also makes the following statement:

> "The marriage having made them one person, the blood relations of each are held as related by affinity in the same degree to the one spouse as by consanguinity to the other. But the relation is only with the married parties themselves and does not bring those in affinity with them in affinity with each other; so, a wife's sister has no affinity to her husband's brother."

Adopting the two principles herein quoted, we are of the opinion that the two directors in question bear no such relationship to the teacher that constitutes any violation of the Nepotism Act.

Yours very truly

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

OWN:EG

JUSTICES OF THE PEACE: Authority to appoint additional justice under Section 2137, R. S. Mo. 1929.

January 10, 1939

FILED
98

Mr. Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

This department wishes to acknowledge your request for an opinion under date of January 5th as follows:

"The question has been raised before the County Court on which I would appreciate the opinion of your Department namely:

The City of Avondale in Clay County, Missouri, is incorporated as a fourth class city and contains a population of approximately 500 persons. Its city limits, at the nearest point, falls approximately two miles from the office of the nearest Justice of the Peace which is in North Kansas City, Missouri. Both of said cities lie in Gallatin Township, in Clay County, Missouri, and their city limits adjoin, although the office of the Justice is on the opposite side of North Kansas City.

The citizens of Avondale, claiming the County Court has proper authority under Section 2137, R. S. Mo. 1929 have asked the County Court to appoint an additional Justice in the City of Avondale. There are no other additional Justices appointed in said Township.

Does the five mile rule in said Section

> prevent the appointment of such additional Justice in said City of Avondale, all of which lies within five miles of the nearest Justice, or may such a Justice be appointed within such city irrespective of the five mile limitation?"

Section 2137, R. S. Mo. 1929 provides in part as follows:

> "Whenever a petition shall be presented to the county court of any county in this state, signed by twelve or more qualified voters of any township in said county, setting forth that they live more than five miles from the nearest justice of the peace in their township, the county court shall have power to appoint an additional justice of the peace for such township, and the justice so appointed shall live in the immediate neighborhood of the petitioners, and at least five miles from any other justice of the peace of such township:"

In order for the county court to appoint an additional justice of the peace in Gallatin Township, the petition presented to the court must state that twelve or more qualified voters of said township live more than five miles from the nearest justice of the peace in their township. Inasmuch as you state that the voters of the City of Avondale in the Township of Gallatin live within five miles of the nearest justice of the peace, we are of the opinion that the county court would not be authorized to appoint

an additional justice for the City of Avondale.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

SHERIFF: The county court in the November Term must make an order allowing a definite amount for the board of each person for each day, notwithstanding the sheriff boards Federal prisoners.

February 21, 1939

Request #96

FILED 98

Hon. Conn Withers
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Sir:

We are in receipt of your request for an opinion under date of February 13, 1939, which reads as follows:

"The County Court of Clay County, Missouri, has asked for and I do hereby respectfully request the opinion of your Department upon the following matter:

A Grand Jury summoned for the June 1938 Term of the Circuit Court of Clay County, Missouri, in the course of its investigations placed an inquiry as to the expenditure of funds from the county revenue for the support and care of prisoners of the Federal Government who were confined in the Clay County, Missouri, jail.

As an investigation under this suggestion the Court employed an auditor to make a recapitulation of the funds expended by the County out of the Treasury thereof and through the disbursements by the Court for all supplies and expenses in maintaining the jail except the allowances to the sheriff for feeding prisoners, and, also, to give them the figures concerning the number of days during the test period calculated on the basis of one day per Federal prisoner, for the total of confinement of all Federal prisoners for the test period.

The Auditors reported that for the test period which began January 1, 1937, and continued to November 30, 1938, the general expenses paid through warrants by the County Court and not through the statutory allowance to the sheriff were as follows:

	Totals
Repairs	$1,018.16
Laundry	283.07
Gas	162.95
Telephone	91.08
Water	202.43
Supplies	443.36
Coal	446.08
Medical attention	138.89
Disinfecting	795.14
Hauling	23.50
Lights	264.05
Insurance	82.58
	$3,951.29

During the same period a total of state, county and Federal prisoners of 241 were confined for a total of 19,738 prisoner days. Of this total 52 Federal prisoners were confined for a total of 6941 prisoner days and 189 county and state prisoners for a total of 12,797 prisoner days.

Consultation was then had with the office of the United States Marshall through whom the Federal prisoners are received and we were advised that it was the practice of the Federal Government to pay a flat rate to the sheriff and that he was expected by the Federal Government to take care of the entire support of the Federal prisoners out of that rate which was, currently, 65¢ per day.

It was found that the sheriff receiving this rate of 65¢ per day did take care of the medical attention to Federal prisoners out of the same, but not any of the other costs which are paid in the

course of maintaining the prisoners in the jail under the items above set out.

The County Court then considered that a sheriff in receiving the pay from the Federal Government for the total support of these prisoners should be liable to the County for the proportion of the general expenses paid by the County which could be allocated to the support of the Federal prisoners.

To that end, in order that the County might be reimbursed for the general expenses involved in maintaining the Federal prisoners, an order was entered by the County Court providing for the deduction of 20¢ per prisoner per day, (which was arrived at by dividing the total general expense for the test period by the total prisoner days for such period) from the allowances to the sheriff for the maintenance of county and state prisoners upon the theory that he was being reimbursed by the Federal Government for such general support and was therefore indebted to the county in the amount properly allocated to the Federal prisoners, which was calculated to be 20¢ per day.

The point has now been raised by Section 8540, R. S. Mo. 1929 that the limit the county can be reimbursed is the rate of $1.00 per month and that the county cannot recover for any allocation of the general expenses of maintaining the jail apportioned to Federal prisoners.

We, therefore, desire the opinion of your Department with respect to the following questions under

the above facts:

1. May the County, under the above facts, make a deduction of 20¢ per day per prisoner for the maintenance of the Federal prisoners from the sum due the sheriff on other matters from the County?

2. If the foregoing question is answered in the negative does the County have any right to force re-payment to it of County funds expended in the keeping of Federal prisoners in the County Jail?

3. If so, by what means may this right of repayment be enforced and by what method should the amount thereof be determined?"

Section 11794 R. S. Missouri, 1929, reads as follows:

"Hereafter sheriffs, marshals and other officers shall be allowed for furnishing each prisoner with board, for each day, such sum, not exceeding seventy-five cents, as may be fixed by the county court of each county and by the municipal assembly of any city not in a county in this state: Provided, that no sheriff shall contract for the furnishing of such board for a price less than that fixed by the county court."

It will be noticed in this section that the officer shall be allowed for furnishing the board for each prisoner for each day and not exceeding seventy-five cents per day. It will also be noticed that this certain amount for each prisoner for each day shall be fixed by the county court of each county.

Section 11,795 R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of the county courts of each county in this state at the November term thereof in each year to make an order of record fixing the fee for furnishing each prisoner with board for each day for one year commencing on the first day of January next thereafter, and it shall be the duty of the clerk of the county court to certify to the clerk of the circuit court of such county a copy of such order, and the same shall be filed in the office of the clerk of the circuit court for the use of the said clerk and the judge and prosecuting attorney in making and certifying fee bills."

It will also be noticed in this section that it specifically says that it is the duty of the county court to make the allowance for each prisoner for each day, as for board, beginning on the first day of January. The section does not say that this allowance can be changed to a different amount during the ensuing year.

The word "board", according to 8 C. J., page 1130, is defined as:

> "That which is served at the board or table; food, especially meals regularly furnished for pay, sometimes including lodging, but often, as in table board, day board, excluding lodging; * * * *"

This allowance made by the county court as prescribed under section 11795, supra, cannot be changed during the ensuing year and it was so held in the case of Mead v. Jasper County, 305 Missouri 476; 266 S. W. 467, l. c. 469, where the court said:

> "Section 11002 contemplates that the sheriff himself will furnish the board for the prisoners under his care in the county jail. But the proviso that he shall not contract for the furnishing of such board for a price less than that

fixed by the county court recognizes the fact that he may lawfully contract with others to furnish such board, the only limitation thereon being that he shall not be permitted to profit thereby. Sections 11002 and 11003 require provision to be made for the future, to wit, the ensuing year, and common fairness requires that the county court should not be permitted, through mere caprice or even while acting under entirely proper motives, to change its order to the detriment of the sheriff. Certainly, if respondent had elected to contract with a third person for the board of prisoners for the ensuing year on the price fixed in the order of December 1, 1922, it would constitute a grievous wrong to permit the county court to change its order.

"It is probable that, in the exercise of proper business foresight and sagacity, any sheriff boarding prisoners himself would make annual or other term contracts with butchers, grocers, and others for furnishing provisions etc., on the basis of the price fixed by the county court prior to January 1st. In any event, respondent clearly had the right so to contract. It was admitted that the aggregate board furnished to prisoners by the respondent during 1923 amounted to a total of 9,678 days. This equaled a daily average of over 26 prisoners. Substantial saving could undoubtedly be made in buying provisions for such a number by making contracts for definite periods, not longer than the year for which the price was fixed. The respondent therefore acquired a property right in the order of December 1, 1922, which the county court could not arbitrarily destroy. In fact, he acted under that order for 16 days and there was performance by him to that extent. By such order his rights became fixed.

"The same rule of law which protects the sheriff from having his fees for boarding prisoners cut after January 1st protects the county from having such fees raised after January 1st by a new county court which might be inclined to favor the sheriff."

Section 12115, R. S. Missouri, 1929, reads as follows:

"Hereafter when any person or persons shall be confined in the common jail for any criminal offense, the sheriff or jailer may make out and present to the county court at its regular session, a bill for all board due him for the board of such prisoners; such bill shall specify the offense with which each prisoner is charged, and shall be audited and allowed by such county court, and the clerk thereof directed to draw a warrant for the aggregate amount thereof. When the final determination of any criminal prosecution shall be such as to render the state liable for costs under existing laws, it shall be the duty of such county clerk to certify to the clerk of the circuit or criminal court in which the case was determined, the amount due the county for boarding said prisoners; it shall then be the duty of the clerk of the circuit or criminal court in which the case was determined, to include in the bill of costs against the state, all fees for board of prisoners theretofore paid by the county, setting forth the fact that such fees are due the county, and the fees for board which have accrued since the last payment by the county, shall be stated separately as being due the sheriff or jailer. Such fees due the county when collected by the clerk of the circuit or criminal court shall be immediately paid into the county treasury."

Under this section the sheriff may make out and present to the county court at its regular session a bill for all board due him for the board of such prisoners under the allowance made by the county court in compliance with section 11795, supra.

Section 8526, R. S. Missouri, 1929, reads as follows:

> "The sheriff of each county in this state shall have the custody, rule, keeping and charge of the jail within his county, and of all the prisoners in such jail, and may appoint a jailer under him, for whose conduct he shall be responsible; but no justice of the peace shall act as jailer, or keeper of any jail, during the time he shall act as such justice."

Under this section the jailer, or sheriff, of the county has the custody, rule, keeping and charge of the jail within his county.

Section 8527, R. S. Missouri, 1929, reads as follows:

> "It shall be the duty of the sheriff and jailer to receive, from constables and other officers, all persons who shall be apprehended by such constable or other officers, for offenses against this state, or who shall be committed to such jail by any competent authority; and if any sheriff or jailer shall refuse to receive any such person or persons, he shall be adjudged guilty of a misdemeanor, and on conviction shall be fined in the discretion of the court."

It will be noticed under this section that it shall be the duty of the sheriff and jailer to receive prisoners and it is mandatory for the reason that it sets out that it shall be the duty, etc.

Section 8533, R. S. Missouri, 1929, reads as

> "Whenever any person, committed to jail upon any criminal process, under any law of this state, shall declare, on oath, that he is unable to buy or procure necessary food, the sheriff or jailer shall provide such prisoner with food, for which he shall be allowed a reasonable compensation, to be fixed by law; and if, from the inclemency of the season, the sickness of the prisoner or other cause, the sheriff shall be of the opinion that fuel, additional clothes or bedding, medicine and medical attention are necessary for such prisoner, he shall furnish the same, for which he shall be allowed a reasonable compensation."

Under this section the sheriff must furnish the prisoner with food where the prisoner is unable to pay for same.

In the case of State ex rel v. Price, 296 Mo., 130, 246 S. W. 572, l. c. 574, the court said:

> "While the statute making it the duty of the county court to fix the daily allowance for the feeding of prisoners terms it a "fee" (section 11002, R. S. 1919) seems carefully to avoid any such designation. This case turns upon the question whether or not this allowance is included in the word "fees" as it is used in section 11036 R. S. 1919."

Under the holding in this case the court held that the board of the prisoner as allowed by the county court to the sheriff, or jailer, was not a part of the fee.

Section 8524 R. S. Missouri, 1929, reads as follows:

> "There shall be kept and maintained, in good and sufficient condition and repair, a common jail in each county within this state, to be located at the permanent seat of justice for such county."

Under this section it was the duty of the county to maintain a good and sufficient jail and it is not the duty of the sheriff or jailer to make repairs or furnish commodities so as to make the jail sufficient for the holding of prisoners, and following this section the court in holding that the county shall keep a sufficient jail it said in the case of Harkreader v. Vernon County, 216 Mo., 696, l. c. 700 and 708:

> "This case is twin to Ewing v. Vernon County, this volume, page 681, and was argued and submitted with that case. Mr. Harkreader was sheriff of Vernon county. He sues in three counts--on the first, for his outlays ($246.15) for gas and water service in the county jail; on the second, for outlay ($18) for stamps used in his official business; and on the third, for outlay ($72) for janitor service at his office at $2 per month -- all which several sums he paid out because of the refusal of the county court to supply such water, gas, janitor service and stamps, and for which he demanded and was refused reimbursement.
>
> "The case went on change of venue to Henry county and was there tried before a jury--Judge Graves presiding. From a judgment following a verdict on each count, Vernon county appeals."
>
> "It is written in the statutes that jails should be 'kept and maintained in a good and sufficient condition,' etc. (R. S. 1899, sec. 8104), that is, 'good and sufficient' in a modern sanitary sense, having an eye to the sure results established by scientific investigation of the disease-breeding effects of filth and bad air. That statute is broad enough to cover the extraordinary condition disclosed by this record.

"We are driven to the conclusion there was more pique than principle at bottom in the action of the county court.

"Let the judgment be affirmed. It is so ordered. All concur, except Graves, J., who took no part."

According to the holding in this case where the county did not furnish a sufficient jail or quarters for the holding of prisoners, the sheriff could purchase such articles and make such repairs as to make it sufficient and could recover the amount expended by him from the county.

Section 8538 R. S. Missouri, 1929, reads as follows:

"It shall be the duty of the keeper of the jail in every county within this state to receive into his custody any prisoner or prisoners who may be from time to time committed to his charge, under authority of the United States, and to safely keep every such prisoner or prisoners, according to the warrant or receipt of such commitment, until he or they shall be discharged by due course of law of the United States."

It will be noticed under this section that it is the duty of the keeper or jailer in every county to receive United States prisoners. This section is mandatory and is further shown to be mandatory by section 8539 R. S. Missouri, 1929, which assesses a penalty for the failure to receive United States prisoners and which section reads as follows:

"The keeper of every jail aforesaid shall be subject to the same pains and penalties, for any neglect or failure of duty therein, as he would be subject to by the laws of this state for the like neglect or failure in the case of

a prisoner committed under the authority of the said laws."

Section 8540 R. S. Missouri, 1929, reads as follows:

"The United States shall pay for the use and keeping of such jails, at the rate of one dollar per month for each person that shall, under their authority, be committed thereto, and also to the jailer such fees as he would be entitled to for like services rendered in virtue of the existing laws of this state, during the time such prisoner shall be therein confined, and shall support such of said prisoners as shall be committed for offenses."

It will be noticed by this section that the county is reimbursed at the rate of one dollar per month for each person and the use of the jail and this section also provided that the jailer could receive such fees as he would be entitled to for like services rendered state prisoners. In other words the Legislature by enacting section 8540 provided that the sheriff should receive the same fees as allowed by the county court for the board of the prisoners. But in reading section 8540, it will be seen that the section does not relate to board but only for the support of said prisoners as shall be committed for offenses against the United States.

CONCLUSION.

In view of the above authorities it is the opinion of this department that if the county court made the order which was attached to your request and should deduct during the year of 1939 the amount of twenty cents per day per prisoner from the fees allowed the sheriff it would virtually amount to the changing of the order made of record in compliance with section 11795, supra, for the reason that when each government prisoner was entered in the jail and it being the duty of the sheriff to accept the govern-

ment prisoner it would change the order as made during the November Term by the county court for the fee for each prisoner for each day for the ensuing year of 1939. This conclusion is based upon the holding in Mead v. Jasper County, supra.

It is further the opinion of this department that the only order that the county court can make is an order of record fixing the fee for furnishing each prisoner with board for each day for one year, commencing on the first day of January, next, after the meeting of the county court. By the words for each prisoner for each day a definite amount must be set and not an indefinite amount as set out in the order of the county court reducing that allowance twenty cents for each government prisoner.

It is further the opinion of this department that the one dollar per month for each prisoner committed by the United States to the county jail, under section 8540, supra, is the only charge that the county can make for the use and keeping in such jail government prisoners. All fee statutes should be strictly construed and the sheriff of Clay County is entitled to an allowance of a definite amount for each prisoner for each day for the board of prisoners.

Of course the above opinion should not be considered as binding, but is only made for the purpose of the guidance of the Prosecuting Attorney and the county court. A very similar case is now pending in Jackson County, wherein Jackson County has commenced an action against Thomas R. Bash, Ex-Sheriff of Jackson County, in regard to the county receiving part of the board paid by the Government to the sheriff for the boarding and keeping of federal prisoners in the Jackson county jail and which amount had been collected in full by the sheriff from the United States Government.

Respectfully submitted,

APPROVED:

W. J. BURKE
Assistant Attorney General

HARRY H. KAY
(Acting) Attorney General.

STATE PURCHASING AGENT)
) The State Treasurer rather than the State Purchasing Agent is given the duty by law to purchase liquor stamps.
STATE TREASURER)

October 28, 1939

11-27

FILED
98

Hon. Robert W. Winn
State Treasurer
Jefferson City, Missouri

Dear Sir:

We have received your letter of October 2, which reads as follows:

> "According to Section 13, Laws of Missouri, Extra Session, 1933-34, it is the duty of the Supervisor of Liquor Control to prescribe an official seal and label for the collection of liquor tax on intoxicating liquors.
>
> "It is my understanding that it is the business of the Supervisor of Liquor Control to furnish specifications for the buying of said stamps. It seems to be the business of the State Treasurer to furnish these stamps for the State Liquor Control Department. The General Assembly has always made an appropriation to the State Treasurer with which to buy these stamps.
>
> "I would like an opinion from your department advising me whether I should buy these stamps with bids through the State Purchasing Department under the State Purchasing Law of 1933, or whether I shall ask for bids myself for the buying of State liquor stamps."

The act creating the office of State Purchasing Agent and prescribing his powers and duties was passed by the Fifty-Seventh General Assembly in 1933 and is

contained in Laws of Missouri, 1933, pages 410 to 414, inclusive. In substance, this act provides that the Purchasing Agent shall purchase all supplies except printing, binding and paper for all departments of the state; that all purchases shall be based on competitive bids and no department shall make any purchase except through the Purchasing Agent, except as the act might otherwise provide.

At the Extra Session of the Fifty-Seventh General Assembly following the regular session, the Liquor Control Act was passed. This act is contained in the Laws of Missouri, Extra Session, 1933-34, pages 77 to 95, inclusive. Relating to the purchase of the stamps in question, the Legislature enacted Section 35 of the Liquor Control Act which reads as follows:

> "It shall be the duty of the State Treasurer, upon the taking effect of this act, to provide suitable and inimitable state certificates and labels for this inspection, gauging and labeling, having on each proper places for countersigning by the State Treasurer and Supervisor of Liquor Control, and shall safely keep the same together with the plates used in making them, when not in actual use. The State Treasurer shall from time to time upon demand, deliver the aforesaid labels to the Supervisor of Liquor Control, taking therefor his receipt, and shall charge said Supervisor of Liquor Control with the same; and shall from time to time, as said Supervisor of Liquor Control makes returns of moneys collected in the course of his inspection, credit said Supervisor of Liquor Control's account with such sums, and shall keep a true and correct book account of his dealings with said Supervisor of Liquor Control."

In the same act and at the same time, the Legislature enacted Section 13, giving certain duties to the Supervisor of Liquor Control. Said section reads in part as follows:

> "* * * prescribe an official seal and label and determine the manner in which such seal or label shall be attached to every package of intoxicating liquor so sold under this act; this includes prescribing different official seals or different labels for the different classes, varieties or brands of intoxicating liquor; * ."

While said Section 13 was amended by the Legislature in 1937, the above quoted part was not disturbed or altered in any way. It appears, therefore, that the Legislature intended for the Supervisor of Liquor Control to prescribe the form and type of seals and labels to be attached to every package of intoxicating liquor sold in this state and that "It shall be the duty of the State Treasurer, upon the taking effect of this act, to provide suitable and inimitable state certificates and labels". In other words, the duty was directly placed on the State Treasurer to provide the stamps. The Legislature did not say that the Purchasing Agent or any other officer should provide the stamps or that the Treasurer could, in any way, delegate this power. On the contrary, the Legislature said in definite terms that the duty shall devolve upon the State Treasurer to <u>provide</u> suitable stamps. In other words, while the Legislature provided in the 1933 session that the Purchasing Agent should purchase all supplies, the same Legislature in a subsequent session, took away from him the authority to purchase and provide the liquor stamps, and gave this particular function to the State Treasurer.

In discussing the meaning of the word "provide", the Kansas City Court of Appeals in the case of Hoffman v. Mastin, 119 S.W. (2nd) 1027, at l.c. 1029, quoted from Webster's Dictionary as follows:

"'Provide' is defined by Webster as:

"2. To look out for in advance; to procure beforehand; to prepare.

"3. To supply for use, afford; contribute; yield.

"4. To furnish, supply, stock with.

"5. To equip in preparation; fit out with means to an end."

It will be observed that the word "provide" means to "furnish" and to "supply". Referring again to Section 35, it appears that the State Treasurer is the one person specifically authorized by the Legislature to "furnish" and "supply" the stamps; that the State Treasurer, as the one authorized to furnish and supply the stamps, is the only one authorized to do so. It would be difficult to say that the Legislature in placing the duty on the State Treasurer to provide, furnish and supply certain equipment, really intended that he was not to have full power to fully carry out this mandate, but rather that he was to request another state officer to perform this particular duty for him. Such a construction does not seem reasonable.

As we have stated, Section 35 was passed after the Purchasing Agent Act was enacted into law and at a subsequent session of the same Legislature. Section 35 was undoubtedly intended as a special act relating solely to the acquisition of state liquor stamps and to no other commodity. The Purchasing Agent Act is obviously a general statute relating to all purchases except, of course, any matters which the Legislature might later see fit to exclude from its operation.

As the Supreme Court said in the case of State ex inf. Barrett v. Imhoff, 291 Mo. 603, l.c. 617:

> "We have said, not once, but a number of times that where there are two acts and the provisions of one have special application to a particular subject and the other is general in its terms and if standing alone would include the same matter and thus conflict with the special act, then the latter must be construed as excepted out of the provisions of the general act, and hence not affected by the enactment of the latter."

Therefore, since the State Purchasing Agent Act would have included the same matter, that is, the providing of liquor stamps, had Section 35 not been passed placing this particular duty in the hands of another, such duty is excepted out of the duties of the State Purchasing Agent and the same is given solely to the State Treasurer.

Furthermore, it has been the practice of the State Treasurer to purchase directly such stamps ever since the present Liquor Control Act has been a law. The State Treasurer has always made such purchases direct and has always fully "provided" the stamps for use by the Supervisor of Liquor Control after the Supervisor has designed the form, etc. The Purchasing Agent has never provided such stamps according to our understanding. This procedure has always been the departmental construction by the departments involved. The courts have always held that departmental constructions are entitled to great weight.

In the case of In Re Bernay's Estate, 126 S.W. (2nd) 209, l.c. 217, the Supreme Court of Missouri said:

> "It is true that the construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

CONCLUSION.

It follows, therefore, that the Legislature, in enacting Section 35 of the Intoxicating Liquor Laws, provided a special statute authorizing and directing the State Treasurer to fully "provide" liquor stamps for use by the Supervisor of Liquor Control, and that this duty was thereby excepted out of the provisions of the Purchasing Agent Act which is an earlier enactment giving to the State Purchasing Agent the right generally to make all purchases. The power and duty to provide liquor stamps, consequently, is exclusively vested in the State Treasurer and he should make all such purchases.

Respectfully submitted,

J.F. ALLEBACH
Assistant Attorney General

APPROVED BY:

J.E. TAYLOR
(Acting) Attorney General

JFA:VAC

INFORMATION: Approved form of information under Section 4304 R. S. Mo. 1929.

March 15, 1939

FILED

Mr. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Wymore:

We are in receipt of your letter of recent date, wherein you state as follows:

> "Will you please render me an approved information for the prosecution of a false and bogus check under section 4303, Revised Statutes of Missouri, 1929."

On March 1st, you advised us orally that the defendant obtained merchandise from the J. C. Penny Clothing Company of Jefferson City, Missouri, and gave a personal check for the merchandise he obtained on a bank at Salina, Kansas, representing that he had funds there on deposit.

The check was deposited by the clothing company in a local bank for collection and payment from the bank at Salina, but was refused by reason of the fact the defendant did not have any money in the Kansas bank.

Section 4304 R. S. Mo. 1929 provides as follows:

> "Every person who, with the intent to cheat and defraud, shall obtain or attempt to obtain, from any other person, or persons, any money, property or valuable thing whatever by means or by use of any trick or deception,

> or false and fraudulent representation, or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means, or by use, of any false or bogus check, or by means of a check drawn, with intent to cheat and defraud, on a bank in which the drawer of the check knows he has no funds, or by means, or by use, of any corporation stock or bonds, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction thereof be punished by imprisonment in the state penitentiary for a term not exceeding seven years."

In the case of State vs. Robinson 14 S. W. (2d) (Mo) 452 l.c. 453, the court in passing on an information based on Section 3552 R. S. 1919, now Section 4304, supra, said:

> "(1) The essentials to a charge under the statute (section 3552, R. S. 1919), here alleged to have been violated, are set forth with particularity in State v. Loesch (Mo. Sup.) 180 S. W. 875, 878, and cases. Among others the allegation is required to be made that the party defrauded relied upon and believed in the truth of the pretenses made by the defendant and was thus induced to and did part with his property."

In the case of State vs. Loesch 180 S. W. (Mo) 867 l.c. 878, the court said:

> "Allegations covering the essentials herein stated appear in the information: The name of the defendant; the venue of the crime (State v. Terry, 109 Mo. 601, 19 S. W. 206); the date of its commission; that it was committed feloniously with intent to cheat and defraud (State

v. Martin, 226 Mo. loc. cit. 548, 126 S. W. 442; State v. Woodward, 156 Mo. 143, 56 S. W. 880; State v. Scott, 48 Mo. 422); the names of the parties to whom the false pretenses were made (State v. Samuels, 144 Mo. 68, 45 S. W. 1088; State v. Chissell, 245 Mo. loc. cit. 557, 150 S. W. 1066); their ownership of the property, its description and value (State v. Myers, 82 Mo. 558, 52 Am. Rep. 389; State v. Vandenburg, 159 Mo. 230, 60 S. W. 79; Halley v. State, 43 Ind. 509; State v. Ladd, 32 N. H. 10); the nature of the trick or fraud committed by defendant described with certainty (State v. Porter, 75 Mo. 171; State v. Miller, 212 Mo. 73, 111 S. W. 18); that the pretenses made were false, and defendant's knowledge of their falsity when made (State v. Janson, 80 Mo. 97; State v. Bradley, 68 Mo. 140); that the parties defrauded relied upon and believed in the truth of the pretenses made by the defendant, and were thus induced to and did part with their property (State v. Kelly, 170 Mo. 151, 70 S. W. 477; State v. Hubbard, 170 Mo. 346, 70 S. W. 883; State v. Vorback, 66 Mo. 168; State v. Evers, 49 Mo. 542); that the pretenses were designedly (State v. Wilson, 143 Mo. 334, 44 S. W. 722) made by the defendant, and by the means thereof he did feloniously obtain and receive from the parties named the property described, with the intent to cheat and defraud them of same (State v. Barbee, 136 Mo. 440, 37 S. W. 1119). The foregoing allegations, which are formally pleaded, are sufficient to charge an offense under section 4765, R. S. 1909, and the defendant will not be heard to complain that he has not been informed as to the nature and cause of the accusation against him. State v. Foley, 247 Mo. loc. cit. 628, 153 S. W. 1010; State v. Lovan, 245 Mo. 516, 151 S. W. 141; State v. Donaldson, 243 Mo. 460, 148 S. W. 79."

The following information under Section 4304, supra, is based upon the suggestions in the above case of State vs. Loesch, supra:

"Carl F. Wymore, Prosecuting Attorney within and for the body of the County of Cole and State of Missouri, under his official oath and according to his best information, knowledge and belief, informs the court that one _____, on the ____ day of _____, _____, at the City of _____, County of Cole, State of _____, did unlawfully, feloniously, knowingly and designedly with the intent then and there to cheat and defraud one _____, did falsely and fraudulently represent, pretend and state to the said _____, that he the said _____, had lawful money of the United States deposited to his credit in the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of _____, and that said money was subject to be checked out of said bank, and that he had sufficient money deposited in said bank to purchase and pay for _____ of the value and purchase price of _____ Dollars, and the said _____ further falsely pretended and represented to the said _____ (herein set out other evidence, if any, of the nature of the trick or fraud committed by defendant described with certainty), that the said _____, believing the said false pretenses and representations so made by the said _____, and being deceived thereby, was by reason thereof then and there induced to sell and deliver to the said _____, _____ the personal property of _____ for the purchase price of _____ Dollars and the said _____ gave the said _____ his _____

personal check for the above amount drawn on the 'Bank of _____', in payment for said _____ and the said _____ relying upon the statements so made by the said _____, and believing them and each of them to be true, then and there accepted said false and bogus check in payment of the purchase price of said _____ and delivered the said _____ to the said _____, and the said _____ presented said false and bogus check at the 'Bank of _____', a banking corporation duly incorporated, organized and operating as such under the laws of the State of Missouri for collection and payment at the 'Bank of _____', and the payment was refused by said 'Bank of _____', because the said _____ had no funds in said bank, and the said _____ by means of said false pretenses and representations so made to the said _____ as aforesaid, unlawfully, feloniously, knowingly and designedly did then and there obtain from the said _____ the possession of the said _____ of the value of _____ Dollars of the moneys and property of the said _____ with the intent then and there unlawfully and feloniously the said _____ to cheat and defraud of the same. Whereas, in truth and in fact the said _____ did not have any money in the 'Bank of _____', (herein set out other clauses, if any, negativing the truth of the alleged statements and representations charged to have been made by the defendant) all of which he the said _____ then and there well knew the said false representations, statements and pretenses made as aforesaid to be false; against the peace and dignity of the state."

From the foregoing, we are of the opinion that the above information contains the essential elements to make a charge under Section 4304, R. S. Mo. 1929.

Respectfully submitted,

MAX WASSERMAN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General
MW:RT

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INSANE PERSONS: Cole County is liable for the expenses of a patient originally declared insane by said county and becomes insane again, even though the patient has been residing in another county for several months. The county may, in its discretion, bear the expense of a person found insane when the residence is not known and cannot be determined.

July 1, 1939

FILED
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Hon. Carl F. Wymore
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Sir:

This department is in receipt of your recent letter wherein you present two questions relative to the status of insane persons. Your first question is as follows:

> "Where a woman was a resident of this County and had been declared insane in this County, but had been fully discharged from the State Hospital, and then changed her residence to another County, and after arriving there and residing there for several months, became insane and was then sent to the State Hospital from that County, which County would be liable for her support in the State Hospital."

Formerly, the statutes contained a section to the effect that every patient "in the asylum shall be deemed to be the county patient of the county first sending him, till one year after his regular discharge from the asylum". This statute was evidently repealed a number of years ago. The intention of the Legislature with respect to the support of the insane poor is clearly and simply stated in the case of State ex rel. Yarnell v. Cole County Court, 80 Mo., l.c. 84, where it is said:

> "We think it apparent from the above statutory provisions and the general law regulating asylums, (2 R.S., p. 818,) that it was the intention of the

legislature to cast the burden of supporting the insane poor upon each county where such insane poor have acquired a residence or settlement, and that where an insane poor person is sent from a county and is discharged from the asylum, he shall be deemed to be the county patient of such county for the period of twelve months after such discharge, the language of the statute being that every patient in the asylum shall be deemed to be the county patient of the county first sending him till one year after his regular discharge. It seems to have been the purpose of the legislature to provide that before the support of an insane poor person of one county can be shifted to or cast upon another county, such insane person must have ceased to reside in the former county for the period of one year. The same policy has been indicated in the law regulating the support of the poor, (2. R.S., p. 1289, Sects. 6579, 6581,) where it is provided that poor persons shall be received, maintained and supported by the county of which they are inhabitants; and that no person shall be deemed an inhabitant, within the meaning of the chapter, who has not resided in the county for the space of twelve months next preceding the time of any order being made respecting such person, or who shall have removed from another county for the purpose of imposing the burden of keeping such poor person on the county where he or she last resided for the time aforesaid."

The question of residence of an insane person is discussed in the case of Thomas v. Macon County, 175 Mo., l.c. 76, where it is said:

> "Of the four classes provided for by the statutes quoted, three are placed within the jurisdiction of the county court to find the facts essential to the reception and maintenance of the insane person in the asylum at the county's expense and one of those essential facts is residence of the person in the county. The fourth class requires no adjudication of the facts by the county court but authorizes the Governor to 'by his warrant to the sheriff of the proper county, or warden of the penitentiary, order such lunatic to be conveyed to the asylum and there kept until restored to reason. . . and the expense of conveying such lunatic to the asylum shall be audited and paid out of the fund appropriated for the payment of criminal costs, but the expenses at the asylum for his board and clothing shall be paid as now provided by law in cases of the insane poor. Provided, if such person shall have property, the costs shall be paid out of his property, by his guardian.' The plaintiff relies on that part of the clause just quoted which provides that the expenses 'shall be paid as now provided by law in cases of the insane poor,' for his right to recover in this case. As we have seen, the only provision made by law for charging such expense to a county, is in case the insane person is a resident of the county. The residence of the insane person in Macon county, therefore, becomes an essential fact for the plaintiff in this case to prove before he can recover."

In the case of Shields v. Johnson County, 144 Mo. 76, the question arose as to what county was liable for the maintenance of a person who escaped from a lunatic asylum, and while in the county, committed a homicide, and defended himself successfully on the grounds that he was insane at the time. It was necessary for the county liable to show the patient was a resident of that county.

Section 655, R.S. Missouri, 1929, defining "residence", is in part as follows:

> "* * * the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; * * * ."

Section 12952, R.S. Missouri, 1929, defines who is deemed a resident of a county.

Applying the above decisions and the statutes to the facts which you have submitted, we think the liability of a county for the maintenance of a patient should be based on the fact that the patient is a resident or a citizen of the county which is to be deemed liable.

You state that the woman in question was a resident of Cole County and duly declared insane by said county. After her discharge from the hospital, she took up her abode in another county, "residing there for several months". She may have had an intention to become a resident and citizen of the other county. However, she had not been a resident of such county for the required statutory length of time and we think that insofar as the laws and decisions relating to insane patients make this mandatory, she was still a resident and citizen of Cole County and that Cole County would be liable for her support in the State Hospital.

Your second question is as follows:

> "Where a man is found in this County and apparently is insane, does this County have the power to send him to the State Hospital, if the County Court finds him insane, where his residence is not known and cannot be determined."

The above decisions bearing on your first question can also be made applicable to the second question insofar as the question of the county court is concerned.

The statute mentions "poor patients" and "pay patients". If a person has no estate and is found in the county, the county is liable for the expenses of such person in the State Hospital.

Under Section 12950, R.S. Missouri, 1929, it is the duty of the county court to relieve, maintain and support poor persons who are inhabitants of said county.

Section 12954, R.S. Missouri, 1929, is as follows:

> "The county court shall at all times use its discretion and grant relief to all persons, without regard to residence, who may require its assistance."

In the case of Scotland County v. McKee, 168 Mo. 282, it was held to the effect that a county is not bound to provide for a poor person who is not a resident of the county, but in its discretion, may do so.

We are, therefore, of the opinion that the county court has the power and discretion to send to a State Hospital a patient when said patient's residence is not known and cannot be determined.

Respectfully submitted,

APPROVED By:

OLLIVER W. NOLEN
Assistant Attorney General

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(Acting) Attorney General

OWL:VAC